Supplementary written evidence submitted by David Anderson Q.C. [CT 11a]

RECOMMENDATIONS OF THE INDEPENDENT REVIEWER ON SCHEDULE 7 TO THE TERRORISM ACT 2000

INTRODUCTION

1. Giving evidence to the Committee on 12 November 2013, I was asked (Q80) to spell out what changes to the port powers contained in Schedule 7 to the Terrorism Act 2000, other than the welcome amendments which have already been proposed by the Government in the Anti-Social Behaviour Crime and Policing Bill 2013, I considered desirable.

2. During the Report stage debate in the House of Commons on 15 October 2013, Rt Hon Damian Green MP had already indicated that he expected the Independent Reviewer to make recommendations, and that the Government would wish to examine them carefully.[1] At second reading in the House of Lords two weeks later, Lord Avebury, citing the Deputy Prime Minister, expressed the hope that my recommendations would be available "*while it may still be of assistance to your Lordships in the passage of this Bill*".[2]

3. My observations on the operation of Schedule 7, based on site visits (to 12 airports and seaports in England, Scotland, Wales and Northern Ireland, St Pancras International Rail Terminal, Calais, Coquelles, the National Ports Analysis Centre and the National Border Targeting Centre) and discussions (with police, MI5, civil servants, affected communities and individuals and NGOs), are recorded in my three annual reports on the operation of Schedule 7.[3] In each of those reports I noted the considerable utility of the Schedule 7 power in the fight against terrorism, while indicating certain areas where it seemed to me that amendment should at least be considered.[4] Some but not all of those issues were addressed in the public consultation and in the Bill. Three which regrettably were not – the thresholds for exercise of the Schedule 7 powers, the treatment of electronic data and the use made of answers given under compulsion – are considered in this note.

4. A full set of recommendations would ideally have awaited the final outcome of the numerous legal cases referred to at paragraph 7 below – in particular the imminent judgment in the judicial review proceedings arising out of the detention of David Miranda at Heathrow Airport in August 2013. I am conscious also that as Independent Reviewer, my primary function is to inform (rather than participate in) the political and public debate on

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1 Hansard 15 Oct 2013 HC col 634.

2 Hansard 29 Oct 2013 HL col 1524.

3 D. Anderson, *The Terrorism Acts in 2012*, July 2013, chapter 10; *The Terrorism Acts in 2011*, June 2012, chapter 9; *Report on the operation of the Terrorism Acts in 2010*, July 2011, chapter 9: all freely available on my website www.terrorism-legislation-reviewer.independent.gov.uk.

4 See, most recently, my report of July 2013 at 10.48-10.80.

the scope of anti-terrorism law. It seems likely however that amendment to Schedule 7 will reach Committee stage in the House of Lords within the next two weeks. In the circumstances, and bearing in mind the comments cited at paragraphs 1 and 2 above, I take this opportunity to expand upon the answer to Q80 that I gave orally on 12 November.

5. My recommendations are given at paragraphs 19, 30, 36, 39, 40, 41 and 43 below, and set out together on the last page of this note.

6. I announced in August my intention of publishing a report into the detention of Mr Miranda. It soon became clear that much of the relevant ground would be authoritatively covered in his judicial review proceedings, which have been expeditiously handled on all sides and in which argument was heard on 6 and 7 November. Once judgment is handed down, I propose to decide what more I can usefully add, including by way of any additional recommendations relating to Schedule 7.

DEVELOPMENTS SINCE JULY 2013

7. The four months since my last report have been the most eventful in the long history of Schedule 7.[5] In addition to the progress of the Bill through Parliament, they have seen:

   (a) the publication in July of the Government's response to the public consultation on Schedule 7 which I had recommended in my 2011 report and which was conducted in late 2012, attracting 395 responses;[6]

   (b) the detention in August of David Miranda under Schedule 7 at Heathrow, giving rise to a storm of media controversy and a claim for judicial review, not yet decided, which raised a number of issues including the scope of the Schedule 7 power and its use in relation to what is said by Mr Miranda to be journalistic material;

   (c) the rejection in August by the Divisional Court of a claim by a French national, examined at Heathrow, that the application of Schedule 7 contravened Articles 5, 6 and 8 of the ECHR and EU free movement rules;[7]

   (d) a Liberal Democrat conference motion in October, calling for further safeguards;[8]

   (e) the publication in October of an "*illustrative*" draft revised Code of Practice for examining officers;[9]

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[5] As was noted in *Beghal v DPP*, Schedule 7 was introduced in 2000 but derived from a temporary power introduced in 1974, at the height of the Troubles: [2013] EWHC 2573 (Admin), [36].

