

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

Claim No.

B E T W E E N

THE QUEEN
on the Application of David MIRANDA

Claimant

-v-

(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT
(2) COMMISSIONER OF POLICE FOR THE METROPOLIS

Defendants

CLAIMANT'S SUMMARY STATEMENT OF FACTS AND GROUNDS

INTRODUCTION

1. This is an application for judicial review of the Defendants' use powers under Schedule 7 to the Terrorism Act 2000, as the Claimant passed through the international transit area of Heathrow Airport on 18 August 2013. The powers were used to:
 - (1) detain, question and search the Claimant, under threat of criminal prosecution for failing to comply.
 - (2) seize confidential, journalistic material in his possession.
2. This claim gives rise to important matters of principle regarding the purpose, scope and extent of the coercive powers under Schedule 7 to the Terrorism Act 2000 ('TACT') and the protection of journalists' sources and confidential journalistic material. The extensive public and political reaction to the Defendants' actions in this country and abroad underscores the importance of these issues.
3. The Second Defendant was responsible for the actions of the police officers that exercised Schedule 7 powers. The First Defendant is joined insofar as any role she or her department played in that process, and in relation to challenges made under the Human Rights Act 1998.

INTERIM RELIEF

4. The Claimant brings this action on an urgent and expedited basis. In order to ensure that the objective of the claim is not irretrievably frustrated, the Claimant seeks interim relief from the court to prevent the Defendants from disclosing, transferring, distributing or interfering with the data and other materials that were seized from him pursuant to Schedule 7, pending the determination of this claim.
5. A key purpose for the Claimant making this application is to protect the integrity and confidentiality of a large quantity of confidential and journalistic material that was seized from him at Heathrow Airport. If interim relief is refused then the objective of these proceedings will be irretrievably frustrated, to the significant detriment of the Claimant and the other journalistic sources whose confidential information is contained in the materials seized by the Defendants.
6. An interim injunction would cause no significant prejudice to the Defendants, who would remain in possession of the material (and/or copies of it), which was seized from the Claimant, until the outcome of these proceedings.
7. In these circumstances the balance of convenience is overwhelmingly in favour of granting interim relief in the terms set out in the draft order at **Annex A**.

OVERVIEW OF GROUNDS

The Submissions

8. The Claimant's submissions fall under three heads:

(1) **Misuse of statutory power**

Schedule 7 powers may only be used 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'*.

Schedule 7 powers may not be used merely to obtain material that may be sensitive or classified in the hands of someone who is not permitted to possess it; nor may it be used simply to retrieve material that may – in theory – be of possible use to terrorists, if terrorists were to come into possession of it.

In using Schedule 7 powers for those purposes the Defendants made an error of law and/or used the discretion given by Schedule 7 for an improper purpose.

(2) **No jurisdiction to in respect of transit passengers**

Schedule 7 powers may only be used if the relevant officer believes that the person's presence at the port in question is connected with:

- (a) his entering or leaving Great Britain or Northern Ireland;
- (b) his travelling by air within Great Britain or Northern Ireland;
- (c) he is on a ship or aircraft which has arrived at any place in Great Britain or Northern Ireland.

The Second Defendant's officers were aware that the Claimant was in transit between Germany and Brazil at the time he was stopped. He did pass through immigration and was not 'entering' or 'leaving' the UK. Neither was travelling 'within' Great Britain. Nor was he on an aircraft at the time he was stopped.

There was therefore no jurisdiction for the use of Schedule 7 powers.

(3) **Violation of fundamental rights**

- (a) As a matter of general principle, the coercive powers to detain, question, search and remove material under Schedule 7 are disproportionate and lack adequate safeguards to be in accordance with law. The powers are incompatible with the rights protected under Articles 5, 6, 8 and 10.

The Claimant seeks a declaration of incompatibility sought under s 4 of the Human Rights Act 1998.

- (b) Whether or not the Defendants' use of Schedule 7 is incompatible with fundamental rights in general terms, it was disproportionate in the specific context of the rights of a person pursuant to Article 10, which were engaged in this case.

Observation on declaration of incompatibility

9. In submitting that Schedule 7 powers are incompatible with the Claimant's fundamental rights, part of the Claimant's submissions rely on the decision of the European Court of Human Rights (ECtHR) in *Gillan v UK* (2010) 50 EHRR 45. That case concerned with section 44 of TACT that has since been repealed. Like Schedule 7, section 44 allowed coercive powers of search to be used without an officer having reasonable grounds to suspect a person of an offence. The ECtHR found that the lack of adequate safeguards against abuse resulted in a breach of fundamental rights pursuant to Article 8 (and, by implication, 5) of the ECHR.
10. The decision of the ECtHR in *Gillan v UK* is in conflict with the earlier decision of the House of Lords in the same case, *R (Gillan) v Commissioner of Police for the Metropolis* [2011] UKSC 2; [2006] 2 AC 307. That conflict is yet to be resolved and this may limit the capacity of this Court to make a declaration of incompatibility.¹ The Claimant would, in any event, seek for this Court to give a ruling on whether or not Schedule 7 powers are compatible with such rights, even if a declaration under section 4 cannot be made.

¹ For a lower court's approach to a conflict between the House of Lords / UK Supreme Court and ECtHR see, *Kay v Lambeth* [2006] 2 AC 465 at [43].

FACTUAL BACKGROUND

The Claimant

11. The Claimant is a Brazilian citizen. He is in a long term relationship with Mr Glenn Greenwald, a prominent American journalist who has written a series of stories for *The Guardian* and *The New York Times* including articles relating to mass surveillance programmes by the US and UK government agencies. The Claimant regularly assists Mr Greenwald in his journalistic work and was doing so at the time he was stopped and detained by the Second Defendant's officers.
12. On 18 August 2013 the Claimant was travelling from Berlin to the couple's home in Rio di Janeiro via Heathrow Airport. During his trip to Berlin, the Claimant visited Laura Poitras, a documentary film-maker who has been working with Mr Greenwald on various high profile journalism projects. *The Guardian* paid for the Claimant's flights to and from Berlin because his travel was directly connected to the journalistic work he was doing with Mr Greenwald.

The Claimant's detention at Heathrow

13. Shortly after disembarking from the plane, which arrived at Heathrow at 8:05am, the Claimant travelled thorough the international transit area. He did not at any time travel through immigration control.
14. While in transit he was stopped by the Second Defendant's officers exercising powers under Schedule 7 of TACT. At 8.15am he was issued with a Schedule 7 'Notice of Examination TACT 1 form' which described the purpose of his detention as follows (emphasis added):

This notice is to inform you that you are being questioned under the provisions of Schedule 7 to the Terrorism Act 2000 as someone whose presence at a port of in the border area (in Northern Ireland) is connected with entering or leaving any place in Great Britain or Northern Ireland.

This applies to a person travelling by air [...]

