

REPORT ON USE OF SCHEDULE 7 POWERS AGAINST ERNEST MORET

Introduction

1. This report is the outcome of the investigation I undertook as Independent Reviewer of Terrorism Legislation into the use of Terrorism Act powers against Ernest Moret on 17 and 18 April 2023. This is a public report, which provides as much detail as possible. There is no closed or private report.
2. The powers used against Mr Moret are contained in Schedules 7 and 8 Terrorism Act 2000 (examination at ports). He was later arrested under the Police and Criminal Evidence Act 1984 with respect to the offence under paragraph 18 of Schedule 7 Terrorism Act 2000 (failure to cooperate with examination).
3. As my predecessors have done from time to time¹, I produce this report outside my usual cycle of annual reporting in order to consider a specific use of counter-terrorism powers. My purpose has been to consider whether Schedule 7 was used correctly, and whether any recommendations can be made for the future. Any question of whether the power was used lawfully or not would be for a Court to determine. Matters of professional standards are not for me.
4. Even if the power was exercised lawfully against Mr Moret, that would still leave the question of whether it was right to examine Mr Moret in these circumstances. I have reached the clear conclusion that this examination should not have happened, and that additional safeguards are needed to ensure it is not repeated.
5. The decision to examine was taken by Counter Terrorism Border Policing Officers from the Metropolitan Police Service's SO15. It was a pre-planned examination based on information which the police did not evaluate as they ought to have done.
6. I have not sought to report on the basis or provenance of the information that led to the stop.
7. I refer to information on which the police acted later in this report, but it comes with a health-warning: information or intelligence is often fragmentary and partial and sometimes wrong. The way in which it is phrased is rarely definitive, and can employ generic terms such as "associated".

¹ For example: Lord Carlile KC's report on the arrests in Operation Pathway (2009); Max Hill QC's report on the use of Schedule 7 in the case of Ms Lauren Southern (2018).

8. That does not mean that intelligence should not be relied upon when pursuing an important goal such as protecting the UK against terrorism, even if it later transpires to be incorrect.
9. I have not examined any interaction between UK Border Force and Mr Moret at the juxtaposed controls at Paris Gare Du Nord where there was no exercise of Schedule 7 powers.
10. I have had full cooperation in conducting my investigation and reviewed all relevant documentation.

The Law: Schedule 7 Terrorism Act 2000

11. Schedule 7 is an exceptional counter-terrorism power which enables police at ports to examine individuals entering or leaving the UK, in order to determine whether they are terrorists, and without any grounds for suspicion. It may be exercised against any person irrespective of nationality, and irrespective of whether an equivalent power exists in their country of nationality².
12. As part of an examination officers can detain up to a maximum of 6 hours, search, seize devices, require cooperation (including passwords to devices) and take biometrics.
13. In the year to 31 December 2022 the power was exercised 2,415 times in Great Britain³. There are no public statistics for how often it has been exercised at St. Pancras International railway station.
14. The power has been the subject of detailed consideration by the Supreme Court⁴, and in each of my previous annual reports⁵. In summary, it is a valuable and justified counter-terrorism power which enables the authorities to detect and deter terrorist activity within and outside the UK. It falls within the PROTECT part of the government's CONTEST counter-terrorism strategy.
15. The power may only be used by accredited police officers⁶ against a person "for the purpose of determining whether he appears to be a person falling within section 40(1)(b)"⁷. That section defines "terrorist" as a person who "is or has been concerned in the commission, preparation or instigation of acts of terrorism". This point is reiterated in the Code with which examining officers must comply⁸. The fact that it may only be used for counter-terrorism purposes was important to the Supreme

² To state the obvious, different countries have different counter-terrorism regimes. The UK conducts more checks at borders than some other states, but does not have compulsory ID cards: *Beghal v Director of Public Prosecutions* [2015] UKSC 49 at para 38.

³ Home Office, Operation of police powers under the Terrorism Acts, statistics to y/e 31.12.22, table S.03a.

⁴ *Beghal*, supra.

⁵ At chapter 6 in *Terrorism Acts in 2018, 2019, 2020 and 2021* available at <https://terrorismlegislationreviewer.independent.gov.uk> under 'Reports'.

⁶ Other than in exceptional urgent operational need: Code of Practice, supra, at para 18.

⁷ Para 2(1).

⁸ Para 23.

Court's decision that it could be used consistently with fundamental rights and freedoms⁹.

