The Legality of 'Suspicionless' Stop and Search Powers under the European Convention on Human Rights

ABSTRACT: This article considers several recent decisions — *Beghal v Director of Public Prosecutions*, *R(Miranda) v Secretary of State for the Home Department* and *R(Roberts) v Commissioner of Police of the Metropolis* — which all concern stop and search powers that do not require reasonable suspicion. The article analyses these decisions, with a focus on the respective courts' treatment of the lawfulness requirement under the European Convention on Human Rights.

KEYWORDS: Schedule 7, Terrorism Act 2000; section 60, Criminal Justice and Public Order Act 1994; *Beghal v Director of Public Prosecutions*; *R(Miranda) v Secretary of State for the Home Department*; *R(Roberts) v Commissioner of Police of the Metropolis*; *Gillan v United Kingdom*; Article 8 European Convention on Human Rights; stop and search.

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1. INTRODUCTION

Powers of stop and search generally require that searching officers have reasonable suspicion of some kind of criminality. But there are exceptions. One is Schedule 7 to the Terrorism Act 2000, which permits authorised officers to stop, question and detain persons at ports and airports in order to determine whether such persons appear to be or to have been concerned in the commission, preparation or instigation of acts of terrorism. Use of Schedule 7 is not contingent upon reasonable suspicion that the person is involved in terrorist activity.[1] A person examined under Schedule 7 is obliged to give any information, identity documents or other documents requested.[2] Their belongings may be searched, and any material handed over or found, including data stored on any electronic devices, may be retained.[3] The person may also be detained for up to six hours.[4]

Another exception to the general requirement for reasonable suspicion is section 60 of the Criminal Justice and Public Order Act 1994. Originally enacted in response to violence associated with football hooliganism, section 60 has since evolved into a means to curb the use of weapons and counter gang violence.[5] Under section 60, a police officer of the rank of inspector or higher, who reasonably believes that one or more stipulated conditions is satisfied in any locality in his or her police area, may make an authorisation that section 60 powers are exercisable for up to 24 hours (with the possibility of a 24-hour extension). The specified conditions are that: incidents involving serious violence either may occur or have occurred, and an authorisation is expedient to either prevent that violence or find the dangerous instrument or offensive weapon used; or that persons are carrying such items without good reason.[6] When an authorisation is in effect, any constable in uniform may, without reasonable suspicion, stop and search any pedestrian or vehicle (and its occupants) for offensive weapons or dangerous instruments.[7]

Both of these exceptional powers have largely escaped judicial attention until recently,[8] when they became the subjects of several notable decisions. The Supreme Court's July 2015 decision in *Beghal v Director of Public Prosecutions* ('*Beghal*'),[9] and the Court of Appeal's January 2016 decision in *R(Miranda) v Secretary of State for the Home Department* ('*Miranda*'),[10] concern Schedule 7. The Supreme Court's December 2015 decision in *R(Roberts) v Commissioner of Police of the Metropolis* ('*Roberts*')[11] is the first decision of either

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[1] Schedule 7, para 2(4), Terrorism Act 2000.

[2] Schedule 7, para 5, Terrorism Act 2000.

[3] Schedule 7, paras 7–11, Terrorism Act 2000.

[4] The maximum period of detention was reduced from the previous maximum of 9 hours in 2014: see Schedule 9, para 2, Anti-social Behaviour, Crime and Policing Act 2014.

[5] Bridges, 'The Legal Powers and their Limits' in Delsol and Shiner (eds), *Stop and Search* (2015) 9 at 16.

[6] *Roberts*, supra n 11 at paras 4–6.

[7] Section 60(4) and s 60(5) Criminal Justice and Public Order Act 1994.

[8] In the case of Schedule 7, this was despite the power having existed in some form since 1974: Anderson, 'The Terrorism Acts in 2013', July 2014, at para 7.1, available at https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2014/07/Independent-Review-of-Terrorism-Report-2014-print2.pdf [last accessed 11 November 2015]. One exception is *McVeigh, O'Neill and Evans v United Kingdom* Application Nos. 8022/77, 8025/77 and 8027/77, Commission Report, 18 March 1981.

[9] *Beghal v Director of Public Prosecutions* [2015] UKSC 49 ('*Beghal*').

[10] *R(Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6 at para 6 ('*Miranda*').

[11] *R(Roberts) v Commissioner of Police of the Metropolis* [2015] UKSC 79 ('*Roberts*').

the Supreme Court or the European Court of Human Rights (ECtHR) to consider section 60.[12] These three decisions are discussed below.

2. BEGHAL

In January 2011, the appellant, Sylvie Beghal, was stopped and questioned under Schedule 7 while passing through East Midlands Airport, having returned from Paris, where she was visiting her husband, a French national in custody for terrorist offences.[13] She sent her two older children out to be met in the arrival hall and kept her youngest with her. She requested the opportunity to consult a lawyer and to pray. After praying, she spoke to her lawyer on the telephone. She was then searched, and, having been told that the officers would not wait for her lawyer to arrive, questioned for approximately half an hour about her travel and personal life. She was told she was free to leave one hour and forty-five minutes after being stopped.[14]

The appellant refused to answer most of the questions, and was convicted of wilfully failing to comply with a duty imposed by Schedule 7.[15] Her appeal against conviction was based on the claim that Schedule 7 was incompatible with various rights under the European Convention on Human Rights (ECHR), namely Article 5 (the right to liberty), Article 8 (the right to respect for private life), and Article 6 (the privilege against self-incrimination). By a majority of 4-1, the Supreme Court dismissed her appeal. Lord Hughes (with whom Lord Hodge agreed) wrote the lead judgment. Lord Neuberger and Lord Dyson gave a concurring judgment. Lord Kerr dissented.

A. The power to stop, question and search and Article 8

It was undisputed that being compelled to submit to questioning and search under Schedule 7 implicated Article 8(1) of the ECHR.[16] However, the majority held that the power to stop, question and search did not breach Article 8 as it was both in accordance with the law and proportionate.

On the legality question, the majority observed that, in order for an interference with a right to be in accordance with the law, the provision in question must have the force of law, and be sufficiently accessible and foreseeable. Additionally, the law must have sufficient safeguards to ensure against the arbitrary exercise of power.[17] The appellant's argument that Schedule 7 conferred an overbroad discretion on examining officers without adequate safeguards was based on this point.[18] The appellant relied on *Gillan v United Kingdom*,[19] where the ECtHR ruled that sections 44-46 of the Terrorism Act, which permitted executive actors to authorise stops and searches of vehicles and pedestrians within a geographical area for up to twenty eight days, lacked sufficient safeguards to constrain the discretion of the police officers executing the searches, with the result that the lawfulness requirement, and hence Article 8, was violated.

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[12] Ibid. at para 16.
[13] *Beghal*, supra n 9 at para 14.
[14] Ibid. at para 12.
[15] Ibid. at para 1. See also Schedule 7, paras 5 and 18(1)(a), Terrorism Act 2000.
[16] Ibid. at para 28.
[17] Ibid. at paras 29–30, 80.
[18] Ibid. at paras 32, 81.
[19] *Gillan & Quinton v United Kingdom* Application No 4158/05, Merits, 12 January 2010 (*'Gillan ECtHR'*). See generally Ip, 'The Reform of Counterterrorism Stop and Search after *Gillan v United Kingdom*' (2013) 13 *Human Rights Law Review* 729.