[6] *Review of the Operation of Schedule 7: A Public Consultation*, Home Office, July 2013.

[7] *Beghal v DPP* [2013] EWHC 2573 (Admin) (Gross LJ, Swift and Foskett JJ). The court is understood to have certified points for a possible appeal to the Supreme Court.

[8] Quoted in *Schedule 7 of the Terrorism Act 2000*, House of Commons Library Standard Note SN/HA/6742 (Joanna Dawson), 11 October 2013.

[9] *Draft Code of Practice for examining officers under Schedule 7 to the Terrorism Act 2000*, Home Office October 2013.

(f) a report in October by the Joint Committee of Human Rights, making a number of recommendations for the further reform of Schedule 7;[10]

(g) a Supreme Court *dictum* in October, in a judgment written by its President and the recently-retired Lord Chief Justice and concurred in by five other Justices, expressing concern about the breadth of the powers given to ports officers by Schedule 7;[11]

(h) the grant in November of a declaration that the refusal of police officers to await the arrival of a solicitor requested by a person detained under Schedule 7 before putting further questions to him was unlawful;[12] and

(i) a ministerial response of 11 November 2013 to the JCHR's report on the Bill, pp.11-17 of which respond to the Committee's recommendations on Schedule 7.

8. The blizzard of litigation has not yet abated. As well as possible appeals in *Beghal* and *Elosta*, judgment is currently awaited both from the Divisional Court in *Miranda* and from the European Court of Human Rights in an application (*Malik*), sponsored by Liberty, which claims that the exercise of Schedule 7 powers violated Articles 5(1) and 8 of the ECHR.[13] Other cases have also been brought.[14] It is plain that the passage of the Bill cannot await the final word from the courts in all these matters.

THRESHOLDS FOR THE USE OF SCHEDULE 7 POWERS

Legal background

9. The no-suspicion basis on which the Schedule 7 powers can be used was recently highlighted by the Supreme Court in *R v Gul* as a potential matter for concern.[15] It was also one of the

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[10] Joint Committee on Human Rights, *Legislative Scrutiny: Anti-Social Behaviour, Crime and Policing Bill*, Fourth Report of Session 2013-2014, HL Paper 56 HC 713, 11 October 2013, chapter 4.

[11] *R v Gul* [2013] UKSC 64, (Lords Neuberger, Lady Hale, Lord Hope, Lord Mance, Lord Judge, Lord Kerr, Lord Reed), [63]-[64]. Having remarked on the broad prosecutorial discretion where terrorist offences are concerned, the Supreme Court continued: "*While the need to bestow wide, even intrusive powers on the police and other officers in connection with terrorism is understandable, the fact that the powers are so unrestricted and the definition of 'terrorism' is so wide means that such powers are probably of even more concern than the prosecutorial powers to which the Acts give rise. Thus, under Schedule 7 to the 2000 Act, the power to stop, question and detain in port and at borders is left to the examining officer. The power is not subject to any controls. Indeed, the officer is not even required to have grounds for suspecting that the person concerned falls within section 40(1) of the 2000 Act (ie that he has 'committed an offence' or he 'is or has been concerned in the commission, preparation or instigation of acts of terrorism'), or even that any offence has been or may be committed, before commencing an examination to see whether the person falls within that subsection. On this appeal we are not, of course, directly concerned with that issue in this case. But detention of the kind provided for in the Schedule represents the possibility of serious invasions of personal liberty.*"

[12] *R (Elosta) v MPC* [2013] EWHC 3397 (Admin): Bean J. I had expressed my own concerns on this point in *The Terrorism Acts in 2011* (June 2012), 9.66.