This in itself does not necessarily mean that the Examining Officer who is questioning you suspects that you are a person who is, or has been, concerned in the commission, preparation or instigation of acts of terrorism.

The purpose of the questioning is to enable him to determine whether you appear to be such a person.

At this stage you are not under caution, arrest or detention. However, should the circumstances change you will be notified.

Your Duties

[...you must answer all questions and hand over any data or documents requested]

If you deliberately fail to comply with any of these duties, you could be prosecuted under paragraph 18(1) of Schedule 7 to the Terrorism Act 2000.

15. At 8.25am the Claimant was served with the TACT2 Notice of Detention ('INTERIM 2011;').²
16. The Claimant asked for his own lawyer to attend. Eventually one of the officials contacted Mr Greenwald, who Guardian News and Media of the Claimants position. Bindmans LLP solicitors were contacted and made urgent arrangements for Mr Gavin Kendall (a legal representative) to attend upon the Claimant.
17. After multiple unsuccessful efforts to make contact with the Claimant through an initial telephone call, Mr Kendall attended the airport in person. Mr Kendall arrived at Terminal 5 at 3.25pm. He called a police sergeant who said he would send someone to collect him. Twenty minutes later an officer brought Mr Kendall through to the detention area where the Claimant was being held.
18. The only explanation the police gave for their treatment of the Claimant, was that he had been detained pursuant Schedule 7 Terrorism Act 2000 at 8.05am. The police confirmed that he would be released at 5.05pm, when the nine-hour statutory time limit would expire.
19. At 4.05pm Mr Kendall was finally granted access to the Claimant.
20. Mr Kendall asked police officers whether the Claimant was being detained as a result of a suspected offence in the UK or on behalf of another state, country or government organisation abroad. The police informed him that they could not say and would not provide any further explanation for his detention. The police also refused to confirm what the Claimant had been asked before Mr Kendall arrived, and

² Insert reference.

refused to provide Mr Kendall with a record of what was discussed. The Claimant asked for a pen to write down the questions and this too had been refused.

21. The Claimant, for whom English is not his first language, was not provided with an interpreter at any point during his detention.

Questioning of the Claimant and seizure of his possessions

22. During the course of the day, the Claimant was subjected to intensive, wide-ranging and intrusive questioning by a number of different officers. But he was not asked – nor was it suggested – that he was involved with terrorist groups, organisations or terrorist activity. The Claimant was informed that he could face imprisonment if he did not cooperate with the officers' inquiries. The Claimant found the whole experience frightening, stressful and intimidating.
23. The following items of property were seized from the Claimant (see the 'Detained Property List':
- (1) Samsung laptop
 - (2) Samsung phone
 - (3) 1 x gold memory stick
 - (4) 1 x silver memory stick
 - (5) 2 x DVDs
 - (6) Sony Games console.
 - (7) Smart watch
 - (8) Portable hard drive.
24. The Claimant's laptop, telephone, memory sticks and hard drive contained large amounts of confidential journalistic material as well as personal material. This property remains in the possession of the Second Defendant and/or the First Defendant.
25. In addition to being required to answer the officers' questions, the Claimant was compelled to provide the secret passwords for his electronic devices and encrypted storage devices.

The Claimant's release from detention

26. The Claimant was released from detention shortly before the expiry of the nine-hour maximum period of detention under Schedule 7. After his detention ended, the Claimant was offered the possibility to enter the United Kingdom in order to accelerate the process for boarding a flight back to Brazil. The Claimant declined to enter the United Kingdom and remained in the international transit zone of the airport until his departure to Rio de Janeiro later that evening.

Public explanations for the Claimant's detention

27. On 20 August 2013, it was made public that the First Defendant and the Prime Minister had been notified of the decision to detain and search the Claimant in advance of his arrival at Heathrow Airport. The United States Government also received advance notification of the decision.
28. The First Defendant also gave detailed public interviews indicating that the decision to exercise Schedule 7 powers in relation to the Claimant was made by the Second Defendant's officers.
29. In a widely broadcast television interview, the First Defendant provided the following explanation for the use of Schedule 7 powers in relation to the Claimant (emphasis added):

'I think that it is right, given that it is the first duty of the government to protect the public, 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. That is what the law enables them to do.'

30. The Claimant's detention has provoked widespread public debate about the use of Schedule 7 in this case and generally. A number of other parties, including David Anderson QC the independent reviewer of terrorism legislation, have expressed concern over the use of the power in this case and stressed the importance for a clear explanation as to why the powers were used in relation to the Claimant.

The Guardian newspaper's experience

31. In May 2013, *The Guardian* newspaper and other international media outlets, published material that had been obtained by Edward Snowden, an American computer specialist who had worked for the US Central Intelligence Agency and the US National Security Agency. *The Guardian* was assisted in that journalistic work by a number of persons and their sources, including the Claimant's partner, Glenn Greenwald and, through Mr Greenwald, the Claimant himself.
32. The editor of *The Guardian*, Mr Alan Rusbridger has indicated the following³:
- (1) From May 2013, the general public as well as the UK authorities (including the police, the Home Office and the Security Services) would have been aware that *The Guardian* were publishing articles derived from the sensitive material obtained by Mr Snowden.
 - (2) *The Guardian* had discussions with Security Services officials as to the nature of those publications, culminating in the officials eventually indicating - in firm terms - that they wished to have the material returned to them.
 - (3) *The Guardian* declined to return the material, but indicated that it would consent to its destruction in the presence of Security Services officials. *The Guardian* was aware that copies of that material remained in existence in other locations outside of the UK.
 - (4) At no point in the discussions with Security Services officials was there any suggestion that by being in possession of, or having access to such material, *The Guardian* or people assisting their work may be involved in the 'commission, instigation or preparation of acts of terrorism'.
 - (5) The clear indication was that the material needed to be returned because it was classified and sensitive and had been taken improperly. But here was no suggestion that any person dealing with that material was or could be concerned in acts of terrorism. However, there was a determined effort to put

³ Ref witness statement.

pressure on persons connected with the Guardian in order to obtain the return of that material.

