[GB] Court of Appeal rules on “stop power” under Terrorism Act and journalistic material

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Lorna Woods
School of Law, University of Essex

The case concerned the legality of the stopping and searching of David Miranda at Heathrow Airport in 2013, who was believed to be carrying information relating to the Snowden disclosures which had been published in The Guardian newspaper (see IRIS 2016-2/28). Miranda is the spouse of Glenn Greenwald, a journalist who at the material time was working for The Guardian. The police relied on the Terrorism Act 2000 (TACT), and the High Court held that the actions of the police were legal, but gave leave to appeal. The Court of Appeal suggested that there were three questions before it: (a) the definition of TACT powers, so as to determine whether the power was used for its intended purpose; (b) the question of proportionality of the power’s use; and (c) whether the use of the power is compatible with the rights guaranteed by Article 10 ECHR, specifically in relation to journalistic material.

As regards the first point, the Court of Appeal held that terrorism required some intention to cause a serious threat to public safety. Nonetheless, the use of the TACT powers in this context was in accordance with the act because TACT did not require actual knowledge or suspicion that the person to be stopped is a terrorist but instead the power may be used "for the purpose of determining whether he appears to be a [terrorist]". The Court of Appeal approved the approach taken at first instance, that this means “the power has been given to provide an opportunity for the ascertainment of the possibility that a traveller at a port may be concerned in the commission, preparation or instigation of an act of terrorism”, and that the use in this case was therefore appropriate.

The Court of Appeal also considered the proportionality of the measure. The Court accepted that in assessing a matter affecting national security, a significant degree of deference should be shown to the view of the security services, and should also take into account the degree of harm that could materialise. The Court of Appeal determined that although the use of the Schedule 7 power was an interference with press freedom, the interests of national security outweighed the Article 10 right.

Despite this, the Court of Appeal then considered Article 10 again and the specific question of whether the stop and search procedure, when used in respect of journalistic information or material, is incompatible with Article 10 in that it is not

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"prescribed by law" as required by Article 10(2) ECHR. Here, the concern is the lack of safeguards, which is a qualitative element of lawfulness arising from the Strasbourg jurisprudence (see Sanoma Uitgevers v. the Netherlands, IRIS 2010-10/2), but also noted by the Supreme Court (see Beghal v. DPP [2015] UKSC 49). The Court of Appeal accepted that there were some safeguards in the system but found that these were insufficient. Lord Dyson MR argued: “The central concern is that disclosure of journalistic material (whether or not it involves the identification of a journalist's source) undermines the confidentiality that is inherent in such material and which is necessary to avoid the chilling effect of disclosure and to protect Article 10 rights. If journalists and their sources can have no expectation of confidentiality, they may decide against providing information on sensitive matters of public interest. That is why the confidentiality of such information is so important. It is, therefore, of little or no relevance that the Schedule 7 powers may only be exercised in a confined geographical area or that a person may not be detained for longer than nine hours. I accept that the fact that the powers must be exercised rationally, proportionately and in good faith provides a degree of protection. But the only safeguard against the powers not being so exercised is the possibility of judicial review proceedings.”

So while the Court of Appeal upheld the Divisional Court judgment on the first two points, it allowed the appeal on this last point, holding that “the stop power conferred by para. 2(1) of Schedule 7 is incompatible with Article 10 of the Convention in relation to journalistic material in that it is not subject to adequate safeguards against its arbitrary exercise.”

R. (Miranda) v. Secretary of State for the Home Department [2016] EWCA (Civ) 6

http://www.bailii.org/ew/cases/EWCA/Civ/2016/6.html

Beghal v. Director of Public Prosecutions [2015] UKSC 49

http://www.bailii.org/uk/cases/UKSC/2015/49.html

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