Case No: CO/1422/2013

Neutral Citation Number: [2013] EWHC 3397 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2013

Before :

MR JUSTICE BEAN

- -

Between :

ABDELRAZAG ELOSTA	**Claimant**
- and -	
COMMISSIONER OF POLICE FOR THE METROPOLIS	**Defendant**
-and-	
(1) THE LAW SOCIETY	
(2) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interveners**

- -
- -

Dan Squires (instructed by **Public Law Solicitors**) for the **Claimant**
Robin Tam QC, Ben Brandon and Guy Ladenburg (instructed by **Solicitor, Metropolitan Police**) for the **Defendant**
Danny Friedman QC (instructed by **Anthony Brooks**) for the Law Society
Jonathan Hall (instructed by the **Treasury Solicitor)** for the Home Secretary

Hearing dates: 24 & 25 October 2013

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Judgment

Mr Justice Bean :

1. The issue raised by this claim for judicial review is whether a person detained for examination under Schedule 7 to the Terrorism Act 2000 is entitled to have a solicitor present to advise him during the interview.

The facts

2. On 10 November 2012 at 4.10 pm the Claimant arrived at Heathrow having been to Saudi Arabia on Hajj with an organised group and presented himself at the immigration desk. He was stopped by officers of the Metropolitan Police for examination pursuant to Schedule 7 of the Terrorism Act 2000. The Examining Officers began to examine the Claimant. The Claimant provided his name, address, phone number and passport details, but asked to speak to a solicitor before answering further questions.

3. At 4.30 pm an Examining Officer telephoned the Claimant's solicitor in Birmingham. He informed her that the Claimant had been stopped pursuant to Schedule 7 and that his examination was likely to last 30-40 minutes. He stated that the Claimant "had a right to consult a solicitor in private" but that the examination would not be delayed pending the solicitor's arrival. The Claimant was permitted to speak to his solicitor on the phone but not in private: officers remained in the room and could hear what he said (though probably not what the solicitor said). It is accepted by the Defendant that it was inappropriate for the officers to have heard what the Claimant said to his solicitor, and the Commissioner's skeleton argument contains an apology to that effect.

4. The Claimant's solicitor informed officers that she would arrange for a solicitor based in London to attend the airport. Another officer came on the phone and repeated that they would not await the arrival of a lawyer before commencing questioning. He said that at 5.30 pm they would continue to examine the Claimant and would arrest him if he refused to answer any question.

5. Between 4.50 pm and 5.20 pm the Claimant was permitted to pray. At 5.22 pm he was served with the appropriate notices (TACT 1 and TACT 2, described later in this judgment) and was detained.

6. At 5.26 pm the Claimant's solicitor called back and spoke to one of the Examining Officers. She again asked him to delay the questioning so that a London-based solicitor could attend. The officer again refused. He repeated that unless the Claimant started answering questions he would be arrested.

7. At 5.45 pm the officers began to question the Claimant. Shortly before 6.30 pm they concluded the examination of the Claimant and he was permitted to leave.

8. Section 40(1)(b) of the Act defines a "terrorist" as a person who "is or has been concerned in the commission, preparation or instigation of acts of terrorism." Section 41 permits a constable to arrest without warrant a person whom he reasonably suspects to be a terrorist.

9. Schedule 7 para 2(1) provides that an examining officer may question a person present at a port or border who is believed to be entering or leaving the UK "for the purpose of determining whether he appears to be a person falling within section 40(1)(b)." There is no requirement for the officer to suspect the person of terrorism or of any wrongdoing.

10. Schedule 7 para 5 states that a person questioned must provide the examining officer with such information and documentation as is requested. If he refuses to do so he commits an offence and is liable to imprisonment for up to 3 months (Schedule 7 para 18).

11. Schedule 7 para 6(1)(b) provides that "for the purposes of exercising a power under [TA Schedule 7 paragraph 2] an examining officer may … detain a person". Pursuant to para 6(4) the person may be detained and questioned for up to 9 hours. Time runs from when the examination begins. There is no provision for the period to be extended.

12. Schedule 8 paragraph 7 provides that "a person detained under Schedule 7 or section 41 at a police station in England, Wales or Northern Ireland shall be entitled, if he so requests, to consult a solicitor as soon as is reasonably practicable, privately and at any time."