16. The Code of Practice contains a list of considerations that examining officers may have in mind when deciding when to exercise the power including known and suspected sources of terrorism; persons, organisations or groups whose current or past involvement in acts or threats of terrorism is known or suspected; and possible current, emerging and future terrorist activity¹⁰.
17. Any use of Schedule 7 must also be on a reasoned basis, proportionately and in good faith¹¹, and must not be arbitrary¹².
18. In practice, ports officers exercise their powers under Schedule 7 in three scenarios:
 - Based on information received.
 - As a result of rule-based targeting communicated to front-line officers via the Regional Control Desk¹³;
 - Based on the front-line officer's observation or interaction with the member of the travelling public (known as 'untasked stops')¹⁴.
19. Schedule 7 cannot be exercised, and there is no indication that this was the case here, on behalf of a foreign government.
20. A person who is examined must give any information in his possession which the examining officer requests¹⁵. It is an offence, punishable by up to 3 months' imprisonment or a fine, to fail to comply with this duty¹⁶. However, a person may only be convicted where the exercise of the Schedule 7 power was lawful¹⁷.
21. Even if enquiries lead to the establishing of a person's innocence, the impact of the original examination and detention (including embarrassment, worry, inconvenience, potentially missed travel arrangements, seizure of work and personal devices, fear, loss of privacy) and of arrest (further embarrassment, worry, fear of criminal prosecution, restrictions imposed by police bail) are likely to be significant.
22. Where it is exercised lawfully, it has been held that the public interest in effective counter-terrorism is likely to outweigh other considerations¹⁸. However, because it may be exercised without suspicion, there remains the risk that it can be misused,

⁹ Para 43 (Lord Hughes); para 88 (Lords Dyson and Neuberger).

¹⁰ Para 30.

¹¹ R (Miranda) v Secretary of State for the Home Department [2016] EWCA Civ 6 at para 112, per Lord Dyson MR.

¹² Ibid at 119.

¹³ Ibid at 6.8.

¹⁴ Ibid at 6.9.

¹⁵ Para 5 of Schedule 7.

¹⁶ Para 18.

¹⁷ Cifci v CPS [2022] EWHC 1676 at para 31.

¹⁸ R (Gillan) v Commissioner of Police for the Metropolis [2006] UKHL 12 at para 30, per Lord Bingham.

wilfully or inadvertently. Constant vigilance and attention to safeguards are necessary to stop it being used in a way that is contrary to the individual rights and the wider public interest.

Terrorism and Public Order Policing

23. The definition of terrorism in UK law¹⁹, whilst practical and effective, is broad and carries the risk of terrorism powers may be exercised in cases which fall outside what would generally be considered terrorism²⁰. There are no clear dividing lines between terrorism and violent activism or protest²¹.
24. In the run-up to the Terrorism Act 2000, the then government's principal concerns in connection with what was then described as "domestic terrorism" were animal rights activists followed by Scottish and Welsh nationalist extremists, environmental rights activities and (potentially) violent anti-abortionists²².
25. There have been many incidents of ideologically motivated public violence in the UK which could, in principle, have fallen within the definition of terrorism: from the anti-Vietnam War Grosvenor Square riots of 1968 to anti-vaccine violence in 2021²³. In practice, however, these have not been treated as terrorism. Instead violent protests and violent activism have been dealt with as a facet of public order policing and maintaining the King's Peace, and are sometimes referred to as domestic extremism.
26. Restraint in the exercise of counter-terrorism powers is needed because their use in this context could be contrary to democratic values and individual freedoms. This has not always been achieved. In particular, counter-terrorism stop and search powers²⁴ came to adverse attention in 2005 when they were used to remove a heckler (Walter Wolfgang) from the Labour party conference.
27. In subsequent years:
 - Police guidance was issued in 2008 which expressly stated that stop and search powers under the Terrorism Act 2000 should never be used as a public order tactic²⁵.
 - In 2009, Parliament's Joint Committee on Human Rights, whilst accepting that a demonstration could be used to mask a terrorist attack, warned about the use of counter-terrorism powers, and noted the government's expressed intention that these should not be used to deal with public order or protests,²⁶.

¹⁹ Section 1 Terrorism Act 2000.

²⁰ Beghal, *supra*, at para 63 to 64.

²¹ In *Blackstones' Guide to the Anti-Terrorism Legislation*, 3rd Ed, Oxford, Professor Clive Walker KC observes that there are concerns about whether section 1 "fairly recognises the rights of political activism" (at para 1.44).

²² See HM Government, *Legislation Against Terrorism*, consultation paper, Cm4178 (December 1998) at para 3.8 et seq.

²³ Sky News, 'COVID-19: Five police officers injured after violence breaks out at anti-vaccine protest in London' (3.9.21).

²⁴ Section 44 Terrorism Act 2000.