The majority distinguished *Gillan* on several grounds. First, while the section 44 power could be used on any pedestrian on the street, Schedule 7 was only applicable to those passing through airports and ports.[20] Second, problems with section 44 highlighted by the ECtHR in *Gillan* did not extend to Schedule 7.[21] Third, there were safeguards governing Schedule 7's operation that, in the majority's view, were sufficient to meet the lawfulness requirement.[22]

The majority also held that the power to question and search was proportionate. It was rationally connected to Schedule 7's objective of preventing and detecting terrorism. Contrary to the appellant's contention, no less intrusive measure (in the form of the inclusion of a requirement of reasonable suspicion) was feasible. On the question of whether a fair balance between individual rights and the community's interests had been struck, the importance of the objective of preventing and detecting terrorism outweighed the relatively trivial intrusion into individual privacy.[23] There was also no substantial risk of the power being used on a discriminatory basis, which would otherwise have been indicative of a lack of proportionality.[24] There was accordingly no violation of Article 8.

B. The power to detain and Article 5

The majority held that there had been no breach of Article 5. Lord Hughes noted that the power of detention was ancillary to the powers to question and search under Schedule 7, and therefore fell within Article 5(1)(b) — that is, the detention was in order to secure the fulfilment of an obligation prescribed by law. Consequently, preventing a person who was being questioned from leaving would not ordinarily amount to a deprivation of liberty, or, even where it did, it would be justified so long as it did not last for longer than necessary to complete the process of examination.[25]

On the facts, it was doubtful whether Article 5 was engaged at all — the appellant was unable to leave the airport for one hour and forty five minutes, with some of the delay being attributable to her.[26] To the extent that there was any deprivation of liberty, the majority held that it was not for longer than necessary to complete the process, meaning that there was no breach of Article 5.[27]

C. The privilege against self-incrimination and Article 6

Schedule 7 required the appellant to answer the questions put to her. Indeed it was her refusal to answer that led to her conviction and subsequent legal challenge. The issue was whether she could rely on the common law privilege against self-incrimination or Article 6 of the ECHR.

The majority held that the appellant was unable to rely on the common law privilege against self-incrimination as it was impliedly abrogated by Schedule 7. In any case, there was no real risk of criminal prosecution based on answers given during questioning under Schedule 7 because section 78 of the Police and Criminal Evidence Act 1984 (PACE) would inevitably exclude evidence so obtained.[28]

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[20] *Beghal*, supra n 9 at paras 38, 88.
[21] Ibid. at paras 42, 89.
[22] Ibid. at paras 43, 87. For further discussion of these safeguards, see text at infra nn 108–128.
[23] Ibid. at paras 46–49, 51, 74–79.
[24] Ibid. at paras 47–51. The concurring judgment puts the point in terms of there being 'no evidence' indicating discriminatory use: ibid. at para 89.
[25] Ibid. at paras 52, 54.
[26] Ibid. at para 53.
[27] Ibid. at para 56.
[28] Ibid. at paras 64–66, 72.

As for the implicit privilege against self-incrimination in Article 6, the majority held that Article 6 was not engaged. This was because Schedule 7 was not directed towards criminal investigation, meaning that the appellant was not 'charged' with a criminal offence for the purposes of the ECtHR's Article 6 jurisprudence.[29]

3. MIRANDA

On 12 August 2013, David Miranda, the spouse of Glenn Greenwald (then a journalist for the *Guardian*), departed Rio de Janeiro for Berlin to meet Laura Poitras, who, along with Greenwald, had earlier been provided with encrypted data stolen from the National Security Agency by Edward Snowden. Miranda was carrying encrypted material derived from Snowden's data, and was to obtain more to assist Greenwald. On 18 August, while returning through Heathrow, Miranda was stopped under Schedule 7.[30] Police officers detained Miranda for nine hours (the maximum period then permitted), questioned him, examined his belongings, and seized several encrypted storage devices, including an external drive said to contain a trove of classified UK intelligence documents.[31]

Miranda sought judicial review, claiming that the use of Schedule 7 against him was unlawful because the power had been exercised for an improper purpose, and because of incompatibility with the Article 10 of the ECHR (freedom of expression), applicable on account of Miranda carrying what amounted to journalistic material.[32] The Divisional Court rejected his claim,[33] and Miranda appealed to the Court of Appeal. Lord Dyson MR, writing for the Court, allowed the appeal in part.[34]

A. Improper purpose and Schedule 7

The Court found that the police's true and dominant purpose for stopping Miranda was to see whether he appeared to be a person who was or had been concerned in the commission, preparation or instigation of acts of terrorism.[35] It then considered whether this purpose fell within the scope of Schedule 7, which depended on whether Miranda's activities could plausibly amount to a form of terrorism. The Divisional Court had held that the definition of terrorism in s 1 of the Terrorism Act was broad enough to encompass the publication or threatened publication of material, which, if revealed, could endanger the lives of members of the armed forces or security agencies, provided that the publication or threatened publication was designed to influence the government and was for the purpose of advancing a political, religious, racial or ideological cause.[36]

Lord Dyson MR took a narrower approach, and held that two of the required consequences in the definition, namely that the action 'endangers a person's life' or 'creates a serious risk to the health or safety of the public', required an element of intent or recklessness.[37] This was necessary to avoid the situation where a person could commit an act of terrorism 'unwittingly or accidentally'.[38] However, publishing material could still

[29] Ibid. at paras 68–69, 72.
[30] *Miranda*, supra n 10 at para 6.
[31] Ibid. at para 20.
[32] Ibid. at para 21.
[33] *R(Miranda) v Secretary of State for the Home Department* [2014] EWHC 255 (Admin).
[34] *Miranda*, supra n 10 at para 119.
[35] Ibid. at para 31.
[36] Ibid. at para 41. The implications of the Divisional Court's interpretation were discussed in the Independent Reviewer's 2013 report: see Anderson, supra n 8 at paras 4.15–4.23.
[37] Ibid at paras 53–56.
[38] Ibid. at para 54.

amount to terrorism if the person doing the publishing possessed the requisite mental state and satisfied the other elements of the statutory definition.[39] In the Court of Appeal's view, it was open to the police to consider that these criteria might have been satisfied in Miranda's case. It followed that Schedule 7 was exercised for a lawful purpose.[40]

B. Journalistic material and Article 10

The other main argument for Miranda was that the use of Schedule 7 against him amounted to an 'unjustified and disproportionate interference' with his Article 10 rights. The Court rejected the proportionality argument.[41] Although it accepted that Miranda was carrying journalistic material, and that the Schedule 7 stop interfered with press freedom, the Court considered that Miranda's rights were outweighed by 'compelling national security interests'.[42]

As for the lawfulness requirement under Article 10(2), the discussion centred on the lack of effective independent scrutiny of the power when journalistic material was involved.[43] The Divisional Court's view was that Schedule 7 was nonetheless compatible because of other safeguards governing its exercise.[44] The Court of Appeal disagreed: while there were safeguards,[45] they did not 'afford effective protection of journalists' article 10 rights',[46] meaning that the use of the power in these circumstances was not 'prescribed by law'[47], as Article 10 (2) requires.

4. ROBERTS

On 9 September 2010, in response to gang-related violence in Haringey, Superintendent Barclay made an authorisation, enabling constables to carry out stops and searches under section 60 of the Criminal Justice and Public Order Act 1994 throughout much of the borough between 9 and 10 September.[48] The appellant, Ann Roberts, a woman of African-Caribbean heritage, was travelling on a bus in Tottenham shortly after the authorisation period began. She had not paid her fare, and gave false details when questioned by a ticket inspector.[49] Police Constable Reid attended the incident. Roberts appeared to be nervous and clutching her bag tightly, causing PC Reid to suspect that Roberts might have an offensive weapon inside her bag. With Roberts restrained, PC Reid invoked section 60 and searched Roberts' bag. No weapons were found and ultimately no action was taken against Roberts.[50]

Roberts sought judicial review, claiming that the section 60 power breached her ECHR rights under Articles 5, 8 and 14 (the right to be free from discrimination). She was unsuccessful in the lower courts. On appeal to the Supreme Court, the sole issue was

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[39] Ibid. at para 55.
[40] Ibid. at para 58.
[41] Ibid. at paras 59–84. The Court considered the argument solely in terms of proportionality; it did not consider whether there was otherwise an 'unjustified' interference.
[42] Ibid. at para 84. The lack of resort to the power under Schedule 5 to obtain a production order, which the Court regarded as less intrusive but also less effective, did not affect its conclusion: ibid at paras 85–93.
[43] Ibid. at paras 94–114.
[44] Ibid. at para 108.
[45] The Court refers to Lord Hughes' list of safeguards: see *Beghal*, supra n 9 at para 43.
[46] *Miranda*, supra n 10 at para 113.
[47] Ibid. at para 119.
[48] *Roberts*, supra n 11 at paras 8–9.
[49] Ibid. at para 10.
[50] Ibid. at paras 11–12.

whether section 60 was 'in accordance with the law' under Article 8(2).[51] The appellant's contention was that it was not, and she sought a declaration of incompatibility to this effect under section 4 of the Human Rights Act 1998 (HRA).[52] Writing for a unanimous Court, Lady Hale and Lord Reed dismissed the appeal.