13. A place which the Secretary of State has designated as a place where a person may be detained under section 41 of the 2000 Act is included within the term "police station" when used in Schedule 8: see paragraph 1(2) of the Schedule. This may reflect the fact that section 41, which concerns arrest without warrant, permits detention following arrest for a period of 48 hours.

14. The Secretary of State may also designate places where a person may be detained under Schedule 7. The relevant Order contains an example of a circular definition: it provides that places designated for the purpose of detention under Schedule 7 include not only any police station, prison, or place of detention at a port, but also "any place used by an examining officer for the purposes of exercising his functions under the 2000 Act". Such places, however, unlike those designated for detention under section 41, are not deemed to be police stations.

15. Schedule 8 paragraph 8 permits a police officer of at least the rank of superintendent to delay consultation with a solicitor if the officer has reasonable grounds for believing that the exercise of the right to consult will lead to any of the following:

> "(a) interference with or harm to evidence of a serious offence,
>
> (b) interference with or physical injury to any person,

> (c) the alerting of persons who are suspected of having committed a serious offence but who have not been arrested for it,
>
> (d) the hindering of the recovery of property obtained as a result of a serious offence or in respect of which a forfeiture order could be made….,
>
> (e) interference with the gathering of information about the commission, preparation or instigation of acts of terrorism,
>
> (f) the alerting of a person and thereby making it more difficult to prevent an act of terrorism, and
>
> (g) the alerting of a person and thereby making it more difficult to secure a person's apprehension, prosecution or conviction in connection with the commission, preparation or instigation of an act of terrorism."

It is not suggested that this power was exercised in the Claimant's case.

16. Schedule 8 paragraph 9 permits an officer of a still more senior rank (Commander or Assistant Chief Constable or above) to give a direction in prescribed circumstances that the right to consult with a solicitor may only be exercised in the sight or hearing of a qualified officer. Again, no such direction was given in the present case.

17. David Anderson QC, the Independent Reviewer of Terrorism Legislation appointed under section 36 of the Terrorism Act 2006, stated in his most recent annual report that a substantial number of people are asked screening questions lasting between a few seconds and a few minutes; in 2012/13 61,145 of these (0.03% of travellers arriving at ports, airports and international rail terminals) were then examined under Schedule 7; in only 2,277 cases did this examination last over an hour; and the detention power was exercised in only 670 cases.

The Code of Practice for Examining Officers

18. Schedule 14 paragraph 6(1) requires the Secretary of State to issue a Code of Practice for officers performing functions under the Act. A draft of the Code must be laid before Parliament (Schedule 14 paragraph 7). Schedule 14 paragraph 5 provides:

> "An officer shall perform functions conferred on him by virtue of this Act ... in accordance with any relevant code of practice in operation under paragraph 6."

The Claimant's case is that examining officers are thus not merely required to have regard to the Code of Practice but have a statutory duty to comply with it.

19. On 2 July 2009 the Home Secretary laid before Parliament the relevant Code of Practice for the exercise by examining officers of their powers under the Act. Paragraph 5 requires the Code to be available for consultation by the police and members of the public at all police stations and all police offices at ports where the powers are likely to be used. At various points the Code includes notes for guidance: paragraph 2 provides that these "are not provisions of the Code but are guidance to examining officers on its application and interpretation".

20. The Code sets out the purpose of a Schedule 7 examination as follows:

> "9. The purpose of questioning and associated powers is to determine whether a person appears to be someone who is or has been concerned in the commission, preparation or instigation of acts of terrorism. The powers, which are additional to the powers of arrest under the Act, should not be used for any other purpose."

21. Following the asking of initial screening questions, there are two ways in which individuals can be examined: they can simply be examined or they can be detained and examined. The procedure applicable to each stage is set out in the Code of Practice as follows:

> "**Examination powers**
>
> **11** The examining officer should explain to the person concerned, either verbally or in writing, that they are being examined under Schedule 7 of the Terrorism Act 2000 and that the officer has the power to detain that person should they refuse to co-operate and insist on leaving... An examination begins after a person has been stopped and screening questions have been asked... Once an examination lasts for one hour, an explanatory notice of examination, a TACT 1 form which is set out at annex A to this code, must be served by the examining officer on the person.
>
> ...
>
> **Detention**
>
> **21** An examining officer may detain a person in order to examine him/her for the purpose set out in paragraph 9 above. A Notice of Detention (TACT 2 form as set out as annex B) should be served by the examining officer on the person. No combination of examination/detention can exceed nine hours. The examining officer should exercise the power to detain a person and arrange for that person to be taken to a police station for further examination as soon as is practicable if the examination cannot, for any reason, proceed or continue at the port or, in the case of the border area, that location.
>
> **22** Where a person is detained under Schedule 7 at a place other than a police station, the examining officer should inform the detained person

that he/she is not under arrest or caution but that he/she is being detained under the provisions of Schedule 7 to the Act.

