

Terrorism and the Court of Appeal

The case of David Miranda had, until earlier this week, acted as a kind of three dimensional, real world Rorschach test for anyone interested in the UK governments approach to anti-terrorism legislation. For some, the fact that Miranda, partner of Guardian journalist Glenn Greenwald, was detained for 9 hours at Heathrow Airport under Schedule 7 of the Terrorism Act 2000, was symptomatic of the way in which legislation introduced to combat terrorism was actually – as opposed to theoretically – capable of curtailing the freedom of the press. For others, the outcry over the Miranda case was merely another example of the liberal chattering class failing to grasp the seriousness of the war on terror, and refusing to accept that the balance between freedom and responsibility had inexorably and inevitably shifted away from the former.

The move away from the use of the Police and Criminal Evidence Act (PACE) 1984 to gain access to journalists' material, and toward the application of the somewhat catch-all phrase 'terrorist investigation' – with its concomitant lowering, if not removal, of the hurdles the authorities are required to clear – was examined in the Court of Appeal this week, an initial appeal having been rejected by the high court in 2014. In the ruling on this first appeal, the three judges involved accepted that the seizure of computer material from Miranda represented 'an indirect interference with press freedom' but found that it was justified on the grounds of national security. The finding this week reversed that viewpoint, accepting that the actions of the individual police officers involved with Miranda's detention were technically lawful but stating, in an unusual step, that the law used to justify the action was flawed and needed to be re-examined.

The ruling, handed down by master of the rolls Lord Dyson, Lord Justice Richards and Lord Justice Floyd, pointed out what were regarded as serious flaws in schedule 7 of the Terrorism Act 2000, including powers which, in some years since being introduced, have been used to stop as many as 85,000 randomly selected travellers passing through UK ports and airports. Campaigners against the act have often pointed out its seeming incompatibility with the commitments which the UK has to a raft of international laws and, in particular with the European Convention on Human Rights, and this week's ruling appeared to validate that viewpoint, as well as casting doubt on the extremely broad definition of terrorism which has been used to underpin the legislation. Lord Dyson ruled that the stop power, when used in respect of journalistic information or material, is incompatible with article 10 of the European Convention, and that the correct legal definition of terrorism – as opposed to that currently enshrined in the Terrorism Act 2000 – requires intent to cause a serious threat to public safety.

The ruling went on to state that the stop power currently being exercised at ports and airports lacks 'sufficient legal safeguards to avoid the risk that it will be exercised arbitrarily. The court therefore grants a certificate of incompatibility.' The issuing of a certificate of incompatibility is an unusual move, but one which is available to judges who feel that a UK law clashes with the country's international human rights obligations. In effect, the ruling is telling the government to go back and reframe the law, equipping it with the safeguards required and removing the risk of journalists 'accidentally' becoming suspected terrorists on the grounds of the suspicion that they might be in possession of certain material.

The ruling is a vindication for those who protested that the Terrorism Act 2000 swung the pendulum too far in the direction of the powers the government insists it needs and away from the freedoms which these powers are, ostensibly, intended to protect.

The onus is now on the government to return to parliament at the earliest possible opportunity and equip the Terrorism Act with the checks and balances which this ruling has starkly illustrated it currently lacks.