LEGISLATIVE FRAMEWORK

The Terrorism Act 2000

Schedule 7 of TACT[†]

33. Schedule 7 of TACT gives police officers and other officials broad powers to determine whether or not a person appears to be a terrorist, as defined by section 40(1)(b) of TACT. Importantly, those powers do not require reasonable grounds for suspicion on behalf of the officers exercising them.
34. Section 1 of TACT defines 'terrorism' and states:
- 1(1) In this Act 'terrorism' means the use or threat of action where—
 - (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government [or an international governmental organisation] or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious [racial] or ideological cause.
 - (2) Action falls within this subsection if it—
 - (a) involves serious violence against a person;
 - (b) involves serious damage to property;
 - (c) endangers a person's life, other than that of the person committing the action;
 - (d) creates a serious risk to the health or safety of the public or a section of the public; or
 - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
 - (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
 - (4) In this section—
 - (a) 'action' includes action outside the United Kingdom,
 - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
 - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

[†] Bundle X / Tab X

- (d) 'the government' means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.
- (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.
35. Section 40 of TACT⁵ states:
- 40(1) In this Part⁶ 'terrorist' means a person who –
- (a) has committed an offence under any of section 11, 12, 15 to 18, 54 and 56 to 63; or
 - (b) is, or has been, concerned in the commission, preparation or instigation of acts of terrorism.
- (2) The reference in subsection (1)(b) to a person who has been concerned in the commission, preparation or instigation of acts of terrorism includes a reference to a person who has been, whether before or after the passing of this Act, concerned in the commission, preparation or instigation of acts of terrorism within the meaning of given by section 1.⁷
36. Schedule 7, paragraph 2 of TACT states:
- 2(1) An examining officer⁸ 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).
- (2) This paragraph applies to a person if –
- (a) he is at a port or in a border area, and
 - (b) the examining officer believes that the person's presence at the port or in the area is connected with his entering or leaving Great Britain or Northern Ireland...
- (3) This paragraph also applies to a person on a ship or aircraft which has arrived at any place in Great Britain or Northern Ireland (whether from within or outside Great Britain or Northern Ireland).
- (4) An examining officer may exercise his powers under this paragraph whether or not he has grounds for suspecting that a person falls within section 40(1)(b).
37. Schedule 7, paragraph 5 imposes obligations on the person under examination:
- 5 A person questioned under paragraph 2... must –
- (a) give the examining officer any information in his possession which the officer requests;

⁵ Bundle X / Tab X

⁶ Part V of TACT – 'Counter Terrorist Powers'

⁷ Section 1 of TACT defines terrorism – Bundle X / Tab X

⁸ An 'examining officer' is a constable, an immigration officer or designated customs officers (see Schedule 7, paragraph 1(1) of TACT)

- (b) give the examining officer on request either a valid passport which includes a photograph or another document which establishes his identity;
 - (c) declare whether he has with him documents of a kind specified by the examining officer;
 - (d) give the examining officer on request any document which he has with him and which is of a kind specified by the officer.

- 38. Schedule 7, paragraph 6 gives an examining officer the power to stop and detain a person subject to examination under paragraph 2, for up to 9 hours.

- 39. Schedule 7 paragraph 8 gives an officer the power wide search powers in relation to the person under examination:
 - 8(1) An examining officer who questions a person under paragraph 2 may, for the purpose of determining whether he falls within section 40(1)(b) –
 - (a) search the person;
 - (b) search anything which he has with him, or which belongs to him, and which is on a ship or aircraft;
 - (c) search anything which he has with him, or which belongs to him, and which the examining officer reasonably believes has been, or is about to be, on a ship or aircraft;...

- 40. Schedule 7, paragraph 11 gives an officer the power to retain any item found on a search, for up to 7 days. There is no apparent restriction on the copying of information from the material seized (e.g. phones, computers etc.):
 - 11(1) This paragraph applies to anything which –
 - (a) is given to an examining officer in accordance with paragraph 5(d);
 - (b) is searched or found on a search under paragraph 8; or
 - (c) is examined under paragraph 9 (power to examine goods arriving in UK).
 - (2) An examining officer may detain the thing –
 - (a) for the purpose of examination, for a period not exceeding seven days beginning with the day on which the detention commences...

- 41. Schedule 7, paragraph 18 creates criminal offences for any person failing to comply with the above obligations:
 - 18(1) A person commits an offence if he –
 - (a) wilfully fails to comply with a duty imposed under or by virtue of this Schedule,
 - (b) wilfully contravenes a prohibition imposed under or by virtue of this Schedule, or
 - (c) wilfully obstructs, or seeks to frustrate, a search or examination under or by virtue of this Schedule.

- (2) A person guilty of an offence under this paragraph shall be liable on summary conviction to –
- (a) Imprisonment for a term not exceeding three months;
 - (b) A fine not exceeding level 4 on the standard scale;
 - (c) Both.

42. Schedule 8 of TACT also sets out further provisions for the treatment of persons detained under Schedule 7: a detained person shall be deemed to be in legal custody through the period of his detention; fingerprints and non-intimate samples may be taken from detained persons without his consent.

The Code of Practice⁹

43. A Code of Practice¹⁰ has been issued pursuant to paragraph 6(1) of Schedule 14 of the TACT. A failure to observe a provision of the Code shall not, of itself, make an examining officer liable to criminal or civil proceedings.¹¹ The current Code was issued in 2009, and contains 'Notes for Guidance'. These are expanded upon in a 'Practice Advice',¹² also issued in 2009.

- Paragraphs 9, 10 and 11 of the Code deal with Examination Powers.
- Paragraphs 21 and 21 of the Code deal with detention. The Notes for guidance state *'Detention will be required usually where a person refuses to co-operate and insists on leaving...'*

Statistics and Reports on the use of Schedule 7

44. In October 2012, the Home Office published the most recent statistics relating to examinations under Schedule 7 of TACT.¹³ They included the following information:

- (1) A total of 63,902 persons were stopped at ports in 2011/12 in Great Britain under Schedule 7 powers.
- (2) 96% of those stopped were held for less than one hour. 4% were held for more than one hour. This was consistent with the previous two years.

⁹ Bundle X/ Tab X

¹⁰ The current version of the Code was issued in 2009. It includes 'Notes for Guidance' which are further expanded in a 'Practice Advice' also issued in 2009.

¹¹ TACT Schedule 14, paragraph 6(1)

¹² Bundle X/ Tab X

¹³ Bundle X/ Tab X

45. The Independent Reviewer on Terrorism Legislation, David Anderson QC, has also reported on the use of Schedule 7, setting out a number of issues that have caused concern. His latest report was published in June 2012. Chapter 9 of that report deals with the use of Schedule 7 of TACT.¹⁴

GROUND 1: MISUSE OF STATUTORY POWER

46. The decision to detain, question and search the Claimant involved an unlawful exercise of the statutory powers under Schedule 7 of TACT.
47. Paragraph 2 of Schedule 7 makes it clear that the power to stop, question and detain an individual is to be exercised *'for the purpose of determining whether he appears to be a person falling within section 40(1)(b)'*. A person falling within section 40(1)(b) is *'a person who... is, or has been, concerned in the commission, preparation or instigation of acts of terrorism'*.
48. *'Terrorism'*, for these purposes, is defined by section 1 of the Act as action designed to influence the government or intimidate the public and which is done for the purpose of advancing a political, religious, racial or ideological cause. It includes serious violence against the person; serious damage to property; endangering a person's life other than that of the person committing the action; creating a serious risk to the health or safety of the public or a section of the public; or is designed seriously to interfere with or seriously to disrupt an electronic system.
49. In the absence of any other explanation, Schedule 7 powers appear to have been exercised in relation to the Claimant not for that purpose, but in order to retrieve the material in his possession which may have originated from Mr Snowden; and/or to question the Claimant in relation to his involvement in those disclosures.
50. The following provides a strong inference that that the use of Schedule 7 powers was for the purpose of obtaining sensitive material and information from the Claimant and not for the purposes related to terrorism with which Schedule 7 powers are concerned:

¹⁴ Bundle X/ Tab X

(1) That inference is consistent with the public explanation given by the First Defendant on 20 August 2013:

- (a) The First Defendant appeared to focus on the use of the power to retrieve sensitive information that had been 'stolen', and not on the whether the individual concerned is, or has been concerned in the commission, preparation or instigation of acts of terrorism.
- (b) A person in possession of highly sensitive, 'stolen' information may or may not be committing an offence in relation to the Theft Act 1978, the Official Secrets Act 1989 or some other statutory provisions. However, the possession of even highly sensitive classified material that has been 'stolen' by a 'whistleblower' is not, of itself, involvement in the commission, preparation or instigation of acts of terrorism.