A. The power to stop and search and Article 8

The Court traversed the relevant case law, including the *Gillan* decisions of the House of Lords and ECtHR,[53] *Beghal*,[54] and the ECtHR's decision in *Colon v Netherlands*,[55] which considered a strikingly similar power.[56] The stop and search scheme at issue in *Colon* was based on legislation that authorised the Burgomaster (mayor) of Amsterdam to designate parts of the city to be a security risk area. This authorisation then enabled a public prosecutor to order that, for twelve hours, anyone in the designated area could be searched for weapons. The ECtHR ruled that this scheme of 'preventive searching' complied with Article 8.[57] Like the majority in *Beghal*,[58] the Supreme Court in *Roberts* used *Colon* as support for the proposition that the absence of a reasonable suspicion requirement did not necessarily entail a failure to meet the lawfulness requirement.[59]

Next, the Court outlined the constraints on the exercise of the section 60 power. It mentioned various accountability mechanisms for ensuring legal compliance, including judicial remedies and non-judicial avenues for ensuring oversight of police, such as Her Majesty's Inspectorate of Constabulary, police and crime commissioners, and the Independent Police Compaints Commission.[60] In terms of substantive constraints, the Court noted the general obligations on a searching officer under PACE, the guidance in the statutory Code of Practice, and the applicable police policies and standard operating procedures.[61] Additionally, the Court emphasised that s 6(1) of the HRA made it unlawful for an officer to act incompatibly with an individual's ECHR rights, and that the Equality Act 2010 prohibited officers from exercising their powers in a racially discriminatory fashion. Failure to comply with these various substantive contraints would likely render a stop and search unlawful and expose the officer to legal or disciplinary sanction.[62]

In sum, section 60, which the Court regarded as being of great public benefit,[63] was subject to sufficient safeguards against abuse. Accordingly, the Court declined to make a declaration that the guidance governing the exercise of section 60, whether in 2010 or the present, was inadequate, or that the stop and search of the appellant was not 'in accordance with the law' for the purposes of Article 8(2).[64]

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[51] Ibid. at para 14.
[52] Ibid. at para 2.
[53] Ibid. at paras 17–20. See generally *Gillan ECtHR*, supra n 19, and *R(Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12; [2006] 2 AC 307 ('*Gillan HL*').
[54] *Roberts*, supra n 11 at paras 24–26.
[55] *Colon v Netherlands* Application No 49458/06, Admissibility, 15 May 2012.
[56] *Roberts*, supra n 11 at paras 21–23.
[57] *Colon v Netherlands*, supra n 55 at para 96.
[58] *Beghal*, supra n 9 at paras 44, 84–85.
[59] *Roberts*, supra n 11 at paras 21, 23.
[60] Ibid. at paras 29–32.
[61] Ibid. at paras 33–37.
[62] Ibid. at paras 42–43.
[63] Ibid. at para 41.
[64] Ibid. at paras 44–48.

5. COMMENTARY

A. What does 'suspicionless' mean?

Like the section 44 power at issue in the *Gillan* litigation, both Schedule 7 and section 60 are typically described as suspicionless powers[65] — a somewhat imprecise shorthand for no reasonable suspicion being required.[66] Section 44 could be exercised 'whether or not the constable [had] grounds for suspecting the presence of articles' which could be used in connection with terrorism;[67] Schedule 7 may be invoked 'whether or not [the examining officer] has grounds for suspecting' that a person is involved in terrorism;[68] section 60 may be employed 'whether or not [the constable] has any grounds for suspecting that the person or vehicle is carrying weapons or articles of that kind.'[69]

That Schedule 7 and section 60 do not require 'objectively explicable suspicion' is clear from the statutory language.[70] But the use of the phrase 'whether or not' in both provisions means that they stipulate what is *not* required, but not what *is* required.[71] Insight into the latter must be gleaned from legislative and judicial statements concerning these powers.

While reasonable suspicion is not required, there is, at least theoretically, some category of person that cannot be subject to these powers because there is no good faith basis for doing so; using these powers in these circumstances would be arbitrary.[72] The remaining operative space is captured by some kind of subjective standard, usually described as an intuition or a hunch. The concurring judgment of Lord Neuberger and Lord Dyson in *Beghal* notes that 'many experienced officers may have a feeling of suspicion, which is justified but objectively inexplicable, of a particular individual passing

[65] *Beghal*, supra n 9 at para 35; *Gillan HL*, supra n 53 at para 9; *Roberts*, supra n 11 at para 3.

[66] See, for example, Anderson, 'The Terrorism Acts in 2011', June 2012, at para 9.1, available at http://terrorismlegislationreviewer.independent.gov.uk/publications/report-terrorism-acts-2011 [last accessed 11 November 2015]; *Gillan HL*, supra n 53 at para 35.

[67] Section 45(1) Terrorism Act 2000. The successor provision, s 47A(5), provides that 'the power … may be exercised whether or not the constable reasonably suspects' there is evidence that a person is involved in terrorism.

[68] Schedule 7, para 2(4), Terrorism Act 2000.

[69] Section 60(5) Criminal Justice and Public Order Act 1994.

[70] *Beghal*, supra n 9 at para 78. The same was true of Schedule 7's predecessors: see Home Office and Northern Ireland Office, 'Legislation against Terrorism' (Cm 4178, 1998) at para 11.3; Lord Lloyd of Berwick, 'Inquiry into Legislation against Terrorism' (Cm 3420, 1996) at para 10.28; Viscount Colville of Culross, 'Review of the operation of the Prevention of Terrorism (Temporary Provisions) Act 1987' (Cm 264, 1987) at para 8.2.3; Lord Jellicoe, 'Review of the operation of the Prevention of Terrorism (Temporary Provisions) Act 1976' (Cm 8803, 1983) at para 119.

[71] The various Codes of Practice governing Schedule 7 replicate this language: see Home Office, 'Examining Officers under the Terrorism Act 2000', 2009, at para 9, available at http://tna.europarchive.org/20100419081706/http:/security.homeoffice.gov.uk/news-publications/publication-search/legislation/terrorism-act-2000/Code-of-Practice-for-Examin1.pdf?view=Binary [last accessed 13 November 2015] ('2009 Code'); Home Office, 'Examining Officers and Review Officers under Schedule 7 to the Terrorism Act 2000: Code of Practice', July 2014, at para 17, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/339197/schedule7.pdf [last accessed 28 November 2015] ('2014 Code'); Home Office, 'Examining Officers and Review Officers under Schedule 7 to the Terrorism Act 2000: Code of Practice', March 2015, at para 17, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417105/48256_Code_of_Practise_Schedule_7_accessible.pdf [last accessed 28 November 2015] ('2015 Code').