[13] Application no. 32968/11 *Malik v United Kingdom*, declared admissible on 28 May 2013.

[14] e.g. *Fiaz v GMP and SSHD*, a damages claim alleging discrimination in the application of Schedule 7.

[15] *R v Gul* [2013] UKSC 64, [63]-[64].

factors which led the European Court of Human Rights to hold that the no-suspicion stop and search power under sections 44-45 of the Terrorism Act 2000 was "*neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse*".[16]

10. As against that, both the Strasbourg institutions and the English courts have shown themselves willing, on occasion, to extend a wider margin of tolerance to the exercise of policing powers at the frontier than elsewhere.[17]

11. The purpose of this note is not to offer legal advice, or to predict the outcome of pending or future litigation before the senior courts of the UK or the Council of Europe. It seems fair to assume however that in any assessment of the Schedule 7 powers against the principles of the ECHR, the extent of the discretion given to examining officers will form an important part of the assessment of whether those powers are sufficiently circumscribed, necessary and proportionate.

The Schedule 7 powers

12. The central powers contained in Schedule 7 are the power to question (or examine) a person believed to be travelling through a port,[18] and an accompanying power of search.[19] For the purposes of exercising the power to question, an officer can stop a person or vehicle or detain a person.[20] Under the proposals in the Bill, a person will have to be detained if it is wished to question him for longer than an hour. Detention triggers the provisions of Part I of Schedule 8, which include both rights (to have a named person informed and to consult a solicitor)[21] and obligations (to submit in specified circumstances to the taking of fingerprints or samples).[22]

13. I drew attention in my annual reports to the practice of downloading the contents of mobile phones and other electronic devices (and of requiring the passwords to be handed over on request), and questioned its legal basis. The Government asserted that the necessary legal powers already existed under Schedule 7, but has also proposed a new paragraph 11A for Schedule 7, entitled "*Power to make and retain copies*", which would permit copies to be made of "*anything*" obtained pursuant to paragraphs 5, 8 or 9, and would permit those copies to be retained for so long as is necessary for the purpose of determining whether a person falls within section 40(1)(b), or while the examining officer believes that it may be needed for use as evidence in criminal proceedings or in connection with a deportation decision.[23]

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16 *Gillan and Quinton v UK* (2010) EHRR 45.

17 *McVeigh v UK* (1981) 5 EHRR 71 (ECommHR); *Beghal v DPP* [2013] EWHC 2573 (Admin), [89]-[91]; Application 26291/06 *Gahramanov v Azerbaijan,* ECtHR 15 October 2013, [39]-[40].

18 Schedule 7, paras 2-3, 5.

19 Schedule 7, paras 7-9. The Bill proposes to prohibit intimate searches.

20 Schedule 7, para 6.

21 Schedule 8, paras 6-9.

22 Schedule 8, paras 10-14. The Bill proposes to remove the power to take an intimate sample.

23 On this issue see D. Anderson, *The Terrorism Acts in 2012*, July 2013, 10.65-10.73.

The current thresholds

14. The ***power to question*** (or examine) a person may only be exercised "*for the purpose of determining whether he appears to be a person falling within section 40(1)(b)*": in other words, a person who "*is or has been concerned in the commission, preparation or instigation of acts of terrorism*".[24] The courts may declare an examination to have been unlawful if this condition was not satisfied.[25] The examining officer may however exercise this power "*whether or not he has grounds for suspecting that a person falls within section 40(1)(b).*"

15. The ***powers to stop and detain*** may be used for the purposes of exercising the power to question, and are likewise subject to no requirement of suspicion.[26] A person who is examined can be compelled to provide any information in his possession, and to give the examining officer identity or other documents, again without any requirement of suspicion.

16. The ***power of search*** may also be used only for the purpose of determining whether a person who is questioned appears to be or to have been concerned in the commission, preparation or investigation of acts of terrorism.[27] No suspicion is required for the exercise of this power, save in the case of a strip search for which (under a proposal in the Bill) reasonable suspicion would be required, together with the authority of a supervising officer.

