CO/11732/2013

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

IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW
BETWEEN

R
on the application of
DAVID MICHAEL DOS SANTOS MIRANDA

Claimant

and

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

Defendants

FIRST DEFENDANT'S GROUNDS FOR OPPOSING THE CLAIM

Introduction

1. At around 0805 on Sunday 18 August 2013 the claimant arrived at Heathrow airport on a flight from Berlin [A15]. He was intending to catch a connecting flight to Rio de Janeiro, where he lives (he is a Brazilian citizen). However, in the international transit area at Heathrow, officers of the second defendant, acting pursuant to Schedule 7 to the Terrorism Act 2000 ("Schedule 7"), detained him. At 0815 the officers served the claimant with a TACT1 Notice of Examination [B1-B2]. At 0815 the officers served him with a TACT2 Notice of Detention [B3]. The claimant was questioned and items of his property were detained. The detained items are listed in the Detained Property List [B3]: (i) Samsung laptop (ii) Samsung phone (iii) 1 x gold & 1 x silver memory stick (iv) 2 x DVDs (The Oath My Country My Country) (v) Sony games console (vi) Smart watch (vii) hard drive.

2. The claimant declined the offer of a duty solicitor and instead requested his own lawyer. That lawyer, Mr Kendall, arrived at Heathrow at 1525 and Mr Kendall attended the claimant at 1605. The claimant was released at 1703.

3. The second defendant has not returned any of the detained property to the claimant.

4. The claimant issued this claim for judicial review on 21 August 2013 [A1]. In it he claims that the detention of his person and property pursuant to Schedule 7 was unlawful. He seeks as final relief [A45]:

   (i) a declaration that the defendants' actions in detaining, questioning and searching the claimant and seizing his property were unlawful;

   (ii) 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;

   (iii) a declaration that the defendants' actions violated the claimant's rights under articles 5, 6, 8 and 10 ECHR;

   (iv) damages for unlawful detention and damages for breach of the claimant's Convention rights under s.8 of the Human Rights Act 1998;

   (v) a declaration of incompatibility under s.4 of the Human Rights Act 1998 in respect of Schedule 7;

   (vi) further or other relief.

5. In the claim form the claimant also sought interim relief until final determination of the proceedings [A9]. On 22 August 2013 the Divisional Court (Beatson LJ,

Parker J) [2013] EWHC 2609 (Admin) [tab 5] ordered that the hearing of the application for interim relief be listed on 30 August 2013 and that, pending the conclusion of that hearing, the defendants shall not inspect, copy, disclose, transfer, distribute (whether domestically or to any foreign government or agency) or interfere with the data held by the claimant and detained pursuant to Schedule 7 save:

(i) for the purpose of investigating whether the claimant is a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism; or

(ii) for the purpose of protecting national security, including by preventing or avoiding the endangering of the life of any person or the diminution of the counter-terrorism capability of Her Majesty's Government.

6. By a consent order made at a hearing on 30 August 2013, the Divisional Court (Laws LJ, Kenneth Parker J) ordered that until the determination of these proceedings or further order the defendants shall not copy, disclose, transfer, distribute (whether domestically or to any foreign government or agency) or interfere with the data held by the claimant and detained pursuant to Schedule 7 save:

(i) for the purpose of investigating whether the claimant is a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism or has committed an offence contrary to ss.58 or 58A of the Terrorism Act 2000 or the Official Secrets Acts 1911 and 1989; or

(ii) for the purpose of protecting national security, including by preventing or avoiding the endangering of the life of any person or the diminution of the counter-terrorism capability of Her Majesty's Government.

7. The Divisional Court on 22 August 2013 also ordered that there be a rolled up hearing and set a timetable for the proceedings. The Divisional Court's timetable was subject to the qualification that the first defendant was to notify the other parties by 1630 on 29 August if she intended to apply for a closed material procedure under s.6 of the Justice and Security Act 2013 and CPR Part 82. By letter dated 29 August 2013 the first defendant informed the other parties and the court that, having been obliged in the intervening period to give priority to her duty to protect national security, which had required her to devote her resources to the examination of the detained material and to other matters such that it had not been possible to date to conduct the necessary analysis to decide whether to apply for a closed material procedure, she had not decided to apply for a closed material procedure, or to make a claim for public interest immunity, but reserved the right to do so. That remains the first defendant's position.