[72] See *Miranda v Secretary of State for the Home Department*, supra n 33 at para 31; 2009 Code, supra n 71 at 8; 2014 Code, supra n 71 at para 19; 2015 Code, supra n 71 at para 19; *Gillan HL*, supra n 53 at para 35.

through a port or border.'[73] Lord Kerr described the threshold as 'no more than a "hunch" or the "professional intuition" of the officer concerned',[74] and as a 'purely instinctive impulse based on nothing more than a feeling that something relating to terrorism might be disclosed by the exercise of the powers'.[75] Similarly, in the Divisional Court's *Roberts* decision, Moses LJ referred to an officer deciding whom to search under section 60 as acting on the basis of 'intuition' or 'instinct'.[76]

The view that these provisions are exercisable on the basis of an intuition or hunch about a particular person is consistent with the ECtHR's account in *Gillan* of the standard applicable to section 44:

> [T]he officer's decision to stop and search … is, as the House of Lords made clear, one based exclusively on the 'hunch' or 'professional intuition' of the officer concerned. Not only is it unnecessary for him to demonstrate the existence of any reasonable suspicion; he is not required even subjectively to suspect anything about the person stopped and searched.[77]

Given that Schedule 7 and section 60, like section 44, are exercisable on what is effectively an officer's hunch or intuition, and given that the broad discretion created by section 44's intuition-based standard was an important reason for the ECtHR's decision in *Gillan*, it is unsurprising that the successful claim in that case — that the provision in question was not in accordance with law — would be relied upon to challenge both Schedule 7 and section 60.[78]

The Article 8 claim in *Beghal* largely turned on the lawfulness requirement; in *Roberts* it was the only issue. In both cases, the Supreme Court rejected the argument that the powers in question failed to meet the lawfulness requirement under Article 8(2). In *Miranda*, the lawfulness issue was argued — successfully on this occasion — in relation to Article 10(2). The treatment of the lawfulness requirement in all three decisions, and in particular the respective courts' consideration of the sufficiency of the safeguards governing the powers in question, is considered below.

B. *Beghal* and the rejection of the *Gillan* analogy

In *Beghal*, the Court's holding on the lawfulness requirement turned on whether Schedule 7 could be said to be analogous to the section 44 stop and search power successfully challenged in *Gillan*. Despite the similarities identified above, the majority considered the analogy to *Gillan* inapt for two main reasons.

(i) The absence of the problems which were apparent in Gillan v UK

The majority stated that the ECtHR's concerns about evidence of section 44's misuse and failures in its safeguards were inapplicable to Schedule 7: the frequency of use had dropped, and the Independent Reviewer had not expressed concern about misuse.[79]

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[73] *Beghal*, supra n 9 at para 78.
[74] Ibid. at para 99.
[75] Ibid at para 106.
[76] *R(Roberts) v Commissioner of The Metropolitan Police* [2012] EWHC 1977 (Admin) at para 40. The Supreme Court's factual account suggests that PC Reid at least met this standard when she decided to search Roberts: see *Roberts*, supra n 11 at paras 11–12.
[77] *Gillan ECtHR*, supra n 19 at para 83. See also Gillan *HL*, supra n 53 at paras 67, 79.
[78] Police authorities had anticipated such a challenge to section 60: see Shiner and Delsol, 'The Politics of the Powers' in Delsol and Shiner (eds), *Stop and Search* (2015) 31 at 40–41.
[79] *Beghal*, supra n 9 at paras 42, 89.

Lord Hughes also emphasised that the Reviewer's 'suggestions for improvements have been heard, and additional safeguards for the individual have been introduced'.[80]

Schedule 7 was indeed amended in response to suggestions from the Independent Reviewer, who has been a prominent advocate for reform.[81] The amendments made to Schedule 7 by the Anti-social Behaviour, Crime and Policing Act 2014 stemmed from the Home Office review and public consultation,[82] which was in turn a response to the Reviewer's recommendations.[83] These amendments included training requirements for examining officers, the reduction of the maximum period of detention to six hours, a requirement to invoke the power to detain for examinations exceeding one hour, a requirement of periodic review of detention by a senior officer, the removal of powers to take intimate biometric samples and to carry out intimate searches, the addition of restrictions on strip searches, the bolstering of the right of detained persons to consult with a solicitor and have a third party informed, and an express power to make and retain copies of anything given to or found by the searching officer.[84]

Several amendments, while laudable, amount to changes at the periphery and are less substantial than might first appear. For example, the reduction in the maximum period of detention ought to be understood in light of the rarity of examinations that exceeded six hours.[85] Similarly, intimate searches, according to the Independent Reviewer, 'are not believed ever to have been conducted under Schedule 7',[86] while strip searches are 'extremely rare'.[87]

Moreover, as Lord Hughes acknowledges earlier in his judgment, certain recommendations of the Independent Reviewer were not part of the public consultation and subsequent reforms.[88] Significantly, the omitted recommendations all concerned issues that, according to the Reviewer, went to the heart of Schedule 7.[89] In that regard, it is notable that these issues — specifically, that Schedule 7 permitted detention and the copying and retention of the contents of personal electronic devices without the need for reasonable suspicion, and that answers given under compulsion during an examination were not statutorily barred from subsequent criminal proceedings — were all extensively discussed in *Beghal*, although only the last issue arose on the facts. On that issue, the majority endorsed the Reviewer's suggestion that answers given under compulsion

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[80] Ibid. at para 42.

[81] The work of the Independent Reviewer (and his predecessors) features prominently in Lord Hughes' judgment: see ibid. at paras 18–26, 34, 41–42, 43, 47, 49, 50.

[82] See Home Office, 'Review of the Operation of Schedule 7: A Public Consultation', September 2012, available at https://www.gov.uk/government/consultations/review-of-the-operation-of-schedule-7 [last accessed 6 December 2015]; Home Office, 'Review of the Operation of Schedule 7: A Public Consultation — The Government Response', July 2013, available at https://www.gov.uk/government/consultations/review-of-the-operation-of-schedule-7 [last accessed 6 December 2015].

[83] Anderson, 'The independent review of terrorism laws' [2014] *Public Law* 403 at 418.

[84] *Beghal*, supra n 9 at para 16. See generally section 148 and Schedule 9, Anti-social Behaviour, Crime and Policing Act 2014.

[85] Between April 2009 and March 2012, 0.06 per cent of examinations ran longer than six hours: see Anderson, 'The Terrorism Acts in 2012', July 2013, at para 10.9, available at https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/07/Report-on-the-Terrorism-Acts-in-2012-FINAL_WEB1.pdf [last accessed 19 September 2015].

[86] Ibid. at para 10.43.

[87] Anderson, supra n 66 at para 9.18.

[88] *Beghal,* supra n 9 at para 26.

[89] Anderson, supra n 85 at para 10.48; Anderson, supra n 8 at para 7.25; Anderson, 'The Terrorism Acts in 2014', September 2015, at para 6.29, available at https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/09/Terrorism-Acts-Report-2015-Print-version.pdf [last accessed 10 November 2015].

during an examination ought to be statutorily barred.[90] As for the other issues, the majority, as will be discussed later, went further in some respects than the Reviewer.