²⁵ Association of Chief Police Officers, *Practice advice on stop and search in relation to terrorism* (2008).

²⁶ Joint Committee on Human Rights, 'Demonstrating respect for rights? A human rights approach to policing protest', 7th Report of Session 2008-9 (23.3.09).

- Following a decision by the European Court of Human Rights in 2010²⁷, the counter-terrorism stop and search power was abolished. The Court had found a real risk that such a widely framed power could be misused against demonstrators and protestors in breach of fundamental rights of expression and lawful assembly²⁸.
28. An important aspect of public order policing is to ensure as far as possible that the possibility of violence or disorder, and even its sporadic occurrence, does not result in restrictions on political speech or on debates of questions of public interest²⁹. Otherwise the right of protest would be too easily curtailed by the authorities. It does not follow from an individual's attendance at a demonstration at which violence has been used that they were themselves not exercising their right of freedom to peaceful assembly.
 29. The police have specific powers for dealing with violent protest contained in the Public Order Acts 1986 and 2023³⁰, and are able to use, where justified, general common law and statutory powers³¹ to gather intelligence.
 30. Until recently, counter-terrorism police and MI5 were mainly concerned with International and Northern Ireland Related Terrorism. However, since 2020, an expanded range of violent ideological and political causes has been assumed within the counter-terrorism system: specifically, Extreme Right Wing Terrorism (ERWT) and Left, Anarchist and Single Issue Terrorism (LASIT). The latter in particular carries the risk that counter-terrorism will be drawn into matters that have been historically dealt with as public order matters.

The examination of Mr Moret

31. On the evening of 17 April 2023, Mr Moret, 28, arrived at St. Pancras International station on the Eurostar from Paris.
32. At about 1930 hrs he was stopped by Metropolitan Police Border Policing Officers from SO15 (counter-terrorism command) who told him he was being examined under Schedule 7 Terrorism Act 2000.
33. This was a planned intelligence-led stop based, in summary, on information that Mr Moret may be associated with violent extremism or terrorism overseas, including violence against law enforcement. The decision to examine was exclusively a UK decision.

²⁷ Gillan and Quinton v The United Kingdom, App.No.4158/05 (12.1.10).

²⁸ At para 85.

²⁹ General Comment No. 37 by the UN Human Rights Committee on #ICCPR Article 21, contains a comprehensive analysis of freedom of assembly under international human rights law.

³⁰ For a history of police powers and protest see House of Commons Library, Briefing Paper, 'Police powers: protest', No.5013 (19.5.21). For practical guidance see College of Policing, Public order public safety, Authorised Professional Practice at <https://www.college.police.uk/app/public-order-public-safety> (last accessed 27.6.23).

³¹ Under the Regulation of Investigatory Powers Act 2000.

34. The examination began at 1940 hrs and was conducted by two SO15 officers. He asked for and was permitted to consult a solicitor.
35. At 2013 hrs he was informed he was no longer free to go, and was detained under paragraph 6 of Schedule 7. He was served with a Notice of Detention³².
36. The examination under Schedule 7 concluded at 0038 hrs (having lasted 4 hrs 58 mins) on 18 April 2023. I have listened to the audio tapes.
37. It is clear that the substance of the questioning was directed entirely towards establishing whether Mr Moret was involved in violent demonstrations. As part of this, he was asked about his political views and those of his associates.
38. The rest of the examination concerned Mr Moret's PIN numbers for his seized iPhone and MacBook laptop. Officers also told him that they intended to look at the digital media on his phone and laptop, and required him to provide his PINs.
39. At this juncture, I need to refer to two aspects of the content of the examination.
40. In general, officers conducting examinations under Schedule 7 have significant latitude about the questions they ask. It is legitimate for officers, if examining to determine whether a person is a terrorist and therefore a threat to national security, to proceed indirectly, to seek to build trust and rapport, to gather general information whose significance may well not be apparent to the person under examination.
41. However, in my view two aspects of the examination of Mr Moret went wrong.
42. Firstly, at one point the officer directly asked Mr Moret what he had been told by his lawyer. Although I believe that in doing so the officer was trying to emphasize the criminal consequences of failing to cooperate with the examination (on the assumption that Mr Moret's lawyer would have explained it to him), it was incorrect in principle for an officer to ask about a legally privileged communication. In the event Mr Moret clearly but politely declined.
43. Secondly, the officer's assertions about the consequences of a conviction for failure to provide the PINs were overstated. The officer had no basis to say that Mr Moret would never be able to travel internationally again to see family members if he was convicted of failure to provide his PINs: he could not possibly know this because future travel would be up to individual jurisdictions and carriers. It was exaggerated and overbearing.
44. Mr Moret answered all questions that were asked him. He said that he felt violated by the requirement to provide access to his devices. He said that his phone

³² In the form contained at Annex A to the Schedule 7 Code of Practice (July 2022).

would contain photos of family and friends. He said it was not fair to examine his digital media, and that he did not want this intrusion into his privacy.