17. No requirement of suspicion attaches to the ***power to copy or download*** that would be created (or confirmed) by the proposed new paragraph 11A.

18. The ***power to take DNA samples*** may be used only if an officer of at least the rank of superintendent is satisfied that it is "*necessary in order to assist in determining whether [a person] falls within section 40(1)(b)*".[28] The ***power to take fingerprints*** may additionally be used if that officer has reasonable grounds for suspecting that a person is not who he claims to be.[29]

Powers to stop, question and search

19. ***I recommend that no change be made to the existing threshold for the exercise of the powers to stop, question and search, save for the amendment proposed in the Bill where strip search is concerned.*** My reasons for taking this position, which were based in part on confidential briefings and evidence from MI5, are set out in my 2013 report and remain valid.[30] A recent briefing on rules-based targeting at the National Border Targeting Centre has strongly confirmed me in this opinion.[31]

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[24] Schedule 7, para 2(1); section 40(1)(b).

[25] As in *CC v MPS and SSHD* [2011] EWHC 3316 (Admin), [34].

[26] Schedule 7, para 6(1).

[27] Schedule 7, para 8.

[28] Schedule 8, para 10(6)(b).

[29] Schedule 8, para 6A(b).

[30] D. Anderson, *The Terrorism Acts in 2012*, 10.50-10.62. The reasons given at 10.58 include the need to preserve a deterrent against the use by terrorists of "*clean skins*", the need not to alert a traveller to the fact

20. The JCHR is largely of the same mind. It took the position, in its report of October, that "*the Government has clearly made out a case for a without suspicion power to stop, question and search travellers at ports and airports, given the current nature of the threat from terrorism, the significance of international travel in the overall threat picture, and the evidence seen by the Independent Reviewer demonstrating the utility of no-suspicion stops at ports in protecting national security*".[32]

21. This does not mean, of course, that the powers to stop, question or search may be used randomly or capriciously. The draft Code of Practice sets out a number of factors of the sort which examining officers need to have in mind when deciding whether to use their powers, before emphasising that:

> "*Schedule 7 powers are to be used solely for the purpose of allowing for the determination of whether the person examined appears to be, or to have been, concerned in the commission, preparation or instigation of acts of terrorism. The powers must not be used to stop and question persons for any other purpose.*"[33]

The courts will no doubt continue, if necessary, to declare an examination unlawful on the basis that it was not used for the statutory purpose.[34]

Power to detain

22. Despite currently being the subject of no higher threshold than the power to question, the power to detain is in general sparingly and responsibly used. Of the 61,145 persons examined under Schedule 7 in 2012/13, only 670 (1.1%) were detained. The majority of those, 547, had biometrics (fingerprints and/or DNA) taken, under the Schedule 8 power that is triggered by detention.[35]

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that he is under surveillance and the need to question the unknown companion of a known terrorist. I also gave (at 10.59) examples of positive results which have been derived from untargeted no-suspicion stops.

[31] Rules based targeting involves the "washing" of carrier data against intelligence-led indicators (or rules), so as to flag those passengers most closely matching the chosen rules. A rule might, for example, be used in the counter-terrorism context to identify travellers with a profile similar to those of known terrorists travelling on routes of concern. Such targeting will not be enough to engender suspicion of each individual who is targeted: but it provides an entirely rational and potentially very useful way of identifying persons whom it may be appropriate to question, and if necessary to search, in order to determine whether they are concerned in the commission, preparation or instigation of acts of terrorism. See further John Vine QPM, "*Exporting the border? An inspection of e-borders October 2012-March 2013*".

[32] JCHR report, fn 10 above, para 110. The JCHR did however recommend a reasonable suspicion requirement before information on personal electronic devices could be accessed or searched: para 122.

[33] Home Office, *Draft Code of Practice for examining officers under Schedule 7 to the Terrorism Act 2000*, October 2013, para 19. The passage cited should however be moved above the sub-heading "*Examination period*", since it belongs under the previous sub-heading "*Exercise of Examination Powers and Selection Criteria*".