The majority's other point, that there was no evidence of Schedule 7's misuse or failure in its safeguards as there had been with section 44, is a key point of distinction between the majority and dissent. The majority emphasised that Schedule 7 was not being misused in practice, as evidenced by the declining number of examinations and the Independent Reviewer's general approval.[91] The implication is that examining officers have been using Schedule 7 prudently, or at least that there is no evidence to suggest otherwise. By contrast, in Lord Kerr's view, the issue was whether Schedule 7 could potentially be misused or whether there were sufficient safeguards to prevent this.[92] So it was not enough to say that the powers under Schedule 7 'have not in fact been used arbitrarily or in a discriminatory way'.[93] Equally, the fact that Schedule 7's use had declined, suggesting that it was being employed with appropriate discretion, was of no moment:

> The fact that it is exercised sparingly has no direct bearing on its legality. A power on which there are insufficient legal constraints does not become legal simply because those who may have resort to it, exercise self-restraint. It is the potential reach of the power rather than its actual use by which its legality must be judged.[94]

Lord Kerr's approach is more readily reconcilable with the Supreme Court's earlier dicta concerning Schedule 7 in *R v Gul*, which arose out of the appellant's conviction under section 2 of the Terrorism Act 2006 for disseminating terrorist publications.[95] The issue was the proper construction of the definition of terrorism in the Terrorism Act 2000. One of the arguments raised by the Crown was that the existence of prosecutorial discretion mitigated the risk of potential over-criminalisation resulting from the broad statutory definition.[96] The Court described the Crown's reliance on prosecutorial discretion as 'intrinsically unattractive',[97] and stated that, unless used rarely, such a device risked 'undermining the rule of law' in that it involved Parliament abdicating part of its legislative function to non-democratically accountable officials and leaving citizens uncertain about whether their actions rendered them liable for prosecution.[98] The Court went on to observe that the broad statutory definition of terrorism was problematic outside the prosecution context. This was because counterterrorism powers, such as Schedule 7, which the Court described as 'not subject to any controls',[99] ultimately relied on the definition as well. Indeed, the Court stated that the broad definition of terrorism, when coupled with the 'unrestricted' nature of powers conferred to counter it, meant that such powers were 'probably of even more concern'.[100]

If, as the Court indicated in *Gul*, the existence of prudently-exercised prosecutorial discretion cannot fully alleviate concerns arising from the broad statutory definition of terrorism, then it stands to reason that the fact that examining officers might prudently

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[90] *Beghal*, supra n 9 at paras 67, 72. See also Anderson, supra n 85 at para 10.64; Anderson, supra n 8 at para 7.28.
[91] Ibid. at paras 42, 89.
[92] Ibid. at para 93.
[93] Ibid.
[94] Ibid. at para 102.
[95] *R v Gul* [2013] UKSC 64; [2014] AC 1260.
[96] Ibid. at para 30.
[97] Ibid. at para 36.
[98] Ibid.
[99] Ibid. at para 64.
[100] Ibid. at para 63.

employ Schedule 7, which also confers a broad discretion and relies on the same statutory definition, cannot fully alleviate concerns about that provision either.[101]

The dicta in *Gul* — a unanimous decision of a seven-judge bench[102] — were described as "trenchant" by the Independent Reviewer,[103] and were specifically referred to by Beghal's counsel during the hearing.[104] But for reasons that are unclear, they receive no mention in Court's decision.

Lord Kerr's approach also fits more readily with the ECtHR's accounts of the requirement of lawfulness, whereby the measure in question must have a basis in domestic law, be sufficiently accessible and foreseeable, and, as Lord Hughes noted in *Beghal*, 'contain sufficient safeguards to avoid the risk that power will be arbitrarily exercised'.[105] As noted, it was on this last point that section 44 foundered in *Gillan*. There, the ECtHR stated that the law 'must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention', and that, where discretion was granted to the executive, the law 'must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise'.[106] Elsewhere, the ECtHR has reiterated the need for there to be 'adequate legal protection against arbitrariness'.[107]

These statements from Strasbourg concerning the lawfulness requirement are expressed in terms of legal protection and the law containing sufficient safeguards. Lord Kerr's dissent, which claims that sufficient legal protection does not exist in relation to Schedule 7, addresses this point; the majority's discussion about how Schedule 7 is used prudently in practice does not.

(ii) Effective safeguards exist in relation to Schedule 7.

The *Beghal* majority did, however, also note the existence of effective safeguards governing Schedule 7. These included: Schedule 7 applying only to travellers at the border; training and accreditation requirements for examining officers; limits on the duration and purpose of questioning; limits on the types of searches permitted; requirements to provide notice, allow consultation with a solicitor, and keep records; the availability of judicial review; and the supervision of the Independent Reviewer.[108] While this is an ostensibly impressive list, a number of them — requirements of proper training and record keeping, for example — are safeguards only in the most attenuated sense. Further, most of these safeguards applied to the s 44 regime; three were specifically considered and rejected by the ECtHR in *Gillan*.

The first is the restriction to the statutory purpose. The section 44 regime included a similar restriction: it could only be used 'for the purpose of searching for articles of a kind which could be used in connection with terrorism'.[109] The ECtHR considered this to be little constraint because the proviso was wide enough to cover 'many articles

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[101] See also See Greene, 'The Quest for a Satisfactory Definition of Terrorism: *R v Gul*' (2014) 77 *Modern Law Review* 780 at 787–89.

[102] Only Lord Neuberger and Lord Kerr sat on both appeals.

[103] Anderson, supra n 8 at para 4.9.

[104] The Supreme Court hearing can be viewed at https://www.supremecourt.uk/cases/uksc-2013-0243.html.

[105] *Beghal*, supra n 9 at para 30.

[106] *Gillan ECtHR*, supra n 19 at para 77.

[107] *Marper v United Kingdom* Application No 2455/05, Merits, 19 February 2009 at para 95; *Colon v Netherlands*, supra n 55 at para 72.

[108] *Beghal*, supra n 9 at paras 43, 88.

[109] Section 45(1) Terrorism Act 2000.

commonly carried by people in the streets.'[110] Paragraph 2(1), the equivalent provision in Schedule 7, provides: '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).' Lord Hughes summarised its effect thus: 'the statutory purpose for which the questions may be asked is for determining whether the person appears either to be, or to have been, concerned in the commission, preparation or instigation of acts of terrorism.'[111] Consequently, the restriction to the statutory purpose is not onerous. As Lord Dyson MR observed in *Miranda*, 'Parliament has set the bar for the exercise of the Schedule 7 power at quite a low level'.[112]

Second, Lord Hughes averred that effective judicial supervision over the exercise of Schedule 7 was available. In *Gillan*, the ECtHR doubted the practical availability of effective judicial supervision because of the lack of a reasonable suspicion requirement, meaning that it was likely 'difficult if not impossible to prove that the power was improperly exercised.'[113] Given that Schedule 7 is the same in this respect, effective judicial supervision is likely to be similarly elusive.[114]

Third, Lord Hughes emphasised the supervisory role played by the Independent Reviewer. However, the Reviewer was not considered a meaningful safeguard over the everyday operation of the section 44 power in *Gillan*, with the ECtHR noting that the Reviewer was 'confined to reporting on the general operation of the statutory provisions'.[115] As Lord Kerr remarked, the Reviewer's role vis-à-vis Schedule 7 is the same.[116]

The first safeguard, namely Schedule 7's restriction to those passing in and out of the country, is a distinctive feature that merits further consideration. It is true that, unlike section 44, Schedule 7 is limited to defined spaces such as seaports, airports and international rail terminals.[117] It is also true that people passing through those areas have always been subject to some form of border control, meaning that expectations of freedom of movement and privacy can be said to be lower.[118]

However, the 'specific and relatively limited and confined places'[119] where Schedule 7 applies are areas through which people must pass in order to enter or exit the country. Approximately 245 million people do so annually,[120] and are therefore potentially subject to Schedule 7.[121] Additionally, as Lord Kerr argued, while the public might reasonably be expected to tolerate or impliedly consent to some form of border control, such as requirements to prove one's identity and entitlement to enter the country, the obligations imposed by Schedule 7 are qualitatively different in intrusiveness: examined persons are compelled to answer questions,[122] often relating to personal matters concerning political beliefs, religious beliefs, and practices of religious observance.[123] Some, like the appellant,[124] experience repeated examinations.[125]

