Miranda's Rights: A Guide for the Perplexed Citizen

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Jeff King Do 22 Aug 2013

David Miranda, the partner of the Guardian journalist Glenn Greenwald, was detained at London Heathrow airport on 18 August 2013 under Schedule 7 of the Terrorism Act 2000. He was in transit between Berlin and Rio de Janeiro, carrying what appears to have been leaked classified material used for journalistic purposes. He was questioned without a lawyer, searched in person and his possessions (computer, phone, video games, other items), and his possessions were retained for a period that may not exceed seven days.

His detention raises an important point for the public about what rights a citizen or foreign national would have in such a situation, and whether and how such rights might be enforced in the courts. To answer that general, to some extent abstract question, I have made some factual assumptions that would cast the government's actions in Miranda's case in a dark light. The relevant question for many is about the legality and constitutionality of taking predatory action against someone assisting a journalist to publish leaked information about surveillance that is highly embarrassing for the government. The following discussion provides a set of answers to basic questions the concerned citizen might ask, and while it can at times get technical and lengthy, it is meant especially for the lay reader or junior lawyer who wants more nuance than what is available in the mainstream press.

1. Can the Government *really do that*?

If by '*that*' we mean just crack down on a reporter or his partner/assistant, using powers that seem manifestly conferred for other uses, the answer is 'no, it can't.' Miranda's rights were interfered with under a number of provisions of Schedule 7, but the main power of detention, questioning, searching, and retention of belongings, all revolve around the authorization granted in paragraph 2(1), which provides as follows: 'An examining officer may question a person to whom this paragraph applies for the purpose of determining whether he appears to be a person falling within section 40(1)(b).' And section 40(1)(b) deems as a 'terrorist' any person who 'is or has been concerned in the commission, preparation or instigation of acts of terrorism.' So it was only lawful under Schedule 7 to question Miranda if it was for the purpose of determining whether he was concerned in the commission, preparation or instigation of acts of terrorism.

The common law of judicial review requires that a statutory power only be used to further the purposes for which it was conferred, and not for any other purpose: *Padfield v Minister of Agriculture* [1968] AC 997 (HL). This substantive law thus forbids any use of the Terrorism Act 2000 to stop and detain Miranda for either the purposes of harassment, or to harvest/destroy any leaked classified information he had in his possession.

The European Convention on Human Rights also protects his rights. The rights to liberty (art.5), privacy (art.8), and freedom of conscience (art.10), had been interfered with. If it can be shown that the Terrorism Act was not appropriately used, all these rights would also have been violated because in no case would the interference with them have been 'in accordance with law,' the very lowest bar any argument must be clear to justify an infringement of our rights.

So Miranda could obtain a declaration from the court that the conduct was not authorized under the statute and thus illegal, as well as a violation of Convention rights, either by way of an application for judicial review or, better still, as part of a civil action for the tort of false imprisonment. So says the constitution in ideal times.

2. But aren't the powers in Schedule 7 of the Terrorism Act 2000 extremely broad, effectively preventing any real judicial control?

Yes and no. The powers are extremely broad. As is widely reported in the press, the exceptional aspect of the

Schedule 7 powers is that officials do not need to have any reasonable grounds for detention, searches, and retention of belongings (para.2(4)). But where the facts show that the power is being used to detain someone for a reason other than determining whether they are or are aiding terrorists, the courts have the power to step in. In the case of *R (CC) v Commissioner of Police of the Metropolis* [2011] EWHC 3316 (Admin), Justice Collins of the High Court did just that. The case involved someone who was detained, but under circumstances where the security services and police had already come to the view that he was a terrorist. The real reason they used the Schedule 7 powers or interrogation was not to answer the question of whether he was a terrorist, but rather as a way of obtaining additional information from him (namely, that which would be untainted by torture, as previous information extracted by others in Somalia had been). The Court quashed this misuse of the power. Of course, Miranda would make for a considerably more sympathetic claimant that CC did, and the case confirms that judicial review will lie where the facts clearly show a misuse of power.