8. Paragraph 3 of the Order of the Divisional Court made on 30 August directed that any application to intervene in these proceedings be made in writing, lodged with the court and served on all parties by 1630 on 5 September 2013. On 23 August 2013 Liberty lodged an application to intervene. At the time of writing, 2 other groups of persons, namely (i) Article 19, English PEN, Media Legal Defence Initiative and (ii) National Union of Journalists of the UK and Ireland, MGN Ltd, Independent Print Ltd, Index on Censorship, The International Federation of

Journalists, The Media Law Resource Center, have indicated an intention to intervene but have not formally applied to do so. The first defendant proposes to respond to the submissions of any intervener in her skeleton argument and at the rolled up hearing.

Legal framework

9. Section 53 of the Terrorism Act 2000 ("TA 2000") gives effect to Schedule 7 [tab 1].

10. Paragraph 2 of Schedule 7 permits an examining officer (which includes a constable: paragraph 1(1)(a)) to question a person who is at a port (this includes an airport: paragraph 1(2)), and whose presence at the port the officer believes is connected with his entering or leaving Great Britain, to question the person for the purpose of determining whether he appears to be a person falling within s.40(1)(b).

11. Section 40(1)(b) [tab 1], read with subs.(2), refers to a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism within the meaning given by s.1. Section 40 is, as its side note states, an interpretation section. It defines "terrorist" for the purposes of the 2000 Act. Subsection (1)(a) covers a person who "has committed" an offence under any of ss.11, 12, 15-18, 56-63.

12. Section 1 is another interpretation section. It defines "terrorism" for the purposes of the 2000 Act. That definition includes the use or threat of action anywhere in

the world that endangers another person's life if the use or threat is designed to influence any government or an international organisation and the use or threat is made for the purpose of advancing a political or ideological cause: subss.(1), (2)(c), (4)(a), (d) [tab 1]. Acts falling within s.1 may or may not, depending on the facts of the particular case, also amount to an offence under any of the sections listed in s.40(1)(a).

13. An examining officer may exercise his powers under paragraph 2 of Schedule 7 whether or not he has grounds for suspecting that a person falls within s.40(1)(b): paragraph 2(4).

14. For the purposes of exercising a power under paragraph 2 of Schedule 7, an examining officer may stop a person and detain him for a maximum of 9 hours: Schedule 7 paragraph 6(1), (4).

15. An examining officer may, for the purpose of determining whether he falls within s.40(1)(b), search the person and anything he has with him: Schedule 7 paragraph 8(1)(a), (b), (c).

16. Any property searched or found on a search under paragraph 8 may be detained by the examining officer (a) for the purpose of examination, for a period not exceeding 7 days beginning with the day on which the detention commences and/or (b) while he believes that it may be needed for use as evidence in criminal proceedings: Schedule 7 paragraph 11(1)(b), (2)(a), (b).

17. A power conferred by virtue of the Terrorism Act 2000 on a constable (a) is in addition to powers which he has at common law or by virtue of any other enactment, and (b) shall not be taken to affect those powers: s.114(1) [tab 1]. Where anything is seized by a constable under a power conferred by virtue of the 2000 Act, it may (unless a contrary intention appears) be retained for so long as is necessary in all the circumstances: s.114(3).

18. A person may disclose information to the intelligence services (meaning the Security Service, the Secret Intelligence Service and GCHQ: s.21(1)) for the purposes of the exercise by that service of any of its functions: Counter-terrorism Act 2008 s.19(1) [tab 2].

19. Section 21(2) [tab 2] gives the cross-reference to those functions. They include, in the case of the Security Service, the protection of national security and acting in support of the activities of police forces; and, in the case of the Secret Intelligence Service, obtaining and providing information relating to the actions or intentions of persons outside the British Islands and performing other tasks relating to the actions or intentions of such persons; and, in the case of GCHQ, obtaining and providing information derived from any equipment producing electromagnetic or other emissions or related to such emissions or equipment and from encrypted material. The provisions of s.19 are without prejudice to any rule of law authorising the obtaining, use or disclosure of information by any of the intelligence services: s.20(3).

20. Information obtained by an examining officer pursuant to Schedule 7 may be disclosed to the intelligence services pursuant to s.19 of the 2008 Act: *R (CC) v Metropolitan Police Commissioner et al* [2011] EWHC 3316 (Admin) [2012] 1 WLR 1913 [tab 6] paragraph 21.

Submissions

21. The claimant makes 4 principal complaints.

    (i) Schedule 7 does not apply to passengers in transit: paragraphs 53-68 of the claim form grounds [A28-A31].

    (ii) Schedule 7 is incompatible with articles 5, 6, 8 and 10 of the European Convention on Human Rights and Fundamental Freedoms: paragraphs 69-73 of the claim form grounds [A32-A33].

    (iii) The use of Schedule 7 in this case was for an improper purpose: paragraphs 46-52 of the claim form grounds [A24-A28].