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[110] *Gillan ECtHR*, supra n 19 at para 83.
[111] *Beghal*, supra n 9 at para 4.
[112] *Miranda*, supra n 10 at para 58.
[113] *Gillan ECtHR*, supra n 19 at para 86.
[114] See also *Beghal*, supra n 9 at para 100. For an unusual case where the argument based on statutory purpose succeeded, see *CC v The Commissioner of Police of the Metropolis* [2011] EWHC 3316 (Admin).
[115] *Gillan ECtHR*, supra n 19 at para 82.
[116] *Beghal*, supra n 9 at para 98.
[117] Ibid. at paras 38, 88.
[118] Ibid. at paras 38–40, 89.
[119] Ibid. at para 88.
[120] Anderson, 'The Terrorism Acts in 2014', supra n 89 at para 6.3.
[121] *Beghal*, supra n 9 at para 102.
[122] Ibid. at para 101.
[123] See Choudhury and Fenwick, 'The impact of counter-terrorism measures on Muslim communities' (2011) 25 *International Review of Law, Computers & Technology* 151 at 163. Other questions, such as those

Moreover, although certain border control measures — such as universal screening of passengers and their belongings — are commonplace, Schedule 7 examinations, as emphasised by the majority, are not.[126] Recent statistics bear this out: in 2014/15, 34,500 out of approximately 245 million travellers (0.014 per cent) were examined, and just over five per cent of those examinations exceeded one hour.[127] Additionally, as the Independent Reviewer has noted, the burden of Schedule 7 is disproportionately borne by ethnic minorities.[128] If the statistical reality is that Schedule 7 examinations are both rare and unevenly experienced across the population, then this undermines the claim that such examinations can be said to be part of the general expectation of the travelling public.

C. *Roberts*: an apparent surfeit of safeguards

Because the only issue before the Court was lawfulness under Article 8(2), *Roberts* predictably focuses on the safeguards constraining the exercise of the impugned power as well. That discussion, together with the Court's account of section 60's effectiveness, is examined below.

(i) Whither the case law?

The Court's discussion occurs largely in isolation from its account of the relevant case law.[129] Apart from one incidental reference to *Beghal* and one reference to *Gillan*,[130] where the Court rightly observes that the language governing the making of authorisations under section 60 is more stringent than was the case with section 44, the stop and search cases are absent from the remainder of the judgment. This is puzzling in respect of *Gillan* and *Colon*, because the powers at issue in those cases, like section 60, were exercisable beyond ports and airports, and consisted of two broad discretions conferred on executive actors: a front-end discretion to authorise the power's use at a particular place and time, and a back-end discretion to exercise the power to stop and search in a particular instance.[131]

The power at issue in *Colon,* as noted, was not only structurally similar but also functionally similar. The legislative framework governing the front-end discretion was elaborate, requiring decisions by both the Burgomaster and the Public Prosecutor, together with consultation and notification.[132] The Burgomaster was subject to democratic control via the local council; objections could be lodged with the

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relating to Osama Bin Laden's whereabouts and people's attitudes towards President George W Bush, border on the absurd: see ibid. at 163, 166.

[124] Beghal's counsel noted at the hearing that she had been stopped under Schedule 7 three times in the space of 14 months.

[125] Choudhury and Fenwick, supra n 123 at 162. Choudhury and Fenwick's study found that Schedule 7 is widely perceived as a form of religious discrimination by members of the Muslim community: see ibid. at 166–67.

[126] *Beghal*, supra n 9 at paras 18, 89.

[127] Anderson, 'The Terrorism Acts in 2014', supra n 89 at para 6.3.

[128] Anderson, supra n 66 at paras 9.21–9.23; Anderson, supra n 85 at paras 10.12–10.14; Anderson, supra n 8 at paras 7.8–7.15. The Independent Reviewer noted that this did not, in itself, indicate discriminatory use of the power. The Reviewer's analysis was endorsed by the majority: see *Beghal*, supra n 9 at paras 50, 89.

[129] Lennon, 'Searching for Change: Scottish Stop and Search Powers' (2016) 20 *Edinburgh Law Review* 178, 188.

[130] *Roberts*, supra n 11 at paras 41, 44.

[131] See Ip, supra n 19 at 731.

[132] *Colon v Netherlands*, supra n 55 at paras 38, 67–68.

Burgomaster, with appeals to administrative tribunals being available as well.[133] There is some uncertainty as to what the back-end discretion entailed, but the Court in *Roberts* was likely correct in rejecting the appellant's submission that officers exercised no discretion in deciding whom to stop and search.[134]

In any event, *Colon* did not turn on the back-end discretion, because the challenge was limited to the lack of prior judicial authorisation in relation to the front-end discretion.[135] While the actual effectiveness of the framework governing the front-end discretion may be questioned,[136] section 60's front-end discretion, even on paper, is subject to fewer constraints — the authorisation process notably requires only decision-making internal to the police.[137] But because of the lack of substantial engagement with the case law, what the Court makes of this, or indeed its views on how *Colon*, *Gillan* and *Beghal* might bear upon the assessment of the sufficiency of the constraints on section 60, is unclear.

(ii) A formalistic discussion of safeguards and improvements

Much of the discussion of safeguards also does little more than note their formal existence. This is most striking in relation to Her Majesty's Inspectorate of Constabulary (HMIC). While there is reference to HMIC's work and the resulting reforms,[138] there is no discussion of HMIC's 2013 report,[139] which found, among other things, poor supervision of stop and search, inconsistencies in record-keeping, and failures to comply with the Code of Practice.[140] In relation to section 60 specifically, HMIC found little evidence of training for those making authorisations, and that authorisations were 'routinely monitored and reviewed' in only 19 of 43 police forces.[141] This highly critical report must at least call into question the efficacy of some of the safeguards relied on by the Court.

Further, as was the case with the *Beghal* majority's discussion of the safeguards applicable to Schedule 7, many of the safeguards put forward in relation to section 60, including the availability of judicial remedies and most of the non-judicial oversight mechanisms, also existed in relation to section 44. The same is true of the constraints applicable to the back-end discretion, which the Court acknowledged was the ECtHR's primary concern in *Gillan.*[142] The requirements to be in uniform, provide identification, explain the power being exercised and the purpose of the search, and make a written record (to which the affected person is entitled),[143] appear in the 2003 Code considered in *Gillan.*[144] The searching officer's obligation under the Code to give reasons for the

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[133] Ibid. at paras 76–77.

[134] *Roberts*, supra n 11 at para 23. See also *Colon v Netherlands*, supra n 55 at paras 3, 38; Lennon, 'Stop and search powers in UK terrorism investigations: a limited judicial oversight?' (2016) 20 *The International Journal of Human Rights* 1, 7.

[135] *Colon v Netherlands,* supra n 55 at para 74. See also *Roberts*, supra n 1 at para 23; *Beghal*, supra n 9 at paras 109–110.

[136] Lennon, supra n 129 at 186.

[137] Bridges, supra n 5 at 25.

[138] *Roberts*, supra n 11 at para 38. The chronology is described in Shiner, 'Regulation and Reform' in Delsol and Shiner (eds), *Stop and Search* (2015) 146 at 161.

[139] Her Majesty's Inspectorate of Constabulary, 'Stop and Search Powers: Are the police using them effectively and fairly?', 9 July 2013, available at http://www.hmic.gov.uk/media/stop-and-search-powers-20130709.pdf [last accessed 5 April 2016].

[140] Ibid. at 6.

[141] Ibid. at 40.

[142] *Roberts*, supra n 11 at para 20.

[143] Ibid. at para 46.