...

Note for guidance on paragraph 21 and 22

Examination and detention under Schedule 7 are not the same. A person being examined will not necessarily need to be detained and it is envisaged that most examinations will be conducted without the need to detain the person. Detention will be required usually where a person refuses to co-operate and insists on leaving. In such circumstances, it may not always be necessary to take the person to a police station: detention may be short lived, for example to complete an examination."

22. "TACT 1" and "TACT 2" notices form the two Annexes to the Code of Practice and set out the rights accorded to those detained and examined. TACT 1 must be provided to a person after one hour of examination and is provided to those examined but not necessarily detained. TACT 1 states in relation to access to a solicitor (emphasis in original):

"**Other Information**

You can request that a friend, a relative or a person who is known to you, or is likely to take an interest in your welfare is informed that you are being questioned and your location.

You can request to consult either in person, in writing or on the telephone, privately with a solicitor. **Examination will not be delayed pending the arrival of a solicitor.** If you do not wish to do so now, you may do so later and at any time while you are being questioned.

Consultation with a solicitor **will not be** at public expense. You do not have a right to have someone informed or to contact a solicitor whilst being examined. Informing someone or contacting a solicitor will be at the discretion of an examining officer."

23. TACT 2, which is provided only when a person is detained, states in relation to their rights (emphasis in original):

"**Do you want someone informed?**

You may, if you wish, at public expense, have a friend, a relative or a person who is known to you, or is likely to take an interest in your welfare, informed that you are being detained here. **NB. Under paragraph 8 of Schedule 8 to the Terrorism Act 2000, or paragraph 16 of Schedule 8 in Scotland, an officer of at least the rank of Superintendent may delay this right.**

> **Do you want to contact a solicitor?**
>
> You may consult either in person, in writing or on the telephone, privately with a solicitor. If you do not wish to do so now, you may do so later and at any time while you are detained. **NB. Under paragraph 8 of Schedule 8 to the Terrorism Act 2000, or paragraph 16 of Schedule 8 in Scotland, an officer of at least the rank of Superintendent may delay this right.**
>
> Consultation with a solicitor **will not** be at Public Expense."

24. In 2011 the Secretary of State became aware, following the case of *R (CC) v Commissioner of Police of the Metropolis* [2012] 1 WLR 1913, that the TACT 2 notice contained an error. It stated that consultation with a solicitor "will not be at public expense". That is incorrect since the Legal Aid Agency may fund advice and assistance to those detained pursuant to TA Schedule 7. Pending a full revision of the Code of Practice, the Secretary of State issued a circular on 18 July 2011 (Home Office Circular 07/2011*)* correcting the error.

25. Circular 07/2011 also confirmed the Home Office's view that the right to consult a solicitor applies wherever a person is detained under Schedule 7 and not only when they are detained at a police station. It states:

> "Schedule 8 provides the right to consult a solicitor, as soon as reasonably practical, privately and at any time. Although in the Terrorism Act 2000 this applies only to those detained at a police station, the code of practice requires a TACT 2 to be served on all those detained and this remains the case. Notwithstanding that the statute does not provide a right to legal advice other than at a police station, all detainees irrespective of the location should be offered access to legal advice."

The Circular noted that there may be a need for delays in examination if necessary to ensure the right to consult a solicitor in private:

> "The Home Office recognises that the nature of some locations where Schedule 7 examinations and detentions can be carried out may not be designed to meet the requirements of this notice. Where private consultation with a solicitor by appropriate means would not be possible when it has been requested, then forces should consider whether changes to accommodation are necessary. Alternatively they should make arrangements for individuals in such a position to be transferred to a police station. It is also recognised that in meeting the requirements of this circular, the examinations of individuals who have been detained may take longer to complete."