[34] As in the case of *CC v MPS and SSHD* [2011] EWHC 3316 (Admin).

[35] D. Anderson, *The Terrorism Acts in 2012*, June 2013, 10.7. For context, it may be recalled that some 245 million passengers travel through UK airports, seaports and international rail terminals in 2010/11: *ibid.*, 10.8(b).

23. The fact that a discretion may in general be responsibly used is however no safeguard against abuse, and no reason not to restrict its use to cases where it is strictly necessary. There may indeed be pressure to detain greater numbers once the Bill has become law, as detention will then be the only lawful way to question a person for longer than an hour. In 2012/13, 2,277 (3.7%) of those questioned were examined for over an hour.

24. The JCHR recommended that the power to detain should be exercised only if the examining officer reasonably suspects that the person is or has been involved in terrorism.[36]

25. I agree with the JCHR that an additional threshold or thresholds should have to be crossed before a person is detained under Schedule 7. Detention is a significant step, as may be seen from the fact that it carries with it the automatic right to legal advice as well as the potential obligation to give fingerprints and DNA samples. To be kept for up to six hours, particularly at the start of an outbound journey, can also be highly disruptive to international travel. It is hard to think of any other circumstances in which such a strong power may be exercised on a no-suspicion basis.

26. Three possible thresholds occur to me. In ascending order of significance, they are:

    (a) The examining officer considering (or a senior officer being satisfied) that detention is ***necessary in order to assist in determining*** whether a person appears to be a person falling within section 40(1)(b) [i.e. a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism;]

    (b) The examining officer considering (or a senior officer being satisfied) that there are ***grounds for suspecting*** that the person appears to be a person falling within section 40(1)(b); or

    (c) The examining officer considering (or a senior officer being satisfied) that there are ***reasonable grounds for suspecting*** that the person appears to be a person falling within section 40(1)(b).

27. As to those options:

    (a) The first ("*necessary in order to assist in determining*") is little more than a statement of the obligation that rests upon any officer whose decision is liable to infringe the Article 8 (or Article 5) rights of another person. It is based on the existing threshold for the taking of fingerprints or a DNA sample,[37] which the Government does not propose to amend, and resembles the "*necessity*" threshold that the Bill proposes to introduce for

[36] JCHR report, fn 10 above, paras 112-114.

[37] Schedule 8 to the Terrorism Act 2000, para 10(6)(b).

authorisation by the review officer of *continued* detention after a so far unspecified period.[38]

(b) The second ("*grounds for suspecting*") would echo the subjective belief standards already present in paragraphs 2(2)(b) and 2(4) of Schedule 7. It would require the officer to have formed a suspicion, whether on the basis of information supplied by others, behavioural assessment or even just intuition. It would however ensure that (in the words of Lord Bingham, in the context of a stop and search power) a ports officer is not deterred from detaining *"a person whom he does suspect as a potential terrorist by the fear that he could not show reasonable grounds for his suspicion*".[39]

(c) The third ("*reasonable grounds for suspecting*") is the default threshold for most stop and search powers, and was the solution favoured by the JCHR in relation to the detention power. It is related to (though not identical to) the proposal in the Bill that strip searches should be conducted only where the examining officer has "*reasonable grounds to suspect that the person is concealing something which may be evidence that the person falls within section 40(1)(b)*".[40]

28. My exposure at a variety of ports to the operational constraints under which ports officers operate inclines me, on balance, towards rejecting the reasonable suspicion standard as a condition for detention.[41] In particular:

a. Terrorists pose risks on a different scale to most other criminals: they have shown themselves capable of causing death and destruction on a massive scale.

b. Active terrorists are not numerous, and not easily identified as such. Factors such as location, demeanour or evasive behaviour in the street may well give rise to a reasonable suspicion that a person is carrying stolen or prohibited articles.[42] In the neutral port environment, an experienced officer's suspicion of involvement in something as specific as the commission, preparation or instigation of acts of terrorism may however be harder to substantiate objectively in the absence of

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[38] Schedule 8 to the Bill, para 7(3). The necessity is there linked to "*exercising a power under paragraph 2 or 3 of that Schedule*": I prefer the more direct formulation suggested here.