(2) The Security Services' interaction with *The Guardian* as described by its editor, gave no suggestion that the Defendants, or any other public authority believed that someone involved in the possession or publication of material derived from Mr Snowden was involved in terrorist activity. Their approach is inconsistent with a genuine belief by the Second Defendant's officers that the Claimant was involved in terrorist activity. Conversely, it is consistent with the indication given to *The Guardian* that the relevant authorities would use the powers available as a means to regain possession of highly sensitive material.

(3) The lengthy questions put to the Claimant by the officers exercising Schedule 7 powers did not suggest that he was or may have been involved in the commission, preparation or instigation of acts of terrorism. They focused on the journalistic activities on Mr Greenwald and others and assistance the Claimant provided to them. This appears to be inconsistent with officers investigating whether the Claimant was a terrorist as defined by section 40(1)(b), but is consistent with them seeking to obtain sensitive material from him and discover his involvement in publication of such material.

51. For all of the above reasons, the Defendants erred in law in using Schedule 7 powers to obtain data and information from the Claimant. The powers were not used '*for the purpose of determining whether he appeared to be a person ...who... is, or has been, concerned in the commission, preparation or instigation of acts of terrorism*'.

52. Further or alternatively, even if the Second Defendants' officers did possess a wide discretion in their use of Schedule 7 powers, for the reasons outlined above, they exercised that power for a purpose beyond the statutory intention for which it was granted by Parliament:

- (1) It is a '*long-established principle of United Kingdom public law that statutory powers must be used for the purpose for which they were conferred and not for some other purpose*' (*R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245.¹⁵).
- (2) A statutory power may not be used for an object outside its intended purpose, no matter how much that object may appear to the decision maker to be in the public interest (*Stewart v Perth and Kinross Council* [2004] UKHL 16 at [28]; *Pyx Granite Co. Ltd. v Ministry of Housing and Local Government* [1958] 1 QB 554 at 572).
- (3) Schedule 7 is intended to facilitate inquiries aimed at discovering whether the person being questioned is personally involved in the commission, preparation or instigation of acts of terrorism. This narrow statutory purpose is plainly not intended to facilitate inquiries aimed at discovering whether a person has been involved in the commission of non-terrorist offences - for example a breach of the Official Secrets Act unconnected to any terrorist activities - still less is it intended to be used as a mechanism for gaining access to journalists' and others' private information merely because journalists are passing through a UK port.
- (4) There is no suggestion that Parliament could have intended that Schedule 7 powers could be used for the primary purpose of obtaining journalistic material in circumstances that would strip the individual concerned from all the protections he would normally have from having to answer questions or provide access to that material:
 - (a) Under English law a number of legal mechanisms are available to a public authority that wants to obtain confidential information held by a

¹⁵ per Baroness Hale at [199].

- journalist, including application to the Crown Court for a production order.
- (b) Each of those mechanisms contains explicit safeguards that are designed to provide appropriate protecting for the confidentiality of journalistic material, and to prevent disproportionate infringements of journalists' Article 10 rights
 - (c) For example, the Police and Criminal Evidence Act 1984 (PACE) enables public authorities to apply for search warrants or production orders that enable the police to search premises and seize property and computerised information connected with the commission of criminal offences.
 - (d) Under PACE some classes of material are subject to additional protection from seizure. These include legally privileged material, journalistic material and certain types of material held in confidence.
 - (e) 'Special procedure material' is defined in section 14 of PACE and includes journalistic material and material acquired in the course of a trade, profession or similar and which is held subject to a duty of confidence. Schedule 1 of the Police and Criminal Evidence Act 1984 sets down conditions for the police to apply to court for a warrant to compel a person to hand over (or to seize) special procedure material, if certain conditions are met.
- (5) These requirements are deliberately intended to include protections that safeguard journalistic material and ensure that any attempt to interfere with such material is subjected to independent judicial oversight.
- (6) Similar provisions are contained in Schedule 5 to the Terrorism Act 2000. Broadly, in terrorist cases the court can order the production or seizure of special procedure material where the order is sought for the purposes of a terrorist investigation; there are reasonable grounds for believing that the material is likely to be of substantial value to that investigation; and there are reasonable grounds for believing that it is in the public interest for the material to be disclosed, having regard to the benefit likely to accrue to the investigation, and the circumstances under which the person had the material in his or her possession. These conditions are reasonably similar to those under PACE, albeit slightly less stringent.

- (7) By using Schedule 7 to obtain the Claimant's confidential journalistic information, the Defendants bypassed the appropriate statutory regimes for obtaining confidential journalistic information and circumvented the important safeguards (including the requirement to obtain a court order before seizing material) contained in those mechanisms.
- (8) The Defendants' purported exercise of Schedule 7 powers pursued an improper purpose and was therefore unlawful.

GROUND 2: NO JURISDICTION IN RESPECT OF TRANSIT PASSENGERS

53. Paragraph 2 of Schedule 7 identifies the persons against whom the power to detain, search and question may be applied (emphasis added):

- 2(1) 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)
- 2(2) This paragraph applies to a person if—
 - (a) he is at a port or in the border area, and
 - (b) the examining officer believes that the person's presence at the port or in the area is connected with his entering or leaving Great Britain or Northern Ireland or his travelling by air within Great Britain or within Northern Ireland.
- 2(3) This paragraph also applies to a person on a ship or aircraft which has arrived at any place in Great Britain whether from within or outside Great Britain or Northern Ireland.

The Second Defendant's officers did not believe that the Claimant's presence at Heathrow was connected with his 'entering or leaving' Great Britain

54. English law distinguishes between 'entry' and 'arrival' in the United Kingdom. This distinction is expressly recognised in s 11(1) of the Immigration Act 1971, which provides (emphasis added):

A person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released

while liable to detention, under the powers conferred by Schedule 2 to this Act or by Part III of the Immigration and Asylum Act 1999 or section 62 of the Nationality, Immigration and Asylum Act 2002 or by section 68 of the Nationality, Immigration and Asylum Act 2002.