26. In preparing my judgment in this case I noticed that while paragraph 11 of the Code of Practice states that a TACT 1 form "must" be served after one hour of examination, paragraph 21 states that a TACT 2 form "should" be served when a person is detained under Schedule 7. No one had suggested in oral argument that this difference of wording is significant and I do not think that it is. Service of the TACT 2 form is in

practice treated as mandatory since under the present practice it marks the transition from examination under Schedule 7, paragraph 2 to detention under Schedule 7, paragraph 6 (1)(b). I also note the statement in Circular 07/2011 that "the code of practice *requires* a TACT 2 to be served on all those detained" [emphasis added].

The parties' positions

27. Mr Squires for the Claimant, supported by Mr Friedman QC for the Law Society as intervener, argued that once detained Mr Elosta had a right to consult his solicitor in person (ie face to face) before and during his interview. Mr Tam QC, for the Metropolitan Police Commissioner, argued that he had no right to consult a solicitor at all; alternatively, that it was for the officers, not Mr Elosta, to specify the mode of consultation permitted, and having obtained advice by telephone he had exhausted his right to legal advice. Mr Hall, for the Home Secretary, supported the Commissioner on the second point but not the first. He accepted that the officers were bound by the Code of Practice, but argued that on its proper construction the Code gave them the right to specify the mode of consultation.

Did the Claimant have the right to consult a solicitor at all?

28. The Commissioner's Detailed Grounds of Defence were served on 12 June 2013. They stated at paragraph 40 that :

> "The Claimant's explicit statutory right following his detention was to consult a solicitor as soon as is reasonably practicable, privately and at any time, pursuant to paragraph 7(1) of TA Schedule 8".

29. Nevertheless in his written and oral arguments Mr Tam submitted that the Claimant had no such right. Mr Squires drew attention to the change of position, but – rightly in my view - did not suggest that I should hold the Commissioner to the terms of the pleading, nor that formal amendment was required.

30. Mr Tam argued that:

    a) The Claimant was not detained at a police station, and the statutory right to legal advice in paragraph 7(1) of Schedule 8 to the 2000 Act did not apply to him;

    b) The Code of Practice does not create a right to obtain legal advice; nor do the Annexes, which in any event are not part of the Code.

31. It is common ground that the Claimant was not detained in a police station. But Mr Squires argues that the right to legal advice is conferred by a different route. Schedule 14, paragraph 5 requires examining officers to perform their functions in accordance with the Code of Practice. The Code of Practice by paragraph 21 requires the TACT 2 form to be served when the person is detained. TACT 2 itself states that consultation with a solicitor is allowed. And although Circular 07/2011 does not have the force of law, it confirms the view of the Secretary of State that while the Act only provides the right to consult a solicitor to those detained at a police station, the Code of Practice requires a TACT 2 to be served on all those detained.

32. I asked Mr Tam whether he could suggest a reason why (if the Commissioner's argument is correct) Parliament should have wished to create such a striking divergence between the rights of someone detained at a police station or a place of detention at a port or airport designated for the questioning of arrested persons on the one hand, and the rights of a detained person being questioned anywhere else (including somewhere else at the same airport) on the other. He was unable to think of one, but engagingly suggested that this was a question to be addressed to Parliament. In the Anti-Social Behaviour, Crime and Policing Bill 2013, which has been passed by the House of Commons and is at present before the House of Lords, there is a provision deleting the words "at a police station" in paragraph 7 (1) of Schedule 8 to the 2000 Act. This may not be a legitimate aid to the interpretation of the statute currently in force, but it does at least indicate the improbability of there being some hidden policy reason for differentiating between the rights of detainees under Schedule 7 depending on the location of their examination.

33. Mr Tam points to the fact that the power of a police officer of the rank of superintendent and above to authorise a delay in permitting a detained person to consult a solicitor (paragraph 8 of Schedule 8) and the power of a still more senior officer to direct that the consultation may only take place in the sight and hearing of a qualified officer (paragraph 9 of the same Schedule) are only exercisable where detention under Schedule 7 is at a police station or deemed police station, and that it would be most unfortunate if a detainee not at a police station could insist on immediate consultation (at least by telephone) when there might be good reasons for a delay to be authorised or private consultation prohibited. The answer to that point is that in such a case the examining officers, if they do not arrest the person concerned, would have to transfer him to a police station or a place of detention deemed to be a police station by virtue of its designation for section 41 purposes, and then obtain the necessary authorisation.