[39] *Gillan and Quinton* [2006] UKHL 12, para 35. It appears that a requirement of subjective suspicion in section 44 might have gone part of the way at least to satisfying the European Court of Human Rights which stated of section 44 in the same case, *Gillan and Quinton v UK* [2010] EHRR 45: "*Not only is it unnecessary for [the officer] to demonstrate the existence of any reasonable suspicion; he is not required even subjectively to suspect anything about the person stopped and searched*".

[40] Schedule 8 to the Bill, para 3(3) at 5(b).

[41] I am conscious that the courts were historically "*loath to subject to any searching analysis the basis of police claims that they had reasonable suspicion*": D. Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edn. 2002, p. 334. But it would be unsatisfactory to rely on the courts adopting an over-permissive interpretation of the reasonable suspicion standard. As the same author acknowledges, ECtHR case law, given domestic effect by the Human Rights Act 1998, "*makes it clear that the reasonableness of a constable's suspicion must be carefully assessed*".

[42] Under the reasonable suspicion power in section 1 of the Police and Criminal Evidence Act 1984.

specific intelligence, if only because such involvement is relatively speaking so unusual.

c. The opportunity to test the validity of an officer's subjective suspicion in the hour allotted for examination may in practice be very limited, particularly when suspicion attaches to a large number of persons travelling together, and when time is lost by language difficulties or the use of false identities.

d. Detention sometimes has to be imposed at the outset of the examination, because the person refuses to cooperate. Such behaviour from a person confronted with the exercise of counter-terrorism powers might awaken suspicion: but it could be hard to characterise it as reasonable suspicion of involvement in terrorism. Effectively to require in such cases that reasonable suspicion be shown immediately after the stop would also be contrary to my recommendation and that of the JCHR.

29. These reasons lead me to the view that the operational needs of the police can best be reconciled with the necessary safeguards on detention by selecting the first and second of the options set out above. For consistency, the same test should be applied by the reviewing officer at the periodic review provided for by the Bill.

30. **I therefore recommend that:**

(a) Detention be permitted only when a senior officer is satisfied that there are grounds for suspecting that the person appears to be a person falling within section 40(1)(b) and that detention is necessary in order to assist in determining whether he is such a person.

(b) On periodic review, a detention may be extended only when a senior officer remains satisfied that there continue to be grounds for suspecting that the person appears to be a person falling within section 40(1)(b), and that detention continues to be necessary in order to assist in determining whether he is such a person.[43]

Copying and retention of electronic data

31. As I have recorded in successive reports, data taken from mobile phones, laptops and pen drives at ports has been instrumental in convicting terrorists and has also been extremely useful in piecing together terrorist networks.[44]

32. Such data are however treated in just the same way as any other thing that may be the subject of a search under Schedule 7. There is no legal threshold either for the search or for the downloading (or copying) of data from an electronic device, other than the basic

[43] Replacing the test in Schedule 8 to the Bill, para 7(3) at (3).

[44] See most recently, D. Anderson, *The Terrorism Acts in 2012*, July 2013, 10.59-10.60 and 10.65-10.80.

requirements that a search must be for the purposes of determining whether a person falls within section 40(1)(b),[45] and that the examination of goods must be for the purpose of determining whether they have been used in the commission, preparation or instigation of acts of terrorism.

33. Measured against the privacy that is liable to attach to the contents of (for example) a mobile phone, these powers are strong ones indeed. Neither the current law nor the proposed new paragraph 11A places any limitations on the categories of data (address book, call log, texts, emails, photographs) that can be copied, or any threshold that must be satisfied before this takes place. This is despite the fact that, outside the port, a warrant would be required for such inspections. Furthermore, the Code of Practice asserts that the information which an officer may expect a person to produce for examination or inspection includes passwords to electronic devices. This contrasts, as the JCHR pointed out, with the regime under RIPA section 49 for requiring the disclosure of the key to electronic data that has come into the possession of any person by means of the exercise of a statutory power.