    (iv) The use of Schedule 7 in this case breached the claimant's rights under articles 5, 6, 8 and 10 ECHR: paragraphs 74 [A34-A43] and 107(3) [A45] of the claim form grounds.

22. Before addressing those 4 complaints, the first defendant makes three preliminary points.

23. First, paragraph 7 of the claimant's pre-action protocol letter of 20 August 2013 [D2] sought the return of the detained property no later than 25 August. It is the second defendant who detained, and who retains, the claimant's property. The final relief sought by the claimant includes the destruction, but not the return, of

the data held on the claimant's property: paragraph 107 of the claim form grounds [A45]. This is a tacit acknowledgment by the claimant that it is not his data.

24. Second, the first defendant agrees that she is the proper defendant in respect of complaints (i) and (ii). These are points of law challenging the ECHR compatibility and the scope respectively of Schedule 7, and the first defendant is the appropriate person to defend the legislation and is properly joined pursuant to s.5 of the Human Rights Act 1998 and CPR 19.4A. Complaints (iii) and (iv) are complaints about the use of Schedule 7 in this particular case, and they are complaints about decisions of the second defendant. The police are independent of the first defendant. The first defendant makes this point because it is the constitutionally correct position. But the first defendant is not seeking in these proceedings to shift responsibility on to the second defendant. On the contrary, the first defendant liaised with the second defendant, as the second statement of Mr Robbins makes clear. Further, in order to avoid unnecessary procedural complications, the first defendant accepts responsibility in the present proceedings not only for her own Department but for the acts and omissions of Her Majesty's Government as a whole.

25. Three, there is some overlap between the 4 principal complaints, and in consequence also in the first defendant's submissions in response. In order to avoid repetition, the submissions are set out below under the particular complaint to which they most directly relate, but the first defendant's submissions should be considered as a whole in respect of all 4 of the principal complaints.

### (i) Transit passengers

26. Paragraph 2(2)(b) of Schedule 7 applies if the examining officer believes that the person's presence at the port or area "is connected to his entering or leaving" Great Britain or Northern Ireland or his travelling by air within Great Britain or within Northern Ireland. On both the ordinary natural reading of these words and a purposive construction of them, they refer to a physical entering or leaving (entry in fact).

27. The natural reading is plain. The claimant was "at a port" (paragraph 2(2)(a)). His presence at the port was as a result of his having flown to Great Britain from Berlin. Anyone other than a lawyer would agree that the claimant did enter Great Britain.

28. The purpose, and effectiveness, of Schedule 7 would be undermined if it did not apply to transit passengers. The claimant's restrictive construction does not "promote the policy and objects of the Act": *Padfield v Minister of Agriculture, Fisheries and Food* [1986] AC 997, 1030c per Lord Reid. It was the physical presence of the claimant, and of the property he had with him, that was the relevant fact. All the reasons for having Schedule 7 powers, namely to secure evidence which assists in the conviction of terrorists; to obtain intelligence about the terrorist threat; to disrupt or deter terrorist activity; to recruit informants (see paragraph 59 of the judgment in *Beghal v DPP* [2013] 2573 (Admin) (DC) [tab 7], citing the 2012 Report of the Independent Reviewer of Terrorism Legislation) apply equally to transit passengers. The fact that a passenger may intend to travel onward from Great Britain, whether or not he remains airside in the interim, is not

a reason for Schedule 7 not to apply. Indeed, in some cases the passenger's onward travel intentions may be part and parcel of his being concerned in the commission, preparation or instigation of acts of terrorism.

29. If, as appears to be the case, the claimant contends that, while in transit at Heathrow, he was within the jurisdiction for the purposes of article 1 ECHR and the Human Rights Act 1998, it is paradoxical that he is simultaneously contending that he was outside the jurisdiction for the purposes of Schedule 7.

30. Read in context, the function of the words in paragraph 2(2)(b), "is connected with his entering or leaving Great Britain or Northern Ireland or his travelling by air within Great Britain or Northern Ireland", is to confine it to (prospective) travellers. Hence the heading to Schedule 7: Port and Border Controls. But these controls are for terrorism, not immigration, purposes. The inclusion of persons travelling by air within Great Britain or within Northern Ireland underlines this.

31. The Terrorism Act 2000 itself makes clear that immigration control powers are separate from the powers conferred by Schedule 7: Terrorism Act 2000 s.53(3), Schedule 7 paragraph 15(3).