34. I am in no doubt that on this issue the Claimant, the Law Society, the Secretary of State, the TACT 2 form and Circular 07/2011 are right and the Commissioner is wrong. As a detainee under Schedule 7 Mr Elosta had the right to consult a solicitor before being interviewed.

Did the Claimant have the right to consult a solicitor face to face?

35. Mr Tam submits in the alternative that any legal right conferred by the Code of Practice and its forms does not include the right to consult a solicitor in person before questioning under Schedule 7. In this argument he is supported by Mr Hall for the Secretary of State. They point out that a person may be quite lawfully examined under Schedule 7 powers without being detained, and having no right at that stage (at any rate, during the first hour before service of TACT 1) to consult a solicitor. There is not the same nexus between the right to consult a solicitor and the questioning as arises under the Police and Criminal Evidence Act 1984 ("PACE"). Moreover, a person being examined under Schedule 7 is obliged to answer questions and commits a criminal offence if he refuses, in contrast to the ordinary suspect being interviewed under PACE.

36. In *R v Chief Constable of the RUC ex p Begley* [1997] 1 WLR 1475 the House of Lords considered the meaning of Section 58(1) of PACE, which confers on suspects in England and Wales an entitlement "to consult a solicitor as soon as reasonably

practicable, privately and at any time". Lord Browne-Wilkinson, with whom the rest of their Lordships agreed, first noted that under the Judges' Rules every person at any stage of an investigation had had the right to communicate and to consult privately with a solicitor, but that the common law had not so far interpreted that right so as to give a suspect the right to have his solicitor present during interviews. He then considered whether such a right had been conferred in England and Wales by PACE. He said at 1480H:-

> "Under section 58 of the Police and Criminal Evidence Act 1984 ("PACE") any suspect (including a suspect arrested under Section 14(1) of the PTA) has a legal right to consult privately with a solicitor as well as a right to have a solicitor present during interview: see also the [PACE] Code of Practice, Code C, para 6 and Annex B."

37. He went on to contrast with Section 58 of PACE a succession of statutory provisions applicable in Northern Ireland. The most recent of these was Section 47(1) of the Northern Ireland (Emergency Provisions) Act 1996, which stated:-

> "A person who is detained under the terrorism provisions and is being held in police custody shall be entitled, if he so requests, to consult a solicitor privately."

38. It will be observed that this provision does not contain the words "at any time". Lord Browne-Wilkinson held that this omission was deliberate, and reflected the intention of Parliament that detainees in Northern Ireland under the terrorism legislation in force there should not have the right to the presence of a solicitor during interviews.

39. Mr Tam and Mr Hall submit that the inclusion of the words "at any time" in Schedule 8, paragraph 7 does not have the "talismanic" effect for which Mr Squires and Mr Friedman contend. But that argument, which might have found favour with the House of Lords in *Begley*, did not do so. It was the contrast between the English and Northern Irish primary statutes, not the content of the Codes of Practice issued under PACE, which was in my view critical to their Lordships' conclusion. As Mr Friedman submitted, Schedule 8, paragraph 7 is clearly modelled on section 58 of PACE. The draftsman who used that wording in the Bill, and Parliament in enacting it, must be assumed to have been aware of the interpretation given to section 58 in *Begley*.

40. The Commissioner adduced the witness statement of Mark Jones, a Detective Superintendant based at Heathrow and currently Head of Ports Policing within the Metropolitan Police Service Counter-Terrorism Command (SO15). He states that there would be real practical difficulties if a solicitor wished to be present during an interview at a port or airport. The solicitor would need to travel to the port and gain access to the restricted area in which the client is being examined. An officer would need to meet the solicitor, check his qualification or accreditation and escort him through security checks to the location of the examination; then wait for the examination to be concluded and reverse the process. Consultation by telephone obviates such difficulties and avoids delays.

41. D/Supt Jones also takes what may be called the Hebridean island point, on which Mr Tam laid much emphasis:-

> "It cannot sensibly be the case that a person under examination at a remote airstrip on a Scottish island could, in effect, frustrate the examination process and avoid complying with their legal duties under paragraph 5 of Schedule 7 for the duration of a 9 hour examination by refusing to answer questions unless and until a solicitor made their way to the island to be present in person. In this case it would be entirely reasonable for an examining officer to view repeated consultation on the telephone to be a sufficient exercise of the person's right to consult a solicitor."

