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RESPONSE TO DRAFT CODE OF PRACTICE, "EXAMINING OFFICERS AND REVIEW OFFICERS UNDER SCHEDULE 7 TO THE TERRORISM ACT 2000" OF FEBRUARY 2019

1. I was appointed as Independent Reviewer of Terrorism Legislation on 23 May 2019.

2. The consultation period for the draft Code ended on 5 April 2019, and these representations are therefore outside the consultation period. Having now spoken to the Home Office, I understand that this response will be considered.

3. This response is informed by my recent visits in my capacity as Reviewer to Heathrow, Coquelles, Dover and Holyhead and discussions with CT Policing at New Scotland Yard, Empress State Building, and elsewhere.

4. As the consultation document correctly notes, the Code must be consistent with the primary legislation and this should be taken into account in responses. This response does so, but is without prejudice to my recommending changes to the primary legislation as Reviewer in due course.

5. [Paragraph 8]. This paragraph concerns s149 Equality Act 2010 but the final sentence concerns potential disruption to travel. I suggest that the final sentence is moved to paragraph 24 which deals more generally with the need to exercise Schedule 7 powers in a humane way. I suggest that express reference is made to considering whether the power should be exercised inbound rather than outbound in order to minimise disruption.

6. [Paragraphs 13 to 17]. These paragraphs should refer to the need to consult with the relevant chief officer of police before designations are made of immigration or customs officers (cf. Schedule 7, paragraph 1A(2)).

7. [Paragraph 22]. This paragraph attempts to define the point at which a Schedule 7 examination begins. The issue of when a Schedule 7 begins is a source of uncertainty amongst certain ports officers, and I understand why an attempt at clarity has been made. However, it is potentially confusing because (a) the difference between questioning to assist in making the decision on whether to examine for the purpose of determining being concerned in terrorism (paragraph 21), and questioning for the purpose of determining involvement in terrorism is a fine one which may be difficult to apply in practice, and (b) officers are entitled to ask questions of any member of the public using common law powers, whether at ports or otherwise, including for the purposes of determining whether someone is concerned in terrorism. The essential distinction arises when a person is required to answer questions. I suggest that paragraph 22 be amended to say, "Where an officer requires a person to answer questions for the purpose of…".

8. [Paragraph 23]. The purposes of examination include those referred to in Schedule 7, paragraph 3, and reference should be included (and to be consistent with paragraph 72).

9. [Paragraph 25, paragraph 30]. These paragraphs refer to protected characteristics being used as "criteria for selection" only if present in association with other relevant considerations. Whilst it is right that in *Beghal* at [50], Lord Hughes (with whom Lord Hodge agreed) stated that the Code should amended in this way, this paragraph was not expressly endorsed by Lords Dyson and Neuberger, and Lord Kerr took the view at [104] that if one of the reasons for selection was religious belief or ethnic origin this would amount to direct discrimination. For completeness, it is difficult to read much into what the Strasbourg Court made of this issue in *Beghal v UK*; the relevant paragraph in that judgment is [97]. The difficulty with the proposed wording (in particular the words "criteria for selection") is that it tends to overstate the reliance that should be placed on protected characteristics. If the words "criteria for selection" are to be retained, it would be preferable to state that "Examining officers must take particular care to ensure that "protected characteristics" (whether separately or together) are not to be used as criteria for selection *except to the extent that* they are used in association with considerations that relate to the threat from terrorism".

10. [Paragraph 43, paragraph 78]. Query whether "legal counsel" is the correct phrase in the UK.

11. [Paragraph 45]. Second sentence should be split into two for clarity: "…may grant that request at his or her discretion. Where reasonably practicable, the request should be granted…".

12. [Paragraph 57]. Ports officers have raised with me the question of whether Schedule 7 enables them to require a person to apply their thumb or finger to unlock a mobile phone, or look at a phone to enable facial unlock. It seems to me (although the Home Office may have different views) that the power to search under Schedule 7 paragraph 8(b) must include the power to require a person to provide the means of doing so in these circumstances. This should be made clear in the Code.