55. A person who arrives at an airport in Great Britain from a foreign country does not 'enter' Great Britain or Northern Ireland unless and until they pass through immigration control. In *R v Naillie* [1993] 1 AC 674 at 680 Lord Slynn stated:¹⁶

A person arriving by air at Heathrow does not enter the United Kingdom when he disembarks. Nor, contrary to the appellant's argument, has he entered when he proceeds towards immigration control having passed the transit corridor, thereby evincing an intention to go through immigration rather than to seek to go to a foreign destination.... a person in my opinion is not seeking to enter within the meaning of the Act when he disembarks. He seeks to enter when he presents himself to the immigration officer or when he tries to pass out of the area of immigration control without presenting himself to the immigration officer.

56. Accordingly, an individual passing through Heathrow as an international transit passenger does not 'enter' the United Kingdom unless during the course of transit he passes through immigration control.
57. The fact that international transit passengers do not 'enter' the United Kingdom is reflected in s 41 of the Asylum and Immigration Act 1999. This empowers the Secretary of State to require '*transit passengers*' to hold a transit visa. '*Transit passengers*' are defined by s 41(2) as '*persons of any description...who on arrival in the United Kingdom pass through to another country without entering the United Kingdom*'.
58. In addition, Schedule 7 itself recognises a distinction between 'entering' and 'arriving' in Great Britain. Paragraph 1(3)(b) states that a place shall be treated as a port for the purposes of Schedule 7 if an examining officer '*believes that the person...has arrived there on disembarking from a ship or aircraft*'. This falls to be contrasted with paragraph 2(b), which applies where an examining officer '*believes that the persons presence at the port is connected with his entering or leaving Great Britain or Northern Ireland*'.
59. According to the established precepts of statutory interpretation, if Parliament employs two similar but different expressions in the same piece of legislation, it is

¹⁶ At 680

taken to intend different meanings to attach to each expression. In *Trustee Solutions Ltd v Dubery* [2006] EWHC 1426 (Ch), [2007] 1 All ER 308, for example, Lewison J held that the expressions '*notice under hand*' and '*notice under writing*' were intended to bear different meanings since, '*One would naturally expect the two different phrases to have two different meanings*'.

60. It is therefore clear that, for the purposes of Schedule 7, 'entering' the United Kingdom is not the same as 'arriving' in the United Kingdom. Moreover, Parliament appears to have had Parliament had the framework of immigration control under the Immigration Act 1971 in mind when enacting the Terrorism Act 2000. (For example, section 53, which gives effect to Schedule 7, makes express reference to the 1971 Act, providing in ss 53(3) that the '*powers conferred by Schedule 7 shall be exercisable notwithstanding the rights conferred by section 1 of the Immigration Act 1971*'. Paragraph 15(3) of Schedule 7 also makes express reference to the 1971 Act.)
61. Accordingly, a person who arrives at an airport in Great Britain as a passenger in international transit does not 'enter' Great Britain for the purposes of paragraph 2 of Schedule 7 unless they pass through immigration control.
62. The Claimant was detained by the police while he was moving through the transit corridor shortly after disembarking from his flight from Berlin. The First Defendants' officers were aware the Claimant was due to join a connecting flight to Rio de Janeiro without leaving the international transit zone at the airport. At no point did the Claimant pass through immigration control at Heathrow. It follows that at no time was the Claimant's presence at Heathrow '*connected with his entering...Great Britain*'. Nor, in the circumstances, could the Defendants' officers have entertained a rational belief to that effect. As a result, there was no statutory basis for exercising Schedule 7 powers against the Claimant during his passage through the airport.

The First Defendant's officers did not believe that the Claimant's presence at Heathrow was connected with his travelling by air 'within Great Britain or within Northern Ireland'.

63. The natural reading of the expression '*travelling by air within Great Britain or within Northern Ireland*' in paragraph 2(2)(b) of Schedule 7 refers to individuals who are travelling on internal domestic flights. This is distinct from passengers in transit who are travelling 'through' Great Britain.

64. The Claimant derives support for this interpretation from paragraph 2(3) of Schedule 7 of TACT, which draws a deliberate distinction between journeys '*within*' Great Britain or Northern Ireland and journeys '*outside*' Great Britain or Northern Ireland:

'This paragraph also applies to a person on a ship or aircraft which has arrived at any place in Great Britain or Northern Ireland (whether from within or outside Great Britain or Northern Ireland)'

65. The word '*within*' appears to refer to ships and aircraft arriving on domestic routes, while '*outside*' refers to ships and aircraft travelling on international routes.
66. This distinction is similarly reflected in paragraph 9 of Schedule 7 of TACT, which confers a power to examine goods for the purpose of determining whether they have been used in the commission, preparation or instigation of acts of terrorism:

9(2) This paragraph applies to—

- (a) goods which have arrived in or are about to leave Great Britain or Northern Ireland on a ship or vehicle, and
- (b) goods which have arrived at or are about to leave any place in Great Britain or Northern Ireland on an aircraft (whether the place they have come from or are going to is within or outside Great Britain or Northern Ireland).

67. Again, the word '*within*' appears to refer to journeys that start and end in Great Britain or Northern Ireland.

The Claimant was not a person 'on a ship or aircraft...'

68. The Claimant was stopped while in transit having disembarked from the plane in which he landed. Accordingly, paragraph 2(3) does not apply.

GROUND 3: THE USE OF SCHEDULE 7 IS INCOMPATIBLE WITH FUNDAMENTAL RIGHTS

69. Some or all of the submissions on which the Claimant would rely are already the subject of judicial consideration in several cases including one in which judgment is imminent:

- In *DPP v Beghal* CO/3047/2012 the Appellant was stopped pursuant to Schedule 7 of TACT on arriving into Birmingham from France. She refused to answer questions in the absence of her solicitor. She was prosecuted and convicted pursuant to paragraph 18 of Schedule 7.

She appealed by way of case stated, submitting that her prosecution was an abuse of process and in breach of her fundamental rights pursuant to Articles 5, 8 and 6 and her right to freedom of movement.

The appeal was heard in March 2013. **Judgment will be handed down on 28 August 2013.**

- In *Malik v UK* Application No 32968/11 the Applicant was stopped and detained at a UK airport pursuant to Schedule 7. He applied to the ECHR on the basis that the use of Schedule 7 was in breach of his fundamental rights pursuant to Article 5 and Article 8.

He did not bring domestic proceedings, on the basis that seeking a declaration of incompatibility would not be an effective remedy.

After considering submissions, including submissions on whether he had exhausted domestic remedies before making his application, the Fourth Section of the ECtHR declared his application admissible on 28 May 2013. His case awaits further consideration by that Court.

- In *Elosta v Commissioner of Police for the Metropolis* (2013) CO/1422/2013 the Claimant challenged the operation of guidance and statutory provisions pursuant to Schedule 7 that enabled police officers to delay or prevent access

to a solicitor when exercising coercive powers. Permission to bring judicial review was granted in July 2013 and a hearing is listed for October 2013.