[144] *Gillan ECtHR*, supra n 19 at paras 35–36; Home Office, 'Police and Criminal Evidence Act 1984 Codes of Practice A-E', 1 April 2003, at paras. 3.8–4.9, available at

stop,[145] on which the Court placed particular emphasis,[146] can also be found in the 2003 Code.[147]

As for the legitimate purpose of the section 60 power being limited to searching for 'offensive weapons or dangerous implements',[148] it is true that the language is narrower than the equivalent statutory provisos under Schedule 7 and section 44.[149] However, any constraining effect is undercut by the lack of any requirement that an officer reasonably suspect the presence of such items.[150]

The Court's discussion of improvements to the governance of section 60 focuses on the Best Use of Stop and Search Scheme (BUSS), a set of guidelines governing stop and search powers that was voluntarily adopted by all police forces.[151] In relation to section 60, BUSS stipulates more stringent conditions for the use of the power than the statute itself.[152] Counsel for the appellant and the Secretary of State disagreed about what the overlay of BUSS meant for the adequacy of safeguards contained in section 60. The Court did not resolve this issue,[153] but observed that the 'very significant reduction' in the use of section 60 ought to be taken into account.[154] If so, then it should also be taken into account that reforms of police practices and procedures directed towards reducing the use of section 60 coincide with the onset of legal challenges to the use of the power, including the litigation brought by Roberts.[155]

(iii) An assertion of effectiveness

The Court stated that any risk that section 60 might be employed in an arbitrary or discriminatory fashion had to be considered against the 'great benefits to the public of such a power' in the form of deterrence and the detection of weapons.[156] This claim about section 60's effectiveness or utility deserves scrutiny.

First, the sole issue before the Court was whether section 60 was in accordance with the law.[157] Effectiveness or utility is not discussed in the relevant case law under the

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<http://webarchive.nationalarchives.gov.uk/20080205132201/http://police.homeoffice.gov.uk/news-and-publications/publication/operational-policing/Previous_Codes_2003/PACE.pdf?view=Binary> [last accessed 5 April 2016] ('2003 Code').

145 *Roberts*, supra n 11 at para 35.

146 Ibid. at para 47.

147 2003 Code, supra n 144 at para 3.8. Similarly, the obligation to complete form 5090 existed in relation to s 44: see *Gillan HL*, supra n 53 at paras 2–3, 48; Metropolitan Police, 'Section 44 Terrorism Act 2000: Standard Operating Procedures', 1 April 2005, at 19, available at http://web.archive.org/web/20051102132537/http://www.met.police.uk/foi/pdfs/policies/stop_and_search_s44_tact_2000_sop.pdf [last accessed 6 April 2016].

148 *Roberts*, supra n 11 at para 46.

149 See text at supra nn 109–112.

150 Lennon, supra n 129 at 189.

151 *Roberts*, supra n 11 at paras 38–39. The Home Secretary subsequently suspended 13 police forces for failure to comply with BUSS: see Dodd, 'UK police forces "still abusing stop and search powers"' *Guardian*, 11 February 2016, available at http://www.theguardian.com/law/2016/feb/11/uk-police-forces-still-abusing-stop-and-search-powers [last accessed 30 March 2016].

152 See Home Office, 'Best use of stop and search scheme', 26 August 2014, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/346922/Best_Use_of_Stop_and_Search_Scheme_v3.0_v2.pdf [last accessed 5 April 2016].

153 The Court's refusal to issue a declaration of incompatibility in relation to the stop and search of Roberts or the then-applicable guidance could be indicative of its view.

154 *Roberts*, supra n 11 at para 40.

155 Shiner and Delsol, supra n 78 at 40–41; Dodd, 'Metropolitan police to scale back stop and search operation' *Guardian*, 12 January 2012, available at http://www.theguardian.com/uk/2012/jan/12/met-police-stop-search-suspicion [last accessed 5 April 2016].

156 *Roberts*, supra n 11 at para 41.

157 Ibid. at paras 14–15.

rubric of lawfulness. In *Colon*, it appears in relation to whether the power was necessary in a democratic society.[158] The part of the concurring judgment in *Beghal* referred to by the Court, in which Lord Neuberger and Lord Dyson referred to the benefits of Schedule 7 as being 'potentially substantial', is part of the proportionality discussion.[159] Lord Hughes' judgment provides further clarification: the utility of Schedule 7 was 'clearly relevant to the question of the proportionality of the power, but it [did] not contribute significantly to the question of its legality'.[160]

Second, the Court's evidence of effectiveness consists of a reference to Moses LJ's judgment in the Divisional Court, which stated that, unlike the discredited section 44, which resulted in no arrests for terrorism offences, section 60 'resulted in over 2,000 arrests in 2007-2008 and 4,273 in 2008-09'.[161] But this is hardly evidence of effectiveness.[162] Those arrests resulted from more than 50,000 and 150,000 stops and searches in those years. If only arrests for offensive weapons are counted, the hit-rate drops further still: between 2002/2003 and 2011/2012, less than one per cent of section 60 stops and searches led to arrests for offensive weapons.[163] When this is coupled with empirical research suggesting the impact of section 60 on reducing the incidence of knife crime or violent crime is far from certain,[164] the Court's claim of effectiveness, even granting its relevance, is doubtful.

D. Qualifying the monolithic approach to Schedule 7

Unlike section 60, which provides only for the power to stop and search (and, where appropriate, to seize specified items), Schedule 7 consists of an array of powers: in addition to the powers to stop, question and search, there are further powers to require the production of documents, copy and retain material, and detain.[165]

Appreciating the multifaceted nature of Schedule 7 provides a means of reconciling the conclusion to *Miranda*, where the Court of Appeal stated that the 'exercise of the Schedule 7 stop power' on Miranda was lawful,[166] but that 'the stop power conferred by para 2(1) of Schedule 7 [was] incompatible with article 10 in relation to journalistic material'.[167] Given that Miranda's case concerned journalistic material, the conclusion that the power is incompatible with Article 10 is at odds with the conclusion that the particular exercise of the power was lawful. However, the power to stop is found in paragraph 6, and stopping Miranda to question him did not, in itself, implicate Article 10. That occurred because Miranda's belongings were searched, leading to the seizure of several encrypted storage devices containing journalistic material and the subsequent accessing of some of that material.[168] These actions were likely justified by the Schedule 7 powers relating to search, the production of information, and the retention of

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[158] *Colon v Netherlands,* supra n 55 at para 94.
[159] *Beghal*, supra n 9 at para 79.
[160] Ibid. at para 34.
[161] *R(Roberts) v Commissioner of The Metropolitan Police* [2012] EWHC 1977 (Admin) at para 40.
[162] See also Lennon, supra n 129 at 190.
[163] Delsol, 'Effectiveness' in Delsol and Shiner (eds), *Stop and Search* (2015) 79 at 90.
[164] Ibid. at 84–85; McCandless et al, 'Do initiatives involving substantial increases in stop and search reduce crime? Assessing the impact of Operation BLUNT 2', March 2016, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/508661/stop-search-operation-blunt-2.pdf [last accessed 18 March 2016]; Her Majesty's Inspectorate of Constabulary, supra n 139 at 41.
[165] *Beghal*, supra n 9 at para 8.
[166] *Miranda*, supra n 10 at para 118.
[167] Ibid. at para 119.
[168] Ibid. at para 20.

property.[169] It was the operation of these powers in relation to Miranda that gave rise to the Article 10 issue.

Significantly, all the core Schedule 7 powers are currently exercisable without reasonable suspicion,[170] and the government's consistent position has been that Schedule 7 ought not to have a reasonable suspicion requirement.[171] However, this is to treat the multifaceted Schedule 7 monolithically. As the Independent Reviewer and the Joint Committee on Human Rights have contended, just because it might be proportionate for the power to stop and question to be exercisable without reasonable suspicion, does not necessarily mean that this must be so for all of the various Schedule 7 powers.[172] Both *Beghal* and *Miranda* provide support for a more granular, calibrated approach to the more potentially onerous Schedule 7 powers.