42. I asked whether statistics exist of the proportion of persons entering Great Britain who do so via the major passenger airports, ferry ports and Eurostar on the one hand, and those who arrive at small airstrips or minor ports lacking any police station or designated place of detention on the other. No figures are apparently available. Common sense suggests that the latter category is a small one, but I accept that a case of the kind put forward by D/Supt Jones is not entirely fanciful. There might equally be a detainee (at any location, remote or otherwise) who says that he is content to receive advice from his solicitor by telephone, but informs the examining officers that the solicitor, for whatever reason, will be unavailable to give such advice for the next 8 or 9 hours.

43. Mr Squires concedes that in such cases the detainee could not properly exercise his right to obtain legal advice so as to frustrate the purpose of the statute, by delaying questioning until it is too late. I agree. In the present case, however, it is not argued that this is what Mr Elosta was doing. His case therefore raises squarely the question of the proper interpretation of the statement in form TACT 2, after the heading "do you want to contact a solicitor?" that:-

> "You may consult either in person, in writing or on the telephone privately with a solicitor. If you do not wish to do so now, you may do so later and at any time while you are detained."

On the case put forward by the Commissioner and the Secretary of State this is to be read as meaning:-

> "You may consult privately with a solicitor, but it is a matter for the examining officer to decide whether you may do so in person, in writing or on the telephone".

44. Similarly, the TACT 2 form continues:-

> "If you do not wish to do so now, you may do so later and at any time while you are detained."

On the Commissioner's and Home Secretary's case this is to be read as meaning:-

> "If you do not do so now, you may do so later, at any time while you are detained, but only once."

45. In my judgment these are strange constructions which the wording of TACT 2 will not reasonably bear. The form tells the detainee that he may consult a solicitor

privately "in person, in writing or on the telephone". This means what it says. The detainee has the choice. The right may be exercised at any time during the period of detention and may be exercised repeatedly, although not in a manner which frustrates the proper purpose of the examination. If the solicitor attends in person he may be present during the interview, since that is what the House of Lords in *Begley* held to be the effect of the identical wording of section 58 of PACE. A reasonable delay to await the arrival of a solicitor may be required, but the detainee is not entitled to exercise that right in such a way as to frustrate the proper purpose of the examination.

Can a solicitor play a useful role by attending a detainee's interview?

46. There is a dispute as to the utility of having a solicitor present in interview. I do not regard the opposing views as a helpful guide to interpretation of the statute or the Codes, but since the Law Society were given permission to intervene and the issue has been argued before me I will record what was said on each side. Mr Tam cites the observations on the operation of Schedule 7 of Collins J in *R (CC) v Commissioner of Police of the Metropolis* [2012] 1 WLR 1913 at [39]:

> "It is incidentally difficult to see what contribution a solicitor could usefully make since there is an obligation to answer questions put and to submit to searches and the taking of samples can occur in the circumstances set out. A solicitor could perhaps act as an observer to ensure proper procedure, but beyond that he would have nothing to do."

47. On the other hand the Independent Reviewer set out in his report of June 2012 the reasons for his view that a solicitor can play a useful role if present during a Schedule 7 examination:

> "The answers that are given in such an examination will not be usable in a criminal trial; but they may still have very significant consequences for the person examined or for others.
>
> To give two practical examples:
>
> (a) A person returning from a country in which people are tortured may be extremely unwilling to disclose the names of those he has visited there in case the information gets back to the police in that country.
>
> (b) The intelligence report that is prepared after an examination may be adduced in support of an executive order such as a TPIM or asset freeze.
>
> There may thus be circumstances in which a client may seek advice not only on whether he is obliged to answer a particular question, but on the legal consequences of refusing to do so. A solicitor may also be useful in persuading the examining officer that – as in the example given at (a) above – a particular line of questioning is unnecessary or inappropriate."

48. The Law Society has adduced two witness statements taking issue with the observations of Collins J in *CC*. One is from Henry Miller, a solicitor employed by Birnberg Peirce & Partners. He has extensive experience of advising and representing persons examined and detained under Schedule 7 and persons arrested, prosecuted or subjected to other measures under the terrorism legislation. He acted for the claimant in *CC,* and states that:-

> "The comment by Collins J was made without relevant evidence being heard or adduced in the proceedings. Further, the contribution that a legal representative could make to the examination process was not discussed in the course of submissions before him. Had CC had the opportunity to present such evidence, I believe he would have done so."