Articles 5, 6 and 8

70. Given the cases mentioned above, in which the fundamental rights of persons subjected to Schedule 7 powers are in issue and awaiting trial or judgment, the Claimant does not rehearse in detail the submissions relating to those rights.
71. In particular, the Claimant is aware that any submissions made at this stage will have to be reconsidered in light of the judgment by the Divisional Court in *DPP v Beghal*, due to handed down on **28 August 2013**.
72. In very brief summary, the Claimant submits, in relation to those rights:
- (1) The powers under Schedule 7 are not restrained by the need for reasonable grounds for suspicion. They are not in accordance with law in that they do not contain sufficient safeguards against abuse. The Claimant relies in this case – as the Appellant has in *DPP v Beghal* – on the decision on *Gillan v UK* which is in contradiction with the decision of the Judicial Committee of the House of Lords in *R (Gillan) v Commissioner of Police for the Metropolis* [2006] 2 AC 307.
 - (2) The Claimant further submits that coercive questioning without adequate safeguards is in breach of the Claimant's fundamental rights pursuant to Article 6.

The Claimant reserves the right to add to the submissions on those grounds in light of the judgment in *DPP v Beghal* and points raised in the cases of *Malik v UK* and *Elosta v Commissioner of Police for the Metropolis*.

73. Importantly, none of the above cases engage the freedom of expression under Article 10 and the use of Schedule 7 in the context of journalistic material. Accordingly, the Claimant makes more detailed submissions about the breach of fundamental rights pursuant to Article 10 that are engaged in his case. These are set out below.

Article 10

Protection of sources and journalistic material

74. The Defendants' actions in seizing the Claimant's confidential journalistic material and subjecting him to compulsory questioning in relation to his journalistic activities violated Article 10.

75. Article 10 provides:

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

76. The case law of the Strasbourg Court repeatedly emphasises the importance of protecting journalists' sources. In *Goodwin v UK* (1996) 1 BHRC 81 the Court stated:

'Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of contracting states and is affirmed in several international instruments on journalistic freedoms (see amongst others the Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7–8 December 1994) and the Resolution on the Confidentiality of Journalists' Sources by the European Parliament of 18 January 1994 (OJ 1994 C44, p 34)). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with art 10 of the convention unless it is justified by an overriding requirement in the public interest.'

77. In his concurring judgment, Judge De Meyer emphasised that:

'The protection of a journalist's source is of such a vital importance for the exercise of his right to freedom of expression that it must, as a matter of course, never be allowed to be infringed upon, save perhaps in very exceptional circumstances...'

78. The Court recently restated these principles in *Financial Times v United Kingdom* (2009) 28 BHRC 616:

The court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and that, in that context, the safeguards guaranteed to the press are particularly important. Furthermore, protection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital 'public watchdog' role of the press may be undermined and the ability of the press to provide accurate and reliable reporting may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect that an order for disclosure of a source has on the exercise of that freedom, such a measure cannot be compatible with art 10 unless it is justified by an overriding requirement in the public interest (see *Goodwin v UK* (1996) 1 BHRC 81 at para 39).

79. These principles are reflected in *Recommendation no R(2000) 7 on the right of journalists not to disclose their sources* of information adopted by the Committee of Ministers of the Council of Europe on 8 March 2000. The Recommendation has been expressly relied on by the ECtHR when considering the application of Article 10 to cases involving attempts to obtain confidential journalistic information (see, for example, *Voskuil v The Netherlands* (2007) 24 BHRC 306 at [65]; *Telegraaf Media Nederland Landelijke Media BV v Netherlands* (2012) 34 BHRC 193 at [86]).
80. The Recommendations lay down a number of '*Principles concerning the right of journalists not to disclose their sources of information*'. These include rights of non-disclosure applicable to journalists and other persons involved in the collection and distribution of journalistic material:

Principle 1 (Right of non-disclosure of journalists)

Domestic law and practice in member States should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with art 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the convention) and the principles established herein, which are to be considered as minimum standards for the respect of this right.

Principle 2 (Right of non-disclosure of other persons)

Other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected under the principles established herein.

81. The Recommendation imposes strict restrictions on the circumstances in which the rights to non-disclosure may be infringed:

Principle 3 (Limits to the right of non-disclosure)

a. The right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Article 10, paragraph 2 of the Convention. In determining whether a legitimate interest in a disclosure falling within the scope of Article 10, paragraph 2 of the Convention outweighs the public interest in not disclosing information identifying a source, competent authorities of member States shall pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case law of the European Court of Human Rights, and may only order a disclosure if, subject to paragraph *b*, there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature.

b. The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that:

i. reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and

ii. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:

—an overriding requirement of the need for disclosure is proved,

—the circumstances are of a sufficiently vital and serious nature,

—the necessity of the disclosure is identified as responding to a pressing social need, and

—member States enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.

c. The above requirements should be applied at all stages of any proceedings where the right of non-disclosure might be invoked.

82. The Recommendation expressly prohibits the use of search and surveillance powers intended to circumvent journalists' right not to disclose information identifying a source:

Principle 6 (Interception of communication, surveillance and judicial search and seizure)

a. The following measures should not be applied if the terms of these

principles, not to disclose information identifying a source:

- i. interception orders or actions concerning communication or correspondence of journalists or their employers,
- ii. surveillance orders or actions concerning journalists, their contacts or their employers, or
- iii. search or seizure orders or actions concerning the private or business premises, belongings or correspondence of journalists or their employers or personal data related to their professional work.

b. Where information identifying a source has been properly obtained by police or judicial authorities by any of the above actions, although this might not have been the purpose of these actions, measures should be taken to prevent the subsequent use of this information as evidence before courts, unless the disclosure would be justified under Principle 3.

83. In light of these principles, the ECtHR has adopted an expansive interpretation of the concept of a 'journalistic source'. In *Telegraaf Media Nederland Landelijke Media BV v Netherlands* the Court stated that (emphasis added):

The court's understanding of the concept of journalistic 'source' is 'any person who provides information to a journalist'; it understands 'information identifying a source' to include, as far as they are likely to lead to the identification of a source, both 'the factual circumstances of acquiring information from a source by a journalist' and 'the unpublished content of the information provided by a source to a journalist' (see Recommendation No R(2000) 7 on the right of journalists not to disclose their sources of information (quoted in para 61, above)...

84. The ECtHR has held that Article 10 requires states to establish stringent procedural safeguards in any statutory regime that enables public authorities to obtain material from journalists. The Court's case law makes it clear that a failure to provide such safeguards will inevitably violate Article 10.

85. In *Sanoma Uitgevers BV v The Netherlands* (2010) 30 BHRC 318 the Grand Chamber of the ECtHR held that a Dutch law which empowered the police to force journalists to surrender material to the police for use in criminal investigations violated Article 10.