32. The claimant relies on s.11 of the Immigration Act 1971: paragraphs 54-56 of the claim form grounds [A28-A29]. But s.11 of the Immigration Act 1971 [tab 4] is not in point here. That section concerns legal entry (entry in law), which is an important concept in immigration control (see eg *R v Naillie* [1993] AC 674; *R (ST (Eritrea) v Home Secretary* [2012] UKSC 12 [2012] 2 AC 135), though even

in that context s.11 is not of universal application: *R v Javaherifard* [2005] EWCA Crim 3231 [2006] IAR 185 at [12] & [21] [tab 14]). But s.11 of the 1971 Act has no relevance to the powers of stop and search that are the subject of Schedule 7. Section 11(1) of the 1971 Act is expressly a deeming provision and s.11 expressly applies "for the purposes of [the 1971] Act". It does not apply for the purposes of Schedule 7: Terrorism Act 2000 ss.121-122 [tab 1]. If Parliament had intended s.11 of the Immigration Act 1971 to apply to Schedule 7, it would expressly have so provided, as it did in s.11(3) of the Nationality, Immigration and Asylum Act 2002, in respect of the British Nationality Act 1981, and in s.2(14) of the Asylum and Immigration (Treatment of Claimants etc) Act 2004.

33. Examining officers are given express power to board an aircraft which has "arrived" to exercise their Schedule 7 powers: Schedule 7 paragraphs 2(3), 6(2) and 15(2)(c); Schedule 14 paragraph 2, read with s.121. This is no doubt to remove any uncertainty as to the possible special position in law of a person aboard an aircraft. It provides no support for the claimant's argument that "entering" in paragraph 2(2)(b) is being used in the technical sense that applies in the Immigration Act 1971.

**(ii) Declaration of incompatibility**

34. On 28 August 2013 the Divisional Court (Gross LJ, Swift and Foskett JJ) in *Beghal* [tab 7] held that Schedule 7 is compatible with articles 5, 6 and 8 ECHR. See in particular paragraphs 91-109, 113, 133. Article 10 ECHR was not in issue in *Beghal*. Ms Beghal has applied for permission to appeal to the Supreme Court.

35. The claimant acknowledged at paragraph 71 of his grounds [A33] that "any submissions made at this stage will have to be reconsidered in light of the judgment in [*Beghal*]". A Divisional Court will follow the decision of another Divisional Court unless convinced that the earlier judgment is wrong: *R v Greater Manchester Coroner ex p Tal* [1985] QB 67, 79e-81e (DC). It cannot sensibly be contended that that stringent test is met here. Accordingly, the first defendant does not make any more detailed submissions on the second complaint so far as it alleges the Schedule 7 is incompatible with articles 5, 6 or 8 ECHR.

36. As regards the compatibility of Schedule 7 with article 10 ECHR, the first defendant submits as follows.

37. The purpose of Schedule 7 is to carry out terrorism checks at a port or border. Its purpose is not to obtain evidence to use in legal proceedings. Schedule 7 is accordingly not comparable (in pari materia) to Schedule 5 to the Terrorism Act 2000 or to Schedule 1 to the Police and Criminal Evidence Act 1984. In plain English, Schedule 5 and Schedule 7 are doing different jobs. That is why Schedule 7, in contrast to both Schedule 5 to the 2000 Act and to Schedule 1 to PACE [tab 4], contains no provision to deal with excluded, special procedure or legally privileged material.

38. Schedule 5 to the 2000 Act is given effect by s.37. Section 37 is in Part IV (ss.32-39) of the 2000 Act. Part IV is headed "Terrorist Investigations". Section 32 defines "terrorist investigation" as the investigation of, among other things, "(a) the commission, preparation or instigation of acts of terrorism". In order to obtain

a warrant to search premises, or an order requiring a person to produce material, under Schedule 5, a constable and a justice or circuit judge, as the case may be, must have "reasonable grounds for believing" that the warrant or order would yield material of substantial value to the investigation: paragraphs 1(3), (5), 2(2), 2A(1), 3(6), 6(2), 7(1)(b), 11(4), 12(2), (2A), (3), (4), 15(2), 16(1). Further, paragraph 6(3) includes a public interest test. And paragraphs 8(1)(a), 11(3)(a), 12(2)(a), (2B), 13(2) provide that a warrant or order shall not confer any right to production of, or access to, items subject to legal privilege. Note that Part IV and Schedule 5 are concerned with police powers, and thus "terrorist investigations" here means investigations by the police.

39. Schedule 7 contains no equivalent provision. The conclusion is inescapable that Parliament did not include such equivalent provision in Schedule 7 because Schedule 7 is not in pari materia to Schedule 5 – and for the same reasons is not in pari materia to Schedule 1 to PACE.