49. Mr Miller goes on to state why he considers that a solicitor can make a "considerable positive contribution to the examination process", although he makes it clear that he does not believe that legal advice *in person* will be necessary in a large number of Schedule 7 examinations. Most of these are conducted and concluded very quickly and may involve only a few simple questions. In such cases, clients who wish to have advice will choose to do so by telephone to seek clarification or reassurance from an independent source, and this can be done in the matter of a few minutes. Examined persons, having been informed of their legal duties by a solicitor, are in his opinion more likely to cooperate willingly and provide the information requested. He adds:-

> "People request the attendance of a solicitor in person for a whole variety of reasons. The reasons can be as diverse as being frightened that they are being interviewed by police at all, having genuine concern about whether the examination is a proper use of police powers, concern about wrongly implicating themselves or others in admissions of criminal activity, and making statements that might impact upon asylum protections. An examined person may wish the attendance of a solicitor in person as a result of previously being subject to torture or other prohibited treatment (including returning from that treatment abroad), or they may be suffering from serious mental illness. All of these situations have been encountered by myself and colleagues within this firm."

50. The Law Society's other witness is Mr Anand Doobay, a consultant to Peters & Peters Solicitors LLP. His evidence deals not with terrorism but with fraud cases. In cases of serious fraud the Criminal Justice Act 1987 provided the Serious Fraud Office with power to require a person to answer questions or otherwise furnish information. It is an offence to fail to comply with a requirement of a notice to answer questions, furnish information or produce documents; although under the fraud legislation, unlike the 2000 Act, there is a defence of reasonable excuse. Mr Doobay sets out the constructive role which a solicitor can play even where there is an element of compulsion on the interviewee to answer questions.

51. I attach greatest weight to the views of Mr Anderson, who as Independent Reviewer has great experience of the practical operation of the terrorism legislation. The solicitor does have a useful, if limited, role to play. I respectfully disagree with the

obiter dicta of Collins J in *CC*. But the practical utility argument is not central in this case.

Ground 2

52. The Claimant's second ground for judicial review is that there has been a breach of ECHR Article 5. Mr Squires argues that to be lawful pursuant to Article 5, detention must be lawful in domestic law as well as falling within one of the subparagraphs of Article 5 itself. He continues:

> "The power to detain is accorded by TA Schedule 7 paragraph 6 "*for the purposes*" of questioning pursuant to Schedule 7 paragraph 2. If Examining Officers have no power to question an individual, they have no power to detain him pursuant to the TA. For the reasons set out above, the Examining Officers had no power to question the Claimant after he had requested the presence of a solicitor and prior to his solicitor's arrival. If the Examining Officers did not wish to await the arrival of the Claimant's solicitor, they were required to cease to detain him. From 5.45 pm on 10 November 2012, when the Examining Officers began to question the Claimant, until he ceased to be detained at 6.30 pm, his detention therefore breached Article 5."

53. I have already held that the examining officers had no power to question the Claimant after he had requested the presence of a solicitor and prior to the solicitor's arrival. The *questioning* between 5.45 pm and 6.30 pm was therefore unlawful. But this did not make his *detention* unlawful. He has no domestic law cause of action in false imprisonment, since if the officers had awaited the arrival of a solicitor he would have been detained for longer: as Mr Tam put it, he has suffered no loss. Putting the same point in term of ECHR Article 5(1)(b), he was lawfully detained in order to secure the fulfilment of his obligation to answer questions put to him pursuant to the 2000 Act.

Remedy

54. The Claimant is entitled to a declaration that the refusal of the Defendant's officers to await the arrival of his solicitor after he was detained on 10 November 2012 and before putting further questions to him was in the circumstances of this case unlawful.

55. I do not consider that this is a proper case for an award of more than nominal damages. There is no evidence that the 45 minutes of unlawful questioning caused the Claimant any loss nor indeed any adverse consequences. Mr Squires has made it clear that the Claimant does not seek a further declaration in respect of the fact that the telephone consultation with his solicitor was not in private: as recorded in this judgment, it is accepted by the Commissioner that this should not have occurred.

56. I conclude by expressing my gratitude to all counsel in the case for their diligent researches and helpful arguments.