34. It is perhaps possible to equate the initial search and examination of an electronic device[46] to the powers that police, customs and airport security have to rummage through hand luggage – a search power which neither the JCHR nor I has recommended should be subject to any new threshold. While the search of an electronic device undoubtedly has the capacity to impact upon private life, it does not do so to a markedly greater extent than other types of search, and may help shorten the examination of a person whose device confirms the innocent story he tells in interview. Notwithstanding the absence of any procedure equivalent to RIPA section 49 – an uncomfortable discrepancy – it might even be considered acceptable to require the production of a password for this purpose, though I can well understand that this is an issue that the Government or indeed Parliament may wish to consider further.

35. It is otherwise, however, where the wholesale copying of personal data is concerned. Of the possible thresholds set out at paragraph 26 and discussed at paragraph 27, above, I consider that the second is once again the most appropriate. The first is not required, because the purposes for which copies may be retained are already set out in the proposed paragraph 11A(3):[47] but see further paragraph 37(c), below.

36. **I therefore recommend that the power under the proposed paragraph 11A to make and retain copies of things detained pursuant to paragraphs 5, 8 and 9, should apply to personal electronic devices and to the data stored on them only if a senior officer is satisfied that there are grounds for suspecting that the person appears to be a person falling within section 40(1)(b).**

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[45] Schedule 7, para 8(1).

[46] Schedule 7 paras 8, 9.

[47] This would allow a copy to be retained for as long as is necessary for the purpose of determining whether a person falls within section 40(1)(b), or while the examining officer believes that it may be needed for use as evidence in criminal proceedings or in connection with a decision by the Secretary of State whether to make a deportation order under the Immigration Act 1971.

FURTHER SAFEGUARDS

37. The Schedule 7 regime appears anomalous in relation to the absence of other safeguards that appear in comparable legislative regimes. Thus:

    (a) Property may be detained for seven days, even in the absence of any belief that it may be needed for use as evidence in criminal proceedings or in connection with a deportation decision. This contrasts with a period of 48 hours for the retention of documents obtained under reasonable suspicion powers such as section 43 of and Schedule 5 to the Terrorism Act 2000, subject to a single extension of up to a further 48 hours if an officer of at least the rank of chief inspector is satisfied that the examination is being carried out expeditiously, and that it is necessary to continue the examination to ascertain whether the document is one that may be seized.[48]

    (b) Schedule 7 contains, as the JCHR has pointed out, no express system of safeguards for categories of material such as legally privileged material, excluded material and special procedure material (including "*journalistic material*").[49]

    (c) The retention of electronic data is liable to be held for very long periods under the MOPI regime, which as I reported in July 2013 has been recently criticised in the courts.[50] The system is in marked contrast to the rules and guidance that exist under the Protection of Freedoms Act 2012 concerning the retention and use of material (including biometric material gathered from Schedule 7 detainees) for the purposes of national security.

38. It is difficult to say more about some of these issues before judgment has been given in the *Miranda* case. I note however that the Minister has undertaken in his response to the JCHR to revisit the issue of safeguards in the light of the judgment in *Miranda*, once it is available, and of any subsequent comments of the Independent Reviewer.

39. **I recommend that the Government indicate how adequate safeguards are to be provided in respect of legally privileged material, excluded material and special procedure material, and will comment further on this issue as seems appropriate after the *Miranda* judgment.**

40. **I recommend that the Government indicate how it will ensure that private electronic data gathered under Schedule 7 is subject to proper safeguards governing its retention and use.**

41. The JCHR also recommended that the Bill be amended so as to specify the intervals for the review of detention, rather than leaving them to be specified in the Code of Practice. I agree, and was pleased to note that the Government in its response of 11 November offered

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48 Counter-Terrorism Act 2008, section 5.

49 JCHR report, fn 10 above, para 125. These concepts are defined in the Police and Criminal Evidence Act 1984, sections 10-14.

