

**fipr – ucl**  
***Scrambling for Safety 8 (14 August 2006)***  
**RIPA III – ss. 49 and 53 –human rights issues**  
by Douwe Korff  
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Slide No. 1

s. 49 – The power (paraphrased):

If an authorised person or authority - such as the police, the intelligence services, etc., etc. - “*believes, on reasonable grounds*” that a [decryption] key to “protected” (i.e., encrypted) information is in possession of “*any person*”, and the authorised person or authority *believes* that production of the key is “*necessary*”:

- to protect national security;
- to prevent or detect [any] crime; or
- to enable any public authority to perform any statutory task or duty –

and if the authorised person or authority furthermore *believes* that it is “*not reasonably practical*” to gain access to the encrypted information by other means –

then the authorised person or authority may demand the key of that person, by means of a notice to that effect, provided the authorised person or authority *believes* that the demand is “*proportionate*” to the purpose for which it is sought.

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Slide No. 2

## s. 53(1) – The offence:

A person to whom a section 49 notice has been given is guilty of an offence if he *knowingly* fails, in accordance with the notice, to make the disclosure required by virtue of the giving of the notice.

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Slide No. 3

## s. 53(2) – The defence:

It is a defence that the person who is asked to produce the key:

- (a) never had possession of the key; or
- (b) had possession of the key before the notice was issued but no longer has such possession.

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**s. 53(2) – Standard and onus of proof:**

- authorities must “*show*” (on the balance of probabilities?) that the person had possession of the key at some stage before the notice was issued;
- thereafter, there is a legal presumption that the person still has such possession;
- the person can rebut this presumption by producing “*sufficient evidence*” that s/he no longer has possession of the key;
- if such evidence is produced, the authorities can only obtain a conviction if they disprove this evidence beyond reasonable doubt.

NB preliminary issue: authorities must show that information in question is “protected” (i.e. encrypted) information - which may not be easy.

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Slide No. 5

## s. 53(2) – Penalty:

- 2 years imprisonment (6 months in summary proceedings);
- 5 years if in terrorist context (Terrorism Act);
- H/O is seeking views on whether it should also be 5 years (or even more) in child pornography cases.

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**Notes:**

- The power to demand a key is vested in a very wide range of authorities - basically any authority with investigative powers.
- The power can be exercised not just to prevent or detect crime, or to protect national security, but to facilitate basically any public task.
- A key can be demanded of anyone, i.e. not just of a person under investigation or suspected of any criminal offence - and the person can be ordered to keep quiet about this (e.g., to not inform his or her boss or business or partner/spouse/father/mother/child/etc.).

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Slide No. 7

## Notes (continued):

- Being “*in possession*” of a key is extensively defined: it includes the key being in possession of a person under the main person’s control, and the main person “*having an immediate right of access to it, or an immediate right to have it transmitted or otherwise supplied to him*” (typically, on-line) (s. 56(2)).
- All the tests for the power to demand a key to come into effect are subjective: they depend on what the authorities “*believe*” [see slide no. 1]

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Slide No. 8

Notes (continued):

- The offence is committed if the person to whom the notice is served “*knowingly*” fails to produce the key, i.e., if that person knows that s/he has been served with the notice and knows that s/he hasn’t produced the key: the failure need not have been deliberate, intentional or willingly, or even negligently.
- The legislator does not appear to have considered the problem that it may not be easy to show that a seemingly random string of numbers is in fact intelligible information in encrypted form.



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Notes (continued):

- It is not clear what is meant by the term “sufficient” evidence (either here or in the Terrorism Act 2000). In law, a formal, sworn statement by a defendant in the dock is evidence - but presumably not “sufficient”. So what further evidence is needed?
- It is difficult to see how one can produce such further evidence - even *prima facie* evidence - of not (no longer) being in possession of a key. A person who really, genuinely lost a key (or forgot it) will be in an impossible position: how can s/he prove this? Similarly, if the authorities find encrypted materials and a court finds that, **on the balance of probabilities**, the materials were “protected” (i.e., encrypted) materials and that someone probably had access to the information, how can that someone absolve him/herself if that judicial finding is wrong?