86. The applicant was the publisher of a Dutch motoring magazine. Two of the applicant's journalists attended an illegal street race and took photographs of the participants on condition that the participants' identities would be kept secret. The applicant intended to publish an article about illegal car races, which would be accompanied by photographs edited in a way that concealed the identity of all the participants. The police, who had opened a criminal investigation into the illegal

street race, subsequently exercised a power under Dutch law requiring the applicant to surrender the photographs. The police threatened to detain the magazine's editor if he did not comply with the order.

87. Before seizing any material the public prosecutors sought the intervention of an investigating judge. Under Dutch law, the investigating judge had no power to sanction or prevent the police from searching the applicant's premises or seizing the material. The Judge nonetheless indicated that, had he had power to do so, he would have sanctioned a search and seizure. In light of these actions, the applicant surrendered under protest a CD containing unedited photographs of the participants in the illegal race. The public prosecutor formally seized the material. The applicant subsequently obtained an order from the Dutch Regional Court preventing the police and prosecution from taking cognisance or making use of the information obtained through the CD, and ordering the CD to be returned to the applicant.
88. The applicant contended that the Dutch authorities' actions violated Article 10.
89. The Grand Chamber explained that Article 10 is engaged whenever a journalists is compelled to assist in the identification of confidential sources:
 71. While it is true that no search of seizure took place in the present case, the court emphasises that a chilling effect will arise whenever journalists are seen to assist in the identification of anonymous sources (*mutatis mutandis*, *Financial Times Ltd v UK* (2009) 28 BHRC 616 at para 70).
 72. In sum, the court considers that the present case concerns an order for compulsory surrender of journalistic material which contained information capable of identifying journalistic sources. This suffices for the court to find that this order constitutes, in itself, an interference with the applicant company's freedom to receive and impart information under Article 10.
90. The Grand Chamber went on to conclude that the interference with the Applicant's Article 10 right was not '*prescribed by law*' because the powers exercised by the Dutch authorities, although enshrined and exercised in full compliance with domestic law, were not accompanied by '*adequate legal safeguards*' to enable '*an independent assessment as to whether the interests of the criminal investigation overrode the public interest in the protection of sources*'. The Court held that the Dutch framework violated the principle of 'quality of law' even though the legal power to remove the Applicant's journalistic material had an accessible statutory basis in Dutch law.

91. In reaching that conclusion, the Grand Chamber explained that (emphasis added):
88. Given the vital importance to press freedom of the protection of journalistic sources and of information that could lead to their identification any interference with the right to protection of such sources must be attended with legal procedural safeguards commensurate with the importance of the principle at stake.
89. The court notes that orders to disclose sources potentially have a detrimental impact, not only on the source, whose identity may be revealed, but also on the newspaper or other publication against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on members of the public, who have an interest in receiving information imparted through anonymous sources (see, *mutatis mutandis*, *Voskuil v Netherlands* (2007) 24 BHRC 306 at para 71).
90. First and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body. The principle that in cases concerning protection of journalistic sources 'the full picture should be before the court' was highlighted in one of the earliest cases of this nature to be considered by the convention bodies (*BBC v UK* (App no 25798/94) (admissibility decision, 18 January 1996); see para 54, above). The requisite review should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identity if it does not.
91. The court is well aware that it may be impracticable for the prosecuting authorities to state elaborate reasons for urgent orders or requests. In such situations an independent review carried out at the very least prior to the access and use of obtained materials should be sufficient to determine whether any issue of confidentiality arises, and if so, whether in the particular circumstances of the case the public interest invoked by the investigating or prosecuting authorities outweighs the general public interest of source protection. It is clear, in the court's view, that the exercise of any independent review that only takes place subsequently to the handing over of material capable of revealing such sources would undermine the very essence of the right to confidentiality.
92. Given the preventive nature of such review the judge or other independent and impartial body must thus be in a position to carry out this weighing of the potential risks and respective interests prior to any disclosure and with reference to the material that it is sought to have disclosed so that the arguments of the authorities seeking the disclosure can be properly assessed. The decision to be taken should be governed by clear criteria, including whether a less intrusive measure can suffice to serve the overriding public interests established. It should be open to the judge or other authority to refuse to make a disclosure order or to make a limited or qualified order so as to protect sources from being revealed, whether or not they are specifically named in the withheld material, on the grounds that the communication of such material creates a serious risk of compromising the identity of journalist's sources (see, for example, *Nordisk Film & TV A/S v Denmark* (App no 40485/02) (admissibility decision, 8 December 2005)). In situations of urgency,

a procedure should exist to identify and isolate, prior to the exploitation of the material by the authorities, information that could lead to the identification of sources from information that carries no such risk (see, *mutatis mutandis*, *Wieser v Austria* [2007] ECHR 74336/01 at paras 62 – 66).

92. The Grand Chamber's judgment in *Sanoma Uitgevers BV v The Netherlands* establishes that:

- (1) Article 10 is engaged whenever a person is compelled to provide information or material that may result in the identification of a confidential journalistic source.
- (2) Any interference with the protection given to journalistic sources '*must be attended by legal procedural safeguards commensurate with the importance of the principle at stake*'.
- (3) The principal safeguard that the law must provide is '*the guarantee of review by a judge or other independent and impartial judicial decision making body*'.
- (4) The reviewing body must be separate from the parties and must have power:
 - (a) to determine, before any material is handed over, a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and
 - (b) to prevent unnecessary access to information capable of disclosing the sources' identity if there is no overriding public interest.
- (5) In order to meet the requirements of Article 10, the independent review must take place before material is handed over. A system where the independent review only takes place after material is handed over '*would undermine the very essence of the right to confidentiality*'.
- (6) In every case where a public authority seeks to obtain confidential journalistic material, it should be open to the judge or independent reviewer to prevent disclosure of the material or to limit the information that may be provided.
- (7) The requirement to protect sources applies even where sources are not expressly named in the material sought to be obtained.

- (8) In urgent situations, 'a procedure should exist to identify and isolate, prior to the exploitation of the material by the authorities, information that could lead to the identification of sources from information that carries no such risk'.
93. In *Sanoma Uitgevers BV* the police were exercising their powers in full compliance with the requirements of Dutch domestic law. The terms of the domestic statute were 'accessible'. The authorities' decision to seize the applicant's journalistic material was referred to an independent judge acting in an advisory capacity, who indicated that he fully supported the police's decision to remove the material. Nevertheless, the Court described the powers as '*scarcely compatible with the rule of law*'.
94. By contrast, Schedule 7 TACT contains no 'legal procedural safeguards' whatsoever in relation to the seizure and analysis of confidential journalistic material. There is no mechanism for independent review of decisions by the police to remove and examine confidential journalistic material. It follows that Schedule 7 manifestly fails to meet the stringent requirements laid down by the Grand Chamber in *Sanoma Uitgevers BV*.