50 D. Anderson, *The Terrorism Acts in 2012*, 10.74-10.80.

to reflect on this point. **I recommend that the intervals for review of detention be specified in Schedule 7, not simply in the Code of Practice.**

USE OF EVIDENCE GIVEN UNDER COMPULSION

42. In its decision of August 2013 in *Beghal v DPP*, the Administrative Court (Gross LJ, Swift and Foskett JJ) commented as follows:

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

43. The issue was adverted to in my July 2013 report, in which I said that it was essential that answers given under compulsion should not be used in proceedings where they could incriminate the person who gave them, and stated my belief that it is generally accepted that answers given under compulsion in Schedule 7 interviews could never be used in a criminal trial.[51]

44. I have no doubt that Ministers and Parliament will wish to give the most careful consideration to the recommendation of the court. For what it may be worth, I add my voice to it and **recommend that a statutory bar be introduced to the introduction of Schedule 7 admissions in a subsequent criminal trial.** As the Court in *Beghal* recognised by its reference to "*sensitivities*", the point of this change would be not merely to confirm the position as it is already assumed to be, but to give those subject to Schedule 7 an assurance that whilst they are obliged to answer questions, their answers could not be used against them in criminal proceedings. The Code of Practice would need to provide that persons questioned under Schedule 7 are given that assurance.

CONCLUSION

45. In formulating these recommendations, I have sought to ensure that those subject to Schedule 7 examinations are given the maximum safeguards consistent with the continued productive operation of these vital powers. Properly operated, I do not believe that anything in them will reduce the efficacy of those powers, or expose the public to additional risk from terrorism.

46. Each of my recommendations goes further than anything so far proposed or agreed to by the Government. I recognise however that the proposed new thresholds will be considered

[51] D. Anderson, *The Terrorism Acts in 2012*, July 2013, 10.63-10.64.

over-cautious by those who take the view, as did the JCHR, that nothing short of reasonable suspicion should be required for the exercise of the more intrusive Schedule 7 powers. The issue is a difficult one, and I have sought to explain my caution at paragraph 28, above.

47. I have taken the opportunity in recent days to discuss my recommendations on a preliminary basis with senior police officers, who have not informed me of fundamental objections to any of them. If these proposals are translated into law, ports officers will need to be provided with all possible clarity by the new Code of Practice.

DAVID ANDERSON Q.C.
Independent Reviewer of Terrorism Legislation

20 November 2013

SUMMARY OF INDEPENDENT REVIEWER'S RECOMMENDATIONS

1. **I recommend that no change be made to the existing threshold for the exercise of the powers to stop, question and search, save for the amendment proposed in the Bill where strip search is concerned (para 19, above).**

2. **I recommend that:**

   (a) Detention be permitted only when a senior officer is satisfied that there are grounds for suspecting that the person appears to be a person falling within section 40(1)(b) and that detention is necessary in order to assist in determining whether he is such a person.

   (b) On periodic review, a detention may be extended only when a senior officer remains satisfied that there continue to be grounds for suspecting that the person appears to be a person falling within section 40(1)(b), and that detention continues to be necessary in order to assist in determining whether he is such a person (paragraph 30, above).

3. **I recommend that the power under the proposed paragraph 11A to make and retain copies of things detained pursuant to paragraphs 5, 8 and 9, should apply to personal electronic devices and to the data stored on them only if a senior officer is satisfied that there are grounds for suspecting that the person appears to be a person falling within section 40(1)(b) (paragraph 36, above).**

4. **I recommend that the Government indicate how adequate safeguards are to be provided in respect of legally privileged material, excluded material and special procedure material, and will comment further on this issue as seems appropriate after the *Miranda* judgment (paragraph 39, above).**

5. **I recommend that the Government indicate how it will ensure that private electronic data gathered under Schedule 7 is subject to proper safeguards governing its retention and use (paragraph 40, above).**

6. **I recommend that the intervals for review of detention be specified in Schedule 7, not simply in the Code of Practice (paragraph 41, above).**

7. **I recommend that a statutory bar be introduced to the introduction of Schedule 7 admissions in a subsequent criminal trial (paragraph 44, above).**

20 November 2013