But what exactly were the stated reasons for Miranda's detention? I have seen no official printed declaration, but Theresa May, the Home Secretary, said in an interview with the BBC on the evening of Tuesday, 20 August 2013, that she thought 'that if the police believe that somebody has in their possession, highly sensitive, stolen information which could help terrorists, which could lead to a loss of lives, then it is right that the police act, and that's what the law enables them to do.' This statement gives crucial information relevant to the legality of the action. Possessing stolen classified information certainly does not make one 'concerned with' commissioning or aiding terrorism, or else some of history's finest journalists become terrorists. And the fact that information 'could help terrorists' cannot on its own be relevant, for plenty of information and even cherished laws and liberties meet that standard.

It is crucial that the powers in Schedule 7, to be regarded by the courts as 'lawful,' [1] must be read in conjunction with the Code of Practice issued under paragraph 6(1) of Schedule 14 of the Terrorism Act 2000. That Code affirms repeatedly that the powers must *only* be used for the purposes of determining whether someone is a terrorist or is helping one. It also tells officers when and how to use Schedule 7 powers. It insists, on p.8, that any detentions and interrogation 'should be based on informed considerations such as' the following:

- 'Known and suspected sources of terrorism;
- Individuals or groups whose current or past involvement in acts or threats of terrorism is known or suspected and supporters or sponsors of such activity who are known or suspected;
- Any information on the origins and/or location of terrorist groups;
- Possible current, emerging and future terrorist activity;
- The means of travel (and documentation) that a group or individuals involved in terrorist activity could use;
- Emerging local trends or patterns of travel through specific ports or in the wider vicinity that may be linked to terrorist activity.'

It is hard to see how Miranda's type of case would ring alarm bells under any of these factors. The real issue for the authorities, under our present assumptions, is not so much his link to terrorism, but rather his unauthorized possession and dissemination of classified and sensitive information. Even if that information poses a strategic threat vis-à-vis foreign nations, it would not trigger the application of Schedule 7.

3. In any court hearing involving Miranda, could the government use 'secret evidence' against him, preventing him from seeing and challenging such evidence?

Yes, it could (though might not), provided it had some type of confidential evidence supporting its decision. If it did, the safety valves in the Justice and Security Act 2013 that aim to control abuse of this power would provide only weak protection. However, if the pretext for Miranda's detention is as we are assuming, his may be the egregious case in which they work.

'Secret evidence' is evidence introduced in Closed Material Proceedings (CMP), in which a party is excluded from proceedings while adverse evidence against him/her is heard by the court. In such cases, a special advocate (security cleared lawyer) is appointed by the government to represent the excluded party, but even the special advocates have protested that the procedure is 'fundamentally unfair' because they cannot consult with the party after seeing the closed material.[2]

Section 6 of the Justice and Security Act 2013 now provides the power that could be used in Miranda's case. The Secretary of State (Theresa May) would apply to the court for a declaration that CMP could be used. The court 'may' grant the declaration if satisfied of two conditions: (a) that if the judge allowed a regular civil trial or hearing, the secretary of state would be required to disclose 'sensitive material' (i.e. material that 'would be damaging to national security' (s.6(11)); and (b) it would be in the interests of 'fair and effective administration of justice' to allow closed proceedings. The first of these conditions would likely be very easily met, especially in a case like Miranda's which revolves around national security. The second condition is one of the few potentially effective safety valves against the exercise of the power. If the judge concludes that it is not 'fair and effective' to use the procedure, the secret evidence could not be used in proceedings against Miranda, and in any litigated case there would be considerable argument on this point. Yet there would need to be convincing evidence already in the public domain that the government is seeking to avoid stating its real reason for detention. And the judge must be confident that there is not some other good reason for detention contained in the closed evidence.

If the judge decided to allow the CMP to go ahead (i.e. the first safety valve did not assist Miranda), then the second safety valve would come into play: a special advocate would be appointed under s.9 of the Justice and Security Act 2013. The special advocate could see all the closed evidence and probe its veracity. If it is as flimsy as it appears to be, it may be one of the few cases where the special advocate could effectively fulfill its stated function. Special advocates are, to be fair, typically independent barristers of the very highest integrity and quality. But the special advocate would be unable to communicate with Miranda after seeing the closed evidence. So if the government presents a remotely coherent story about any whiff of a link between Miranda and terrorist activities, there will be little even a brilliant special advocate can do to rebut the claims.

4. Apart from Miranda's case, aren't the powers in Schedule 7 too broad to be compatible with our right to privacy and liberty under the European Convention on Human Rights?