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**In effect, this exposes persons to a criminal conviction on the basis of a “balance of probability” rather than “beyond all reasonable doubt” standard.**

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Slide No. 11

**Re proposed increased penalty in child pornography cases (1):**

This would apply:

- where the person in question had a previous conviction relating to such materials;
- where other such materials (unencrypted) were found on the storing device; or
- where the court is otherwise “*satisfied that the protected information is likely to contain an indecent photograph or pseudo-photograph of a child (on the basis, for example, of evidence from a witness).*”

The first alternative condition, concerning a previous conviction, sits uneasily with the principle that previous convictions should not be regarded as evidence of a further offence (although changes are being considered on this issue more widely).

The term “*satisfied*” in the third condition again suggests that the evidentiary standard would be “*on the balance of probabilities*”.

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**Re proposed increased penalty in child pornography cases (2):**

In the vast majority of the cases selected by the Home Office itself as illustrations for its consultation document convictions were secured, mainly because the defendants had both encrypted and non-encrypted illegal materials in their possession (see pp. 4 and 5).

The only exception is the case of “Mr. B” who was “*suspected of possession of indecent images [and] found to be in possession of 27 encrypted disks, none of which could be opened.*” There is no indication of the evidence that led to the suspicion.

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Slide No. 13

**Potential issues under the ECHR/HRA (1):**

Demanding access to information in a person's possession is an "interference" with that person's right to private life (and possibly, his or her right to correspondence / communication) as protected by Art. 8 ECHR. Such interferences must be justified as:

- based on (clear and precise) law;
- serving a "legitimate interest";
- "necessary" and "proportionate" to achieve that interest.

There must furthermore be an appropriate (judicial) procedure to challenge the compatibility of the interference with these requirements.

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**Potential issues under the ECHR/HRA (2):**

Wide ranges of authorities, purposes and persons whose private life may be affected by a s. 49 notice: requires a **strict test** of the “necessity” and “proportionality” of the interference, and this test should be **objectively applied**.

The purely subjective phrasing in the Act contrasts with this, and may lead to **insufficient scrutiny by the courts**: they may merely check if the authority actually believed the matters mentioned, and only overrule such “beliefs” if they were manifestly unreasonable. That **would not satisfy the ECHR/HRA requirements**.

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**Potential issues under the ECHR/HRA (3):**

**No detailed evidentiary rules in ECHR/HRA but Art. 6 demands “*presumption of innocence*” and “*fair*” trial .**

**Requiring a defendant, in effect, to prove his or her innocence would clearly violate the presumption of innocence, and would render the trial unfair.**

**Arguably, this would also be the case if a criminal conviction would essentially be based on a “balance of probability” test, rather than on the basis of proof “beyond reasonable doubt”.**

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Potential issues under the ECHR/HRA (3 continued):

Cf. the ruling of the Supreme Court of Canada in R v. Whyte (1988) 51 DLR (4th) 481 (quoted on the fipr website):

**"If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused."**

[Note that this ruling relates to a situation in which the *defendant* has to prove something on the balance of probabilities, but the same applies if it suffices for a conviction for the prosecution to prove something on the balance of probabilities: it is implicit in that standard that a matter can be found proven on the balance of probabilities even though some - even quite reasonable - doubts remain.]



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**Potential issues under the ECHR/HRA (4):**

The very fact that increased penalties can be imposed in terrorism-related cases, and that the same is proposed for child-pornography-related cases, shows that the offence under s. 53 RIPA is effectively a **surrogate offence**, to be used against persons who are suspected of being a terrorist or a paedophile, but against whom there is insufficient evidence to convict: the “Mr Bs” of Slide No. 12.

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**Potential issues under the ECHR/HRA (5):**

Persons suspected of serious offences such as terrorism or child pornography - which, moreover, carry extreme, lifelong stigma - should be entitled to the **full protection of the law**, to a **fair trial in which they are really presumed innocent**.

Reducing the protection of the law for “beyond the pale” suspects such as terrorists or suspected paedophiles will inevitably lead to a reduction in legal protection for other categories - “terrorist supporters”, “extremists”, “organised criminals”, etc. - and ultimately to the **erosion of the rule of law** altogether.

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(or simply type “korff” in the search box on the main [www.londonmet.ac.uk](http://www.londonmet.ac.uk) site)