Protection of journalists' sources under English law

95. The importance of protecting journalistic material, and ensuring that any attempts to obtain access to such material are subjected to rigorous judicial oversight, are reflected in section 10 of the Contempt of Court Act 1981, which prevents a court from ordering a person to disclose the source of information contained in a publication for which he is responsible unless the court is satisfied that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime. They are also reflected in a long line of domestic authorities (see, for example, *X Ltd v Morgan-Grampian (Publishers)* [1990] 2 All ER 1; *Ashworth Hospital Authority v MGN Ltd* (2002) 12 BHRC 443; *Mersey Care NHS Trust v Ackroyd (No. 2)* [2007] EWCA Civ 101) as well as the additional protections afforded to journalists; sources in legislation such as PACE.
96. The English courts have emphasised the importance of ensuring that attempts to compel journalists to disclose confidential material take place in accordance with the law and give full weight to Article 10. In *R (Malik) v Manchester Crown Court* [2008] EWHC 1362 (Admin), [2008] 4 All ER 403 Dyson LJ emphasised that:
- The importance of the right and the weight of the justification required for an interference that compels a journalist to reveal confidential material about or provided by a source has been frequently stated both in Strasbourg and in

our courts. It is sufficient to refer to *Goodwin v UK* (1996) 1 BHRC 81 (paras 39 and 40) '[p]rotection of journalistic sources is one of the basic conditions for press freedom' and 'limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court'; *Tillack v Belgium* App no 20477/05 (27 November 2007, unreported) (para 53); *John v Express Newspapers* [2000] 3 All ER 257 at 265, [2000] 1 WLR 1931 at 1939 (para 27) where the court of appeal said: 'Before the courts require journalists to break what a journalist regards as a most important professional obligation to protect a source, the minimum requirement is that other avenues should be explored'; and *Ashworth Hospital Authority v MGN Ltd* [2002 UKHL 29 at [61], [2002] 4 All ER 193 at [61], [2002] 1 WLR 2033 where Lord Woolf CJ said that disclosure of a journalist's sources has a chilling effect on the freedom of the press and that the court will 'normally protect journalists' sources'.

97. Dyson LJ identified the approach that the court must adopt whenever the court is asked to make an order compelling a journalist to provide confidential journalistic information:

The correct approach to the art 10 issues as articulated in both the Strasbourg jurisprudence and our domestic law emphasises that (i) the court should attach considerable weight to the nature of the right interfered with when an application is made against a journalist; (ii) the proportionality of any proposed order should be measured and justified against that weight and (iii) a person who applies for an order should provide a clear and compelling case in justification of it.

Application of principles in the present case

98. The decision to seize the Claimant's journalistic material constituted an infringement of the Claimant's rights under Article 10(1).
99. For the reasons explained above, the infringement of that right was not '*in accordance with law*' for the purposes of Article 10(2). Nor did it pursue a legitimate objective or represent a proportionate restriction on the Claimant's right. Unlike the regime for obtaining production orders under Schedule 5 of TACT, Schedule 7 contains no mechanism for independent judicial oversight before journalistic material is seized and examined by the police. The Schedule 7 regime therefore fails to comply with the legal safeguards identified by the Grand Chamber in *Sanoma Uitgevers BV*. In addition, the fact that journalistic material may be seized for examination without prior warning or explanation is likely to have a seriously chilling effect on the ability and willingness of journalists to travel to and from the United Kingdom.

100. For all these reasons, the coercive powers under Schedule 7 and their application against the Claimant violate Article 10.

INTERIM RELIEF

101. The principles governing the grant of interim relief in judicial review proceedings are well established.
102. As in private law actions, the court must assess whether the 'balance of convenience' favours the grant of interim measures. In considering this question, the court '*shall choose the course which, in all the circumstances, appears to offer the best prospect that eventual injustice will be avoided or minimised*'. (*R v Secretary of State for Transport, ex p Factortame Ltd (No. 2)* [1991] 1 All ER 70, Per Lord Goff at 107).
103. In *National Commercial Bank Ltd v Olin Corporation Ltd* [2009] UKPC 16, [2009] 1 WLR 1405 the Privy Council summarised the principles applicable to the balance of convenience as follows:
16. The purpose of [an interim] injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding the injunction is more likely to produce a just result...
17. The basic principle is that the court should take whatever course seems likely to cause the least irremediable prejudice to one party or the other...
18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.
104. In the present case the Claimant will clearly suffer irremediable prejudice if the court does not grant an interim injunction to prevent the Defendants from disclosing, transferring, distributing or interfering with his confidential journalistic material. The very purpose of these proceedings is to protect the confidentiality of that material and to vindicate the Claimant's right not to have his journalistic material unlawfully seized, disrupted and shared with third parties.

105. On the other hand, the Defendants will not suffer significant prejudice if a temporary injunction is granted. The Defendants' public statements say that the objective of seizing the material was to prevent the Claimant from communicating it to third parties. Granting an interim injunction would not compromise that objective.
106. In the circumstances of this case, the objective of 'holding the ring' until the substantive hearing and avoiding irremediable prejudice to either party requires the court to grant interim relief in the terms sought by the Claimant. In particular, the Claimant asks the Court to make the following order that:
- (1) The Defendants shall not disclose, transfer, distribute or otherwise interfere with the data and other materials that were seized from the Claimant on 18 August 2013, pending determination of these proceedings.
 - (2) If the Defendants have granted possession of or access to the data seized from the Claimant to any other public authority or third party, either in the United Kingdom or abroad, the Defendants shall:
 - (a) Disclose the identity of each of those parties to the Claimant and confirm the material disclosed; and
 - (b) Take reasonable steps to obtain undertakings that the third party/parties will not disclose, transfer, distribute or otherwise interfere in any way with the data pending the determination of these proceedings.

PERMANENT RELIEF

107. At the conclusion of this claim the Claimant will ask the court to grant the following relief:

- (1) A declaration that the Defendants' actions in detaining, questioning and searching the Claimant and seizing his property were unlawful.
- (2) A mandatory order requiring the Defendants to destroy all data seized from the Claimant (including all copies of seized data) and to recall any of the Claimant's data that has been transferred to third countries.
- (3) A declaration that the Defendants' actions violated the Claimant's rights under Articles 5, 6, 8 and 10.
- (4) Payment of damages for unlawful detention and damages for breach of the Claimant's Convention rights under s 8 of the Human Rights Act.
- (5) A declaration of incompatibility under s 4 of the Human Rights Act in respect of Schedule 7 of the Terrorism Act 2000.
- (6) Further or other relief.

CONCLUSION

108. For the reasons outlined above, the Claimant invites the Court to:

- (1) Grant his application for permission to bring judicial review proceedings against the Defendants; and
- (2) Grant interim relief in the terms sought in the draft order.

Matthew Ryder QC
Edward Craven
Raj Desai

21 August 2013

Matrix Chambers