Miranda has friends as well as enemies in high places. But what about the average Malik, detained and shaken down at Heathrow on his way home from the Hajj? Just that person has taken a case challenging the Convention-compatibility of Schedule 7, and the European Court of Human Rights (ECtHR) has found the claim admissible: *Malik v The United Kingdom (Application No. 32968/11) (28 May 2013)*. Malik argued that the broad Schedule 7 powers violated his rights to liberty under article 5(1) and to privacy under article 8(1) because Schedule 7 failed to require that the examining officer act on 'reasonable suspicion' that the detained person was concerned in terrorism.[3] The case has good potential for success, because the earlier ECtHR case of *Gillan & Quinton v UK* (Application No. 4158/05) (28 June 2010) rejected a highly similar stop-and-search power contained in what was originally section 44 of the Terrorism Act 2000.[4] The reasoning in *Gillan* confirms that both the liberty and privacy interests are engaged in Malik and Miranda's situations. The crucial finding in the *Gillan* case was that the stop and search powers were not 'in accordance with the law' (as required under article 8(2)) because 'in the absence of any obligation on the part of the officer to show a reasonable suspicion, it is likely to be difficult if not impossible to prove that the power was improperly exercised' (para.86).

The reasoning in *Gillan* applies quite plainly to the Schedule 7 powers as well, and thus Malik and Miranda's cases. However, there are two distinguishing factors about Schedule 7 which complicate any straightforward application. First, the Court in *Gillan* was 'struck' by the fact that none of the thousands of stop-and-searches under s.44 had led to a terrorism-related arrest. The powers under Schedule 7 have, by contrast, led to 24 terrorism-related arrests.

Whether that tips the scales of proportionality is another story. There is no significant theoretical difference between no arrests and extremely few arrests. And we would also need to examine other data such as charges laid and successful prosecutions before coming to any conclusion on the matter. Second, however, the Government in *Gillan* argued unsuccessfully that judicial review or an action for damages could have provided a remedy for any abuse of power under s.44. The Court rejected the claim, finding it highly unlikely that any such claim would succeed without any 'reasonable suspicion' qualification (para.84). Yet in the case of Schedule 7, there in fact has been one successful judicial review claim (again, whether that is enough is another story), and a willingness to find damages under the common law for Miranda's case might, ironically, save this capacious power from Strasbourg's gavel.

So the wise government lawyers, in other words, might strategically lose the battle with Miranda under the common law in order to win the Schedule 7 war with Malik under the Convention. Doing so would be politically tricky, however, because the government has admitted that No10 Downing Street knew of the detention. A flagrant and knowing misuse of executive power, which is what the court must find under the common law, would politically look no finer than an adverse judgment from a foreign court. Indeed, adverse judgments from Strasbourg are helpful talking points for Tory politicians speaking to the tabloid press.

5. Isn't this a veiled assault on freedom of the press? Can the courts do anything about that?

The court could do something about this exercise of power in Miranda's case in particular. There is no doubt that the detention and interference with Miranda's belongings interferes with his freedom of expression as understood by the ECtHR (see e.g. *Foka v Turkey* (Application No. 28940/95) (24 June 2008). The fact that he was acting on behalf of a journalist, if not working directly for the newspaper, suggests that an interference with his rights in this respect is also an interference with media freedom. It is likely the court would or at least could so find.

But can the government interfere with press freedom in that way? We should get one thing straight right away – the Strasbourg court has in a range of cases found that even the restraint of publication on grounds of national security is permissible and legitimate, and the House of Lords, for its part, found that article 10 gives no 'public interest' defence to whistleblowers who violate the Official Secrets Act 1989.[5] But even so, any such interference with expression must be justified under article 10(2) as 'in accordance with the law' and 'necessary in a democratic society.' As we saw above, the state's case apparently falls at that hurdle. And this is very relevant to the press freedom issue. Any exercise of the powers to restrain publication or to press charges would be carried out under the Official Secrets Act 1989 and the common law of confidence. Those proceedings would carry the ordinary, and thus more robust, set of procedural and substantive protections for persons or media being investigated, tried or sued. No secret evidence would be admissible in any criminal prosecution either, a fact the government would have to reckon with before pressing its claim aggressively.

When government officials met with the Guardian editor and more or less (ordered) him to destroy the GCHQ files or face prosecution, the action was bold and troubling (but also complicated given allegations that foreign governments might obtain the data). Their legal rights to do so, however, are clear. Section 5 of the Official Secrets Act 1989 makes it a criminal offence for one to further disclose information that one knows was unlawfully disclosed by another under other (applicable) provisions of the Official Secrets Act.