13. [Paragraph 64, footnote 16]. This footnote refers to retention, and refers to the examining officer being permitted to examine the thing retained in order to fulfil the purpose of the detention. However, the power under paragraph 11(2)(a) does not limit the examination to the examining officer alone: for example, a technical expert may carry out the examination. I question whether the footnote is necessary but if so, I suggest the second part of the footnote should read, "…examination is permitted in order to fulfil the purposes of the retention".

14. [Paragraph 65]. The power to copy data, particularly the power to take data downloads, is an important and discrete power. It should require separate consideration but, unlike selection for examination, and detention, no guidance is given on whether it is appropriate to exercise this power. At the very least this paragraph should be amended to include reference to proportionality.

15. [Paragraphs 67 to 69]. These paragraphs are designed to prevent the examination or copying of material consisting of or including items that are legally privileged, excluded or special procedure material (defined by sections 10, 11 and 14 Police and

Criminal Evidence Act 1984). Most material encountered by ports officers will be electronic, for example data held on mobile phones. Whilst it is right that further safeguards are provided with respect to, in particular, legally privileged material and journalistic material, it is essential that the any amendment to the Code reflects what is technically feasible. From my observations at ports, and discussions with officers and officials, I am not persuaded that the type of graduated copying, retention and destruction contemplated by these paragraphs is possible. These paragraphs should therefore be excluded from the new Code. Whilst unsatisfactory because it does not sufficiently set out how, for example, privileged material is to be protected when encountered during an examination, what is described in paragraph 40 of the current 2015 Code is at least technically feasible. My intention is to make recommendations on the issue of Schedule 7 and electronic data, if not in my forthcoming Annual Report, then as soon after as my programme of work allows.

16. [Paragraph 72]. As a matter of primary legislation, persons examined for more than one hour must be detained if questioning is to continue (Schedule 7, paragraph 6A). However, there remains a discretion to detain prior to one hour. Any decision to detain prior to one hour should be proportionate, and this paragraph should be amended to include reference to proportionality.

17. [Paragraph 84]. This paragraph is dealing with refusals of "in person" consultations and the words "in person" should be added to the first line after "a particular solicitor".

18. [Paragraph 97, footnote 22]. Schedule 7 is a national power and there is no justification for treating persons under 18 differently depending on whether they are examined in Scotland or not.

19. [Paragraph 120]. This paragraph refers to the power to take fingerprints or non-intimate samples with consent or in relation to certain convicted person. As with the power to make copies, the Code should at a minimum refer to proportionality.

20. [Paragraph 126, paragraph 127]. These paragraphs refer to "interviews" which should be avoided as it has connotations of interview under caution with suspects. The "Code of Practice for the video recording with sound of interviews of persons detained under section 41 of, or Schedule 7 to, the Terrorism Act 2000 and post-charge questioning of persons authorised under sections 22 or 23 of the Counter-Terrorism Act 2008" refers to "questioning" of persons detained under Schedule 7.

21. [Paragraph 127], This paragraph provides that a person detained at a port may willingly choose not to have his "interview" recorded. There is good sense in having flexibility, so that a person may consent not to have the examination recorded where, for example, it would take even a small amount of time to get hold of the recording device and the person is concerned about missing a flight, and the officer is also content to proceed in this way. However, it is undesirable to give an individual a complete 'opt out' because, as explained in paragraph 128, audio recordings are useful to have not least in case there is a subsequent complaint. This paragraph should be made clear that if an officer wishes to record the examination, then recording must take place.

22. [Paragraph 136]. Just as with selection of persons, it would be possible to select goods for examination in a wrongfully discriminatory manner. Cross-reference should be made to the need to avoid unlawful discrimination.

23. [Annex B, paragraph 19, paragraph 33]. These paragraphs state that there should be an "option" to withdraw accreditation where an officer's performance does not meet the desired standard. These paragraphs should be amended to require forces to ensure that remedial steps are taken where an officer's performance does not meet the desired standard.

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INDEPENDENT REVIEWER OF TERRORISM LEGISLATION

4 SEPTEMBER 2019