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Terrorism and Surveillance

Miranda, Court of Appeal

- Husband of Glenn Greenwald, carrying encrypted material stolen from NSA
- For “journalistic” purposes
- Stopped under TA 2000 Schedule 7 to determine whether he appears to be concerned in terrorism

Definition of terrorism

- action that involves serious violence/damage, **endangers life** or **creates serious risk to health or safety** of the public ...
- designed to **influence the government** or to **intimidate the public** ...
- for the purpose of advancing a **political, religious, racial or ideological cause**.

Terrorism Act 2000 s1

Judgment of CA

- Read in requirement of intention/recklessness for endangering life / health / safety
- “It does not follow that publication of material cannot amount to an act of terrorism”
- Unauthorised access to “journalistic material” declared incompatible with Art 10 ECHR

IRTL Annual Report, Dec 2016

- **5% to 8%** of Schedule 7 intelligence reports related to **counter-espionage**, 2009-15
- **8%-17%** related to **counter-proliferation**
- Terrorism definition still too wide
- *“The Schedule 7 power should be used only for its lawful purpose. If there is a national security need to extend its scope, consideration should be given to doing so” – IRTL Dec 2016*

Beghal v DPP, Supreme Court

- “*Objective grounds [for suspicion]*” needed for:
 - “**detention** *beyond what is necessary to complete the process*”
 - **retention of electronic data** longer than “*a short period*” (7 days, or longer?)
- “*Hope*” that statutory bar on admissibility of answers given under compulsion will follow

November 2016 SoS response

- Declined to apply a **suspicion threshold** to any of the Schedule 7 powers
- Schedule 7 never to be used for **journalistic material**
- Police looking at utility of holding **downloaded data**
- Will consider law on **admissibility**

Deproscription and *Gill* (POAC)

- “It is a matter for comment and regret that the decision-making process in this case has ***signally fallen short of the standards*** which our public law sets”: *Lord Alton v SSHD* [2008] EWCA Civ 443
- “The fact that there have been since at least 2013 some 14 proscribed organisations in respect of which the statutory test for proscription is not satisfied is ***an affront to the rule of law***”: IRTL 2016 5.24

Gerard Flannigan

[46] In the instant circumstances there was a technical glitch which resulted in the failure to record the actual search. This fact cannot disengage Article 8. The loss of control over the use of the search subject's nakedness occurs at the time where there is an intention to record the search and all parties believe that the search is being recorded. This is an interference with the search subject's Article 8 rights in itself. The creation and retention of the record is a further and ongoing interference.

Strasbourg cases

- *Malik* – Schedule 7
- *Sher* – WFDs, searches
- RE – handling of retained material
- *McKevitt and Campbell* – burden, absent witness
- *Ibrahim* – safety interviews

Digital Rights Ireland

- "Directive 2006/24 .. ***is not restricted*** to a retention in relation (i) to data pertaining to a particular time period and/or a particular geographical zone and/or ***to a circle of particular persons likely to be involved, in one way or another, in a serious crime,*** or (ii) ***to persons who could, for other reasons, contribute, by the retention of their data, to the prevention, detection or prosecution of serious offences.***
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- It must therefore be held that Directive 2006/24 entails ***a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU,*** without such an interference being precisely circumscribed by provisions to ensure that it is ***actually limited to what is strictly necessary.***

Digital Rights Ireland, CJEU GC Apr 2014, paras 59, 65

Tom Watson v SSHD

- Div Ct: Declared DRIPA 2014 inconsistent with EU law
- CA: *DRI* contained “*no principled statement of the justification for such a general extension*” of ECHR case law: referred to CJEU
- Advocate General Jul 2016: “*no reason to take a flexible attitude*” to *DRI* safeguards

Surveillance cases

- ***Greennet***: lawfulness of thematic warrant to hack computers
- ***R(PI)***: Judicial Review of IPT?
- ***HRW***: Art 8 protection of those outside UK?
- ***Privacy International***: bulk CD, bulk PDs

Shakeel Begg v BBC

- *"What is extreme is, by definition, something which is not moderate." (117)*
- *Moderate Islam is "essentially those ideas, doctrines and worldviews consensually agreed by .. Muslim scholars" (117)*
- *Claimant "repeatedly espouses a series of extremist Islamic positions" (368), inc. by classifying "all non-Muslims as unbelievers" (125)*

Counter-Extremism Bill?

- Queen's Speech 2015
 - Extremism Disruption Orders
 - Closure Orders
 - Banning Orders

- Queen's Speech 2016
 - The introduction of a new civil order regime to restrict extremist activity, following consultation

Prevent Duty guidance for HE

- If views likely to be expressed “constitute ***extremist views*** that risk drawing people into terrorism ..” (para 11)
- including “***non-violent extremism***, which can ***create an atmosphere*** conducive to terrorism and can ***popularise views*** which terrorists exploit” (para 19)
- “..the event should not be allowed to proceed except where RHEBs are ***entirely convinced*** that such risk can be ***fully mitigated***” (para 11)