40. It is true that material found on a Schedule 7 search may be used in evidence in legal proceedings: *R v Hundal and Dhaliwal* [2004] EWCA Crim 389 [2004] 2 CAR 307. But the Court of Appeal in *Hundal and Dhaliwal* expressly distinguish material found on a search, on the one hand, from answers to questions or material obtained under a production order on the other hand: [18-19]. Further, the Divisional Court in *Beghal* said at [138] that "there is (currently) no specific statutory bar precluding the introduction in evidence in subsequent criminal proceedings of admissions obtained pursuant to a Schedule 7 examination. But, in our judgment, it is fanciful to suppose that permission would be granted in

criminal proceedings for such admissions to be adduced in evidence." See too the Divisional Court's further comment at [146].

41. If, following a Schedule 7 stop, material comes to light that gives rise to a criminal investigation, then the course of that investigation, and of any subsequent criminal proceedings, are governed by provisions other than Schedule 7. It is those other provisions, and not Schedule 7, that would need to be considered if any challenge was made to the course of the criminal investigation or proceedings.

42. The same reasoning applies in respect of use of the material that the first defendant is currently making for the protection of national security. If any challenge is to be made to that, it must be a challenge to those national security functions, not to the use of Schedule 7.

**(iii) Improper purpose**

43. The claimant alleges that Schedule 7 "appear[s] to have been exercised ... in order to retrieve the material in his possession which may have originated from Mr [Edward] Snowden; and/or to question the Claimant in relation to his involvement in those disclosures": paragraph 49 of the claim form grounds [A24]. The claimant further alleges that this was done in order to "bypass the appropriate statutory regimes for obtaining confidential journalistic information and circumvented the important statutory safeguards (including the requirement to obtain a court order before seizing material) contained in those mechanisms": paragraph 52(7) of the claim form grounds [A27-A28].

44. There are two components to this second complaint. One, an allegation that the defendants acted for a purpose outwith Schedule 7. Two, an allegation that the defendants bypassed the statutory regimes for obtaining journalistic material.

45. As regards the first component, the second defendant stopped, questioned and searched the claimant under Schedule 7 for the purpose of determining whether he appeared to be a person concerned in the commission, preparation or instigation of acts of terrorism. Acts of terrorism include among other things the use or threat of action that is designed to influence a government or international governmental organisation and which endangers a person' life. The phrase "concerned in" is a wide one, apt to include encouraging or assisting crime (as to which, see Part 2 (ss.44-67) of the Serious Crime Act 2007). The first defendant's reasoning is set out in the second statement of Mr Robbins, the Deputy National Security Adviser for Intelligence, Security and Resilience in the Cabinet Office.

46. As regards the second component, Schedule 7 was not used in this case to bypass statutory regimes for obtaining confidential journalistic information. The first defendant makes four submissions on this point.

47. One, as mentioned above, Schedule 7 is not in pari materia to Schedule 5, so the question of bypassing Schedule 5, or Schedule 1 to PACE, does not arise.

48. Two, there was at the time no terrorist investigation underway. Schedule 5 therefore had no possible application.

49. Three, to the best of the first defendant's knowledge and belief, the detained property does not include any journalistic material. The first statement of Mr Robbins, dated 27 August 2013, says at paragraph 6 that "no information that has so far been analysed by Her Majesty's Government has identified a journalist source or has contained any items prepared by a journalist with a view to publication. The information that has been accessed consists entirely of misappropriated classified UK intelligence documents. I can confirm that the disclosure of this information would cause harm to UK national security". That remains the position.

50. Now, as mentioned at paragraph 45 above, the use of Schedule 7 in the present case was for the purpose of determining whether the claimant appeared to be a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism, such as the use or threat of action that is designed to influence a government or international governmental organisation and which endangers a person's life. As explained in Mr Robbins' statements, that action might involve publishing or threatening to publish articles in the press which produced or described material the unauthorised disclosure of which could harm national security. But it does not follow that the detained material was journalistic material.

51. If a thief steals an unpublished manuscript from a famous novelist, intending to publish a scoop about the forthcoming book, that does not make the manuscript journalistic material. Why not? The thief "acquired [the manuscript] for the purposes of journalism": s.13(1) of PACE. The first defendant submits that the

answer is an application of the principle that a person should not benefit from his own wrongdoing (*Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government* [2011] UKSC 15 [2011] 2 AC 304 contains a recent authoritative exposition of the law). In the present context, the wrongdoing is twofold. A handler of stolen goods is as much a wrongdoer as the thief (and being a journalist is not a defence to a charge of handling stolen goods) and, a person using, or intending to use the goods for a criminal purpose, here to be involved in the commission etc of acts of terrorism, is equally a wrongdoer for this purpose.

52. It is irrelevant in this context whether what Mr Snowden took (to use a neutral word) was in law property, for that is not determinative of whether he is properly categorised as a wrongdoer. See *Fairstar Heavy Transport NV v Adkins et al* [2013] EWCA Civ 886 [tab 15] for an illuminating examination of the developing law of information as property and of the importance of identifying the relevant issue in the particular case in question.