45. A DNA swab was taken from Mr Moret. An attempt was made to take his fingerprints, but the machine was broken.
46. In a later note following the examination, the officers recorded their assessment that they did not think Mr Moret was likely to push a political agenda through violence, or was a threat to national security.
47. At the conclusion of his examination, at 0041 hrs on 18 April 2023 Mr Moret was arrested on suspicion of wilfully obstructing a Schedule 7 examination, contrary to paragraph 18 of Schedule 7 to the Terrorism Act 2000, by refusing to disclose his PINs. He was transferred to a police custody suite at 0220 hrs.
48. In interview under caution from 1618 to 1706 hrs on 18 April 2023 Mr Moret reiterated that whilst he was happy to cooperate and answer questions, he did not understand why he should give access to his private and work files.
49. Mr Moret was bailed from police custody the same day and later released under investigation.
50. On 23 June 2023 Mr Moret was informed that he would not be prosecuted. The police issued a statement saying they had been advised by the Crown Prosecution Service (CPS) that the evidential test for prosecution was not met³³. I have no knowledge of the CPS's independent advice, but it is at least possible that any prosecution might have failed to prove to the criminal standard that the examination was lawful, which is a precondition for any conviction³⁴.
51. Mr Moret's phone and computer were returned to him unexamined. I am informed by police that a download of his SIM card was taken but that the data has not been disseminated and has now been made inaccessible.
52. Mr Moret showed dignified composure and good humour throughout, despite the inevitable impact on him of being told he was subject to counter-terrorism powers.

Conclusions

53. I start by acknowledging that I should accord a substantial degree of deference to the police's expertise in assessing the risk to national security and in weighing it against countervailing interests. I also accept that, as the Code states, officers are entitled to exercise the power in relation to new or emerging forms of terrorism; and that terrorism could be linked to violent protest.

³³ Under the Code for Crown Prosecutors issued by the Director of Public Prosecutions, a person can only be prosecuted if there is a realistic prospect of conviction.

³⁴ Cifci, *supra*.

54. But it also necessary to record that the Schedule 7 power, however useful and justified in some cases, is powerful. It must therefore be exercised with due care.
55. The fundamental question to be answered in this report is whether counter-terrorism police should have exercised the Schedule 7 power at all. It has never been the case that terrorism powers should be exercised merely because it is possible to use them. In general, counter-terrorism powers are exercised with restraint. This is vital for public confidence.
56. In my view, based on the information provided, police both *could* have decided not to exercise the power, and *should* have decided not to exercise the power.
57. Th substance of the examination was to determine whether Mr Moret was a violent protester. This was an investigation into public order for which counter-terrorism powers were never intended to be used. The rights of free expression and protest are too important in a democracy to allow individuals to be investigated for potential terrorism merely because they may have been involved in protests that have turned violent.
58. I do not seek to minimise the impact of violence at protests, or defend violent protest, merely to distinguish between conduct that may attract public order powers, and conduct that may attract counter-terrorism powers.
59. Despite this being a pre-planned examination, no one involved stood back and asked themselves whether this was really a matter of public order. If they had, they would have realised that the use of Schedule 7 was not appropriate.
60. In addition, once the decision was taken to examine, there was never any further reflection on whether it was right to exercise the further Schedule 7 powers (to detain, to seize devices, to take DNA) that were used.
61. It is difficult not to sympathise with some of what Mr Moret said during examination.
62. He described the decision to detain him and to seize and download his devices as “crazy” and as “not normal” in a democracy. The problem with exercising counter-terrorism powers to investigate whether an individual is a peaceful protestor or a violent protestor is that it is using a sledge-hammer to crack a nut. The police have many other powers to investigate public order matters.
63. Now that Left and Single Issue Terrorism (LASIT) is part of the core work of counter-terrorism police and MI5, a relatively new area of work where understanding of thresholds may not yet be well developed, there is a risk of recurrence unless modest but additional safeguards are built into the Code of Practice.
64. I **recommend** that the Code is amended to specify that Schedule 7 should not be used for the purpose of public order policing. I believe that is simple and clear, reflects long-

standing policy, and does not inhibit police from investigating terrorism. There should also be training to that effect.

JONATHAN HALL KC
21 JULY 2023