Even so, the security forces went further than 'cordial' threats when they detained and searched Miranda. That would be, data-wise, and assuming it was unlawful, the equivalent of entering and searching the Guardian's premises for information without lawful warrant and taking away what they found for 7 days. Indeed, the actions taken at the Guardian were gentlemanly by comparison.

6. What remedies could the court give?

Assuming Miranda could clear these hurdles and show in court that the Terrorism Act 2000 was misused, he would

be entitled to a range of remedies. He could obtain a declaration from the court that the authorities acted unlawfully, both under the common law and, under section 6 of the Human Rights Act 1998 in connection with the violations of the European Convention rights. He could sue for damages, under the common law (a tort action for false imprisonment) and seek damages under section 8 of the Human Rights Act 1998 (though the former leads to higher damages awards). No doubt the Guardian has sufficient interest to intervene in the case, and could perhaps even be joined as an interested party. It could argue that the issue of press freedom be put front and centre in the court's judgment as well, and could conceivably obtain nominal damages if the invasion of liberty were regarded as an indirect assault on its own interests.

As this post goes to press, it has come to light that Miranda's lawyers are also seeking an interlocutory injunction to restrain the government from harvesting or retaining any information from Miranda's possessions. The court must here be persuaded that there is a serious question to be tried; that there will be irreparable injury to a party if the injunction is not given; and that the balance of inconvenience between the parties favours granting the temporary injunction pending the full resolution of the matter in subsequent proceedings: *American Cyanamid Co. v Ethicon Ltd.* [1975] AC 396 (HL). The law, here too, appears from a distance to be on Miranda's side, though it is unclear whether any success in that application can unlearn what has already been learned by the security services so far.[6]

Conclusion

This discussion has sought to answer not the real question of whether Miranda will succeed in court, but the more abstract question about how a person in his situation would fair, assuming the worst, under the British legal system and constitution (which incorporates much of the European Convention on Human Rights). Real cases are messier. Litigation risks, costs, and settlement offers bound up by confidentiality agreements always pervade the parties' decisions (over and above the stress of it all). The best the public can hope for is that the devil's case scenario discussed here is not as accurate as it first appears to be.

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[1] An implication of *Gillan v Commissioner of Police* [2006] 2 AC 307, p.345ff (Lord Bingham).

[2] Miranda's case is an interesting test case for the use of the CMP procedure before and after the introduction of the Justice and Security Act 2013. In the *Al Rawi and others v The Security Services* [2011] UKSC 34 case, the Supreme Court held that where the CMP procedure was not provided for by statute (which is also Miranda's case), then the courts had no power to improvise one as part of the ordinary judicial process. Any such incursion, they held, interferes so strongly with our basic rights that only an Act of Parliament could authorize it. So the Coalition Government authorized just that with the Justice and Security Act 2013, after a short consultation period that was subject to one of the more vigorous and lop-sided choruses of disapproval in recent memory. See the consultation responses, and see in particular the response from the Bingham Centre on the Rule of Law and that of the Special Advocates, as well as Liberty and Reprieve). See also the responses of the Joint Committee on Human Rights and House of Lords' Constitution Committee, which are also quite notable for their criticism. Much of the criticism in these responses and reports was of a proposal to make CMP much more widely available than what was adopted in the bill. However, the criticism in the JCHR report linked above takes account of the bill in its near final form.

[3] Malik did not take proceedings in the UK because damages were unavailable to him under the Human Rights Act 1998 when he challenged the convention-compatibility of Schedule 7. This was accepted by the Court as meeting the obligation to exhaust domestic remedies.

[4] This was subsequently replaced by the government with high-handed rhetoric in Part IV of the Protection of Freedoms Act 2012.

[5] *Observer v UK* (1992) 14 EHRR 153 (ECtHR); *Sunday Times v UK* (No.2) (1992) 14 EHRR 229; *Brind v UK* (1994) 18 EHRR CD76 ; *R v Shayler* [2002] UKHL 11.

[6] The Guardian reports that Miranda won his case, but the terms of the judgment (as yet unpublished) do appear to permit the continued use of the material by the authorities for reasons of national security. It is thus doubtful whether the ruling does much to tie their hands.

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