Schedule 7 Code of Practice: public consultation

Response by the Independent Reviewer of Terrorism Legislation

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Summary

1. This document responds to the government's consultation on modifications to the Code of Practice governing counter-terrorism examinations at ports and at the border between Northern Ireland and the Republic of Ireland, under Schedule 7 Terrorism Act 2000.[1]

2. The Code of Practice contains safeguards to the exercise of this power, which are particularly important since the power can be exercised on a no-suspicion basis.[2]

3. In summary, subject to one aspect dealing with self-incrimination, the proposed changes are justified.

4. The consultation, and therefore this response, proceeds on the assumption that the Nationality and Borders Bill is passed as originally introduced into the House of Commons. The Bill is currently subject to Parliamentary ping-pong following, among other things, the defeat of the proposed 'arrival' offence in the House of Lords.[3]

Response

5. Changes to paragraphs 3, 27 and 38: No observations – these changes reflect the proposed modification to the Schedule 7 power, by the Nationality and Borders Bill, to allow examinations to be conducted of those who arrive in the UK away from ports, for example on small boats.

6. Change to paragraphs 42 and 53[4]: No observations – these changes are deletions of the (erroneous) reference in the current version of the Code to a power to access legally privileged or journalistic information with prior authorisation. This power is not available under Schedule 7.[5]

7. Change to paragraph 43: No observations – the change makes it clearer how the privilege against self-incrimination operates in the context of Schedule 7. The removal of 'if appropriate' is correct – a person should always be informed that their answers

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[1] Home Office, 'Consultation on modifications to the Code of Practice for Schedule 7 to the Terrorism Act 2000' (15 March 2022).
[2] For a full explanation of the power see Terrorism Acts in 2018 at Chapter 6.
[3] See Clause 39, HL Bill 138 Commons Disagreement, Amendments in Lieu, and Reasons (23 March 2022).
[4] The online version of the draft Code has two paragraphs 46. I refer to what is incorrectly numbered paragraph 52 but should be numbered paragraph 53.
[5] See Terrorism Acts in 2019 at 6.56-8. The reference appears to have been copied across from the Code for Schedule 3 to the Counter-Terrorism and Border Security Act 2019, which deals with hostile state activity.

cannot be used against them in criminal proceedings. This is particularly relevant to the analysis below.

8. Paragraph 44 (self-incrimination): This is a new paragraph which applies where the proposed power to examine away from ports is used. It would typically apply where an individual has been intercepted crossing the Channel in a small boat and brought to shore, and then required to answer questions and provide access to any electronic devices.

9. Some background is needed to explain the significance of this change.

10. Under paragraph 18 of Schedule 7, an individual commits an offence if he wilfully fails to submit to, or obstructs, an examination. It is therefore an offence, punishable by up to three months' imprisonment, to fail to answer questions or hand over a mobile phone for analysis. An oral answer cannot be used in criminal proceedings.[6]

11. It is currently an offence to knowingly enter the UK without leave[7]. It is not however an offence merely to arrive in the UK, which will be the position for those who are intercepted at sea and brought to shore.[8] The government proposes to legislate so that arrival is an offence.[9]

12. The effect of this is to greatly increase the prospect that a person who is examined under Schedule 7 will already have been arrested and/or be subject to investigation for having committed a criminal offence (i.e. the offence of arrival without leave). Although it is technically possible for a person to be examined whilst under investigation for having entered the UK without leave, this does not seem to have occurred in practice.[10]

13. The result is that individuals may be required to provide information and access to phones under Schedule 7, under pain of criminal penalty, whilst also subject to criminal investigation for the offence of irregular arrival. In practice, an examining officer might legitimately ask about arrangements for travel to the UK under Schedule 7 (for example, to determine whether the individual was in contact with known terrorists), where the answers might also be relevant to the criminal investigation. The contents of a phone examination could also be relevant to the criminal investigation.

14. The question then arises whether this is fair and specifically in accordance with Article 6 of the European Convention on Human Rights. Ordinarily, since a person who is subject to examination under Schedule 7 will not be arrested or charged with any offence, Article 6 will not be in issue.[11] However, this will no longer necessarily be the case.