(i) Beghal *on detention and the inspection, copying and retention of electronic data*

In relation to the power to detain, Lord Hughes stated that a Schedule 7 examination would not ordinarily give rise to a breach of Article 5, because either it would not amount to a deprivation of liberty, or, if it did, it would be justified as being necessary to complete the process of examination.[173] However, the level of intrusion resulting from a six-hour detention was another matter altogether,[174] and it was not obvious how a six-hour detention could be necessary for completing the process of examination. For such a detention to be proportionate, 'objectively demonstrated suspicion' was necessary.[175] In this respect, Lord Hughes went further than the Independent Reviewer, who had suggested a standard of subjective suspicion on the part of a senior officer.[176]

In relation to the inspection, copying and retention of data from devices such as laptops and smartphones, the Independent Reviewer had previously expressed doubt as to whether this practice, which was reportedly what had actually generated information leading to convictions for terrorist offending,[177] was properly authorised.[178] This uncertainty was resolved through the addition of paragraph 11A, which confers an express power to make and retain copies of anything given to or found by the searching officer.[179] Significantly though, despite the significant privacy interests implicated by searches of personal electronic devices,[180] suggestions that this power ought to require the satisfaction of a higher threshold were rejected.[181] The result is that, under Schedule 7

[169] Schedule 7, paras 5, 8 and 11, Terrorism Act 2000.
[170] Anderson, supra n 8 at para 7.25.
[171] See, for example, Home Office, 'Review of the Operation of Schedule 7: A Public Consultation', supra n 82 at para 9.
[172] Anderson, supra n 85 at para 10.62; Joint Committee on Human Rights, 'Legislative Scrutiny: Anti-social Behaviour, Crime and Policing Bill', HL 56, HC 713, 11 October 2013, at paras 110–112.
[173] *Beghal*, supra n 9 at para 54.
[174] Ibid. at para 52.
[175] Ibid. at paras 54–55. The position of the concurring judgment on this point is unclear.
[176] Anderson, supra n 8 at para 7.28. See also ibid. at Annex 2. Lord Hughes' view is consistent with the recommendations made in the Jellicoe report regarding Schedule 7's predecessor under the 1976 legislation: see Lord Jellicoe, supra n 70 at paras 141–142.
[177] Anderson, supra n 85 at paras 10.68–10.69.
[178] Ibid. at para 10.70.
[179] Anderson, supra n 8 at para 7.22.
[180] Ibid. at 7.29. Such devices typically contain a collection of highly personal information: see Joint Committee on Human Rights, supra n 172 at para 119. See also the opinion of Chief Justice Roberts in *Riley v California* 134 S Ct 2473 (2014).
[181] The Independent Reviewer's suggestion was that a senior officer have subjective suspicion: see Anderson, supra n 8 at para 7.28. The Joint Committee on Human Rights suggested reasonable suspicion: see Joint Committee on Human Rights, supra n 172 at para 122.

at present, strip searching requires reasonable suspicion,[182] but rifling through the virtual manifestations of an individual's life on their smartphone does not.[183]

The *Beghal* majority did not go as far as the Independent Reviewer or Joint Committee in that it did not advocate that a higher threshold be satisfied for the initial inspection and copying of data, which it analogised to the inspection of baggage and other possessions. However, in relation to retention, the majority added important caveats. First, the majority read paragraph 11A(3)(a), which provides that a copy may be retained 'for so long as is necessary for the purpose of determining whether a person falls within section 40(1)(b)', to permit 'retention for the duration of the stop, and for a short period afterwards to compare records', but not indefinite retention so as to create a permanent database.[184] Second, once this period after initial inspection and copying has elapsed, the majority suggested that retention beyond this ought to require '*objectively* established grounds for suspicion'.[185] While the majority did not express a concluded view on the matter, it clearly suggested that the legal framework regulating the retention of electronic data was deficient.[186]

(ii) Miranda *on the protection of the confidentiality of journalistic material*

Miranda adds a further caveat in respect of journalistic material. As noted earlier, the Article 10 issue arose out of the seizure of several encrypted storage devices containing journalistic material, and the subsequent accessing of some of that material. All of this would have been done under Schedule 7 without the need for reasonable suspicion. The Court's discussion took a familiar turn, considering whether there were sufficient legal safeguards to ensure the power was 'prescribed by law'.[187]

The Court considered Lord Hughes' list of safeguards from *Beghal*, but did not regard it as dispositive because Article 10 raised distinct issues.[188] Lord Dyson MR also considered that, although the constraints relied on by the Divisional Court provided some limit on Schedule 7,[189] they did not 'afford effective protection of journalists' article 10 rights'.[190] The only safeguard against the illegitimate exercise of the power was the prospect of judicial review. Importantly, the Court went on to consider how judicial review might actually function as a safeguard in relation to journalistic material. It found that, because of its after-the-fact nature, judicial review was inadequate protection against the improper disclosure of confidential journalistic material.[191] In the Court's view, the obvious mechanism for protecting against the unlawful exercise of Schedule 7 in relation to journalistic material and ensuring the confidentiality of such material was 'prior judicial or other independent and impartial oversight (or immediate post factum oversight in urgent cases)'.[192] It was for Parliament to create such a mechanism.[193]

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[182] Schedule 7, para 8(5), Terrorism Act 2000.
[183] For discussion of these issues in the US context, see Kugler, 'The Perceived Intrusiveness of Searching Electronic Devices at the Border: An Empirical Study' (2014) 81 *University of Chicago Law Review* 1165.
[184] *Beghal*, supra n 9 at para 57.
[185] Ibid. at para 58 (emphasis in original).
[186] Ibid.
[187] *Miranda*, supra n 10 at para 94.
[188] Ibid. at para 98.
[189] These included that: the power only applied in the border area; the power to detain was limited to 9 hours; and the power had to be exercised on some reasoned basis, proportionately, and in good faith: see ibid. at para 112.
[190] Ibid. at para 113.
[191] Ibid. at paras 110, 113.
[192] Ibid. at para 114. Post factum oversight refers to review that occurs after 'the handing over of material but before access has been gained to its contents': see ibid. at para 100.
[193] Ibid. at para 119.

The Home Office suggested in the wake of the decision that changes made in the 2015 Code of Practice already exceeded the Court's recommendation.[194] As a result of those changes, the Code now states that 'examining officers should cease reviewing, and not copy, information which they have reasonable grounds for believing' falls into certain categories, one of which is journalistic material.[195] Certainly this represents progress from the Code operative at the time of Miranda's examination, but it appears some way short of the Court's suggested safeguard.[196]

6. CONCLUSION

The past year has certainly been an eventful one for 'suspicionless' stop and search. Schedule 7 has emerged mostly unscathed, although there are clear judicial signals that certain aspects of it require reconsideration and reform.[197] Section 60 has, less convincingly, been given a clean bill of health.

These decisions will not be the last word. Further litigation in the form of applications to the ECtHR by Beghal or Roberts, or an appeal to the Supreme Court in the case of *Miranda*, remain possibilities. Indeed, the ECtHR has already ruled another case concerning Schedule 7 admissible.[198] What is clear is that the relative obscurity that these powers have enjoyed is over.

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[194] 'Airport stop of Snowden reporter's partner David Miranda "lawful"', *BBC News*, 19 January 2016, available at http://www.bbc.com/news/uk-35343852 [last accessed 10 April 2016].

[195] 2015 Code, supra n 71 at para 40; Section 11 Police and Criminal Evidence Act 1984.

[196] Unless it is contemplated that access to journalistic material will be governed by a different legal regime, with Schedule 5 of the Terrorism Act being a possibility: see *Miranda*, supra n 10 at para 117.

[197] The Independent Reviewer noted that the *Beghal* majority went out of its way to address the use of Schedule 7 powers that did not directly arise from the facts: see Anderson, 'The Terrorism Acts in 2014', supra n 89 at para 6.38.

[198] *Malik v United Kingdom* Application no 32968/11, Admissibility, 28 May 2013.