53. There is no evidence that the data on the detained material was "acquired for the purposes of journalism". The data did not belong to the claimant, as he tacitly concedes by not asking for its return (paragraph 23 above refers). The claimant is not a journalist. There is no evidence at all from the claimant in the present proceedings. The claimant did not when questioned under Schedule 7 say that he had acquired the data for the purposes of journalism. The reference in paragraph 11 of the claim form grounds [A15] to "assist[ing] Mr Greenwald in his journalistic work" is too insubstantial to bear any weight. And the files were

stolen from the first defendant and others. The files therefore cannot have been held in confidence by the claimant vis-à-vis the first defendant (or vis-à-vis any other true owner). See the second statement of Mr Robbins. There is no factual foundation for a finding that the detained material was journalistic material.

54. The claimant cannot have it both ways. Either he is an innocent courier, in which case he had not acquired the material for journalistic purposes. Or he was party to what was ex hypothesi the commission etc of acts of terrorism. The key point here is that the use of Schedule 7 in the present case was in these circumstances not for the improper purpose of bypassing the statutory provisions on gaining access to journalistic material, for it was not the purpose of the defendants to gain access to journalistic material.

55. Four, the request of the first defendant, and the decision of the second defendant, to use Schedule 7 was for a lawful purpose, namely to determine whether the claimant appeared to be a person falling within s.40(1)(b). It was not the purpose of either defendant to obtain journalistic material.

**(iv) Breach of human rights**

56. The claimant alleges breaches of article 5, 6, 8 and 10 ECHR. The crux of the claimant's case is article 10, and it is convenient to take that first. For reasons that will become apparent, it will then be possible to deal with articles 5, 6 and 8 in relatively short order.

57. First, some introductory remarks. This is an unorthodox complaint. As previously mentioned, there is no evidence from the claimant himself. Paragraphs 69-73 of the claim form grounds [A32-A33] contain generalised statements of complaint. Paragraph 11 of the claim form grounds [A15] implicitly concedes that the claimant is not a journalist. That paragraph asserts that the claimant "regularly assists Mr [Glen] Greenwald in his journalistic work and was doing so at the time he was stopped and detained". Mr Greenwald is not a party to these proceedings.

58. In respect of article 10 ECHR, there is no factual foundation for a finding that the claimant intended to use the detained material for publication. There is therefore no factual foundation for a finding that the defendants interfered with the claimant's freedom to impart, or with any third party's freedom to receive, information.

59. Even if, contrary to the first defendant's case, the defendants did interfere with the claimant's or a third party's freedom of expression, that interference was prescribed by law (namely by Schedule 7), and was for legitimate aims of the interests of national security and/or for the prevention of crime and/or for the protection of the rights of others (namely those who would be endangered by the disclosure of the data) and/or for preventing the disclosure of information received in confidence (namely classified documents).

60. It was also necessary in a democratic society, or in other words a proportionate measure on the facts of the case. This is for the following reasons.

61. Even if the data was journalistic material, article 10 ECHR does not require as a rule of law that there must always be judicial scrutiny prior to seizure of the material. What matters is whether there was an interference with freedom of expression and, if so, whether it was in accordance with the law, pursued a legitimate aim and was a proportionate measure in the circumstances. That requires an investigation of the facts of the particular case, not the application of a blanket rule of law. This can be seen from an examination of the relevant Strasbourg case law.

62. In *Nordisk Film v Denmark*, application 40485/02 (2005) [tab 8] the European Court of Human Rights (First Section) dismissed as manifestly ill-founded and thus inadmissible a complaint by a television company about a judicial order to disclose unbroadcast documentary film about a paedophile group. The Court found that the courts had given relevant and sufficient reasons for their decision, which had been a proportionate one on the facts of the case.

63. The documentary was filmed covertly, which led the court to say at p.10:

> Seen in this light, the applicant company was not ordered to disclose its journalistic source of information. Rather it was ordered to hand over part of its own research-material. The Court does not dispute that Article 10 of the Convention may be applicable in such a situation and that a compulsory hand over of research material may have a chilling effect on the exercise of journalistic freedom [citation omitted]. However, this matter can only be properly addressed in the circumstances of a given case.
>
> On the other hand, the Court is not convinced that the degree of protection under Article 10 of the Convention to be applied in a situation like the present one can reach the same level as that afforded to journalists when it comes to their right to keep their sources confidential, notably because the latter protection is two-fold, relating not only to the journalist but also and in particular to the source who volunteers to assist the press in informing the public about matters of public interest.