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[6] Subject to minor exceptions: paragraph 5A(1) Schedule 7.
[7] Section 24 Immigration Act 1971.
[8] Bani v Crown [2021] EWCA Crim 1958 at paragraph 71.
[9] See Explanatory Notes to Bill as introduced in the House of Commons on 6 July 2021, paragraphs 382-393.
[10] Probably because of where individuals are examined, or because they are subject to immigration detention, and have therefore not 'entered': see section 11 Immigration Act 1971.
[11] Beghal v United Kingdom, App.No.4755/16 (28 February 2019) at paragraph 121.

15. The new paragraph 44 represents an attempt to address the issue of fairness. It contains a concrete prohibition ('avoid asking the person any questions about the form of transport the person used…') and a purported explanation of principle ('minimising the risk of an examining officer inadvertently prompting a person to provide evidence of immigration offences, in particular arriving in the UK illegally').

16. Although the government is right to consider unfairness in this context[12], the current draft paragraph 44 is counter-productive because (a) it unduly limits the ability of counter-terrorism police to ask questions which may be relevant to determining whether a person is a terrorist and (b) potentially overstates the effect of Article 6 in this context.

17. It is necessary to consider the legal position is more detail.

18. Until recently, the dominant domestic approach in relation to answers given under compulsion which are excluded from being used criminal evidence (as here) is that no violation of Article 6 can arise[13], and that Article 6 does not apply to the compulsory production of pre-existing documents[14].

19. However, a recent decision of the Privy Council has shown, by reference to decisions of the European Court of Human Rights, that questions of fairness under Article 6 can arise at the investigatory stage in both these circumstances.[15]

20. But it does not follow that Article 6 will be violated by a requirement to provide answers or documents or phones under Schedule 7, even if the individual is under investigation for the offence of arrival.

21. As the Privy Council explained, the question of whether Article 6 is violated is fact specific but to be considered against the following four factors: the nature and degree of compulsion used to obtain the documents in question[16], the weight of the public interest in the investigation and punishment of the offences at issue, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained may be put. [17]

22. None of this suggests that a certain type of question should be avoided. Rather, the focus is on (i) the nature and degree of compulsion during the Schedule 7 interview, (ii) the weight of the public interest in the determination of whether a person is a terrorist[18], (iii) the existence of any relevant safeguards in the procedure, and (iv) the use to which any material so obtained may be put.

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[12] To the risk of which I draw attention in my forthcoming Terrorism Acts in 2020 report.
[13] R v Hertfordshire County Council, Ex p Green Environmental Industries Ltd [2000] 2 AC 412.
[14] Following Saunders v United Kingdom (1996) 23 EHRR 313.
[15] Volaw Trust and Corporate Services Ltd and others v The Office of the Comptroller of Taxes; ibid v Her Majesty's Attorney General for Jersey [2019] UKPC 29 at paragraphs 49, 72.
[16] And to the obtaining of oral answers, as in Ibrahim v UK, App.Nos 50541/08, 50571/08, 50573/08 and 40521/09 (13 September 2016).
[17] Paragraph 61.
[18] Rather than 'the investigation and punishment of the offences at issue', since Schedule 7 is not concerned with investigating and punishing offences (see Beghal v UK, supra).

23. Nothing more needs to be said about factor (ii) and (iv). In relation to (i) and (iii), the government should consider the following:

- Deleting paragraph 44 as currently drafted.
- Specifying in paragraph 44 that where an investigation has commenced pursuant to paragraph 2(3A) and (3B) of Schedule 7, the person should be specifically told, in addition to the information at paragraph 34, that the purpose of the examination is not to gather evidence in relation to any immigration offence.
- Ensuring that examining officers are given training on dealing with individuals who have recently arrived in the UK irregularly, for example by small boat and therefore in conditions of danger or stress.
- Ensuring that places in which persons are detained for examination[19] are open to inspection by the relevant inspection body (part of the National Preventive Mechanism) under Article 4 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Jonathan Hall QC
1 April 2022

[19] Under Schedule 8 Terrorism Act 2000.