64. To pursue the point about the relevance of seeking to identify a journalistic source, in *Telegraaf Media Nederland Landelijke Media BV et al v Netherlands*, application No.39315/06 (2012) 34 BHRC 193 [tab 9] the Court observed at [86] (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 [adopted by the Committee of Ministers of the Council of Europe] (quoted in paragraph 61 above)".

65. An analysis of the relevant cases clearly identifies that the Court attaches importance to the identification of a journalist source, and not simply information which may be used for the purposes of journalism.

66. The *Telegraaf Media* case concerned an article that had been published about the Netherlands General Intelligence and Security Service, suggesting that highly classified information had been leaked to criminals. In that case, the journalists were ordered to surrender the documents pertaining to the activities of the security services and the journalists were also subject to telephone tapping and surveillance. In finding that there was a violation of article 10, the Court was of the opinion that the case was characterised by the targeted surveillance of journalists in order to determine whence they had obtained the information: [97]. The Court found that the law did not provide safeguards appropriate "to the use of powers of surveillance against journalists with a view to discovering their journalistic sources": [102]. The Court similarly found a violation of Article 10 in respect of the use of an order to surrender documents, stating that the respondent

government's need was not "sufficient to find that it constituted a 'an overriding requirement in the public interest' justifying the disclosure of the applicant's journalistic source".

67. *Goodwin v United Kingdom* (1996) 22 EHRR 123 concerned the provision of information by a source to a journalist relating to financial problems at Tetra Ltd. The company had been granted an injunction which ordered the disclosure of the journalist's notes from a telephone conversation, thereby identifying his source. The journalist was subsequently fined for contempt of court having failed to comply with the order. In finding that there had been a breach of article 10, the Court noted that: "Protection of journalistic sources is one of the basic conditions for press freedom...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 article 10 of the Convention unless it is justified by an overriding requirement in the public interest": [39]. The Court found that, in light of an injunction preventing publication of the information already having been granted, the additional restriction on freedom of expression which the disclosure order entailed could not be regarded as having been necessary in a democratic society: [46].

68. *Roemen and Schmit v Luxembourg*, application No.51772/99 (2003) [tab 10] concerned an article that had been published concerning allegations of tax fraud by a Minister. The underlying documents were said to have been obtained in breach of professional confidence and the investigating judge issued search warrants

relating to the journalist's home and workplace. The Court was of the opinion that the searches "were intended to establish the identities of the Registration and State-Property Department officials who had worked on the file … to establish the identity of the person responsible for the breach of confidence, in other words, the journalist's source": [47]. The Court therefore found a breach of article 10, considering that that the Government had not shown that the balance between the competing interests "namely the protection of sources on the one hand and the prevention and punishment of offences on the other, was maintained": [58].

69. *Financial Times Ltd et al v United Kingdom*, application No.821/03 (2009) [tab 11] concerned the leaking of a documents relating to a potential takeover bid to various news and media organisations. The company concerned, Interbrew, sought an order requiring the applicants to serve a witness statement setting out the names and addresses of every person who had provided them with the relevant documents and, if their identities were not known, the circumstances in which they received the documents, to the best of their knowledge. In finding that there had been a breach of article 10, the Court emphasised that a "chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources" and it was sufficient that the information or assistance was required under the disclosure order for the purpose of identifying 'X'. The company's interest in eliminating the threat of damage through future dissemination of material was not sufficient to outweigh "the public interest in the protection of journalists' sources": [70-71].

70. *Weber and Saravia v Germany* (2006) 46 EHRR SE5 47 [tab 12] concerned an amendment to an act known as the "G10 Act" which allowed for the strategic monitoring of communications. This permitted the collecting of information by intercepting communications in order to identify and avert serious dangers facing the Federal Republic of Germany, such as armed attacks on its territory or the commission of international terrorist attacks and certain other serious offences. The first applicant was a freelance journalist and the second applicant took telephone messages for the journalist. The first applicant submitted that the amended act prejudiced the work of journalists investigating issues targeted by surveillance measures. She argued that she could no longer guarantee that the information she received in the course of her journalistic activities remained confidential. The Court dismissed the application as manifestly ill-founded. The Court found that the interference was prescribed by law and pursued a legitimate aim. In consideration of whether such interference was necessary in a democratic society, the Court noted that surveillance was not aimed at monitoring journalists and were not directed towards uncovering journalistic sources. The judgement states:

> 151. The Court observes that in the instant case, strategic monitoring was carried out in order to prevent the offences listed in section 3(1). It was therefore not aimed at monitoring journalists; generally the authorities would know only when examining the intercepted telecommunications, if at all, that a journalist's conversation had been monitored. Surveillance measures were, in particular, not directed at uncovering journalistic sources. The interference with freedom of expression by means of strategic monitoring cannot, therefore, be characterised as particularly serious.
>
> 152. It is true that the impugned provisions of the amended G 10 Act did not contain special rules safeguarding the protection of freedom of the press and, in particular, the non-disclosure of sources, once the authorities had become aware that they had intercepted a journalist's conversation. However, the Court, having regard to its findings under Article 8, observes that the impugned provisions contained numerous safeguards to keep the interference with the secrecy of telecommunications – and therefore with the freedom of

> the press – within the limits of what was necessary to achieve the legitimate aims pursued. In particular, the safeguards which ensured that data obtained were used only to prevent certain serious criminal offences must also be considered adequate and effective for keeping the disclosure of journalistic sources to an unavoidable minimum. In these circumstances the Court concludes that the respondent State adduced relevant and sufficient reasons to justify interference with freedom of expression as a result of the impugned provisions by reference to the legitimate interests of national security and the prevention of crime. Having regard to its margin of appreciation, the respondent State was entitled to consider these requirements to override the right to freedom of expression.

71. The Court has distinguished *Weber and Saravia* in a number of cases concerning the identification of journalists' sources precisely because, as in the instant case, the intention of the respondent government was not to obtain the identity of the source. For example, in *Telegraaf Media* the Court said at [97]:

> The present case is characterised precisely by the targeted surveillance of journalists in order to determine from whence they have obtained their information. It is therefore not possible to apply the same reasoning as in *Weber and Saravia*.

72. The Strasbourg case law therefore attached particular importance to attempts to identify a journalist's source. This concern is not a feature of the present case. It is public knowledge that Mr Snowden took classified material.

73. Returning to *Nordisk*, the Court also took into account the need to protect the (potential) victims of crime, saying at p.12:

> In that connection, the Court considers that the obligation on Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction, the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals [citation omitted]. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge [citation omitted].

74. *Nordisk* was one of the two cases cited by the Grand Chamber in *Sanoma v Netherlands*, application 38224/03 (2010) at its key paragraph [92]. The other case cited in that paragraph was *Wieser and Bicos v Austria* (2007) 46 EHRR 1343. *Wieser* was not a case about journalists or article 10. It was an article 8 "correspondence" case about a search of a lawyer's office. *Wieser* does not throw any light on the present case.

75. *Sanoma* was another case concerning a challenge to a court order against a publisher to deliver up material, here photographs of an illegal car race. The Grand Chamber found a breach of article 10 because Dutch law did not provide adequate safeguards: paragraphs 88-100. The key paragraphs of the judgment are 91-92. The claimant seeks to interpret *Sanoma* as imposing a blanket rule of law that there must always be a court order (see paragraph 52(7) of the claim form grounds [A28]) before journalistic material is seized. But the Grand Chamber's judgment must be read in the context of the facts of that case. It was about seizure of material for use as evidence in a criminal investigation. It was not concerned with terrorism. The magazine was not alleged to be party to the criminal activity being investigated. The photographers were themselves acting lawfully in taking the photographs.

76. On 16 July 2013 the Court (Fourth Section) gave judgment in *Nagla v Latvia*, application 73469/10 [tab 13]. The applicant was journalist. She received information and data from an anonymous source, concerning security flaws in the database of the Revenue Service. The police obtained a warrant from a prosecutor to search the applicant's home, and seized material. The following day, a court

retrospectively approved the warrant. The Court's assessment is at paragraphs 78 ff, though the whole judgment repays reading in full. It would take up too much space to set out all relevant passages from the judgment here. The Court considered *Nordisk*, *Telegraaf Media*, *Goodwin*, *Financial Times*, *Roemen*, *Sanoma* and other cases. The Court concluded, at [91], that on the facts of the case a retrospective court approval of the warrant was "prescribed by law". However, the Court concluded at [102] that the reasons given by the Latvian court were not "relevant and sufficient". The important point for present purpose is that it turned on the facts of the particular case. *Nagla* is inconsistent with the claimant's submission that there must always by prior independent scrutiny before journalistic material is seized.

77. On the facts of that case, the Court attached importance to, among other things, the lack of urgency (the application was made almost 3 months after the authorities learned of the material: [98-100]), and that the applicant was a mere witness ([101]).

78. Once it is recognized that article 10 ECHR imposes no blanket rule of law requiring prior judicial approval before seizure of journalistic material, attention can properly be focussed on the question of proportionality, and on whether relevant and sufficient reasons have been given for the decision under challenge. For the avoidance of doubt, the first defendant repeats the submission at paragraph 49 above that there is no evidence in this case that the claimant had, or that the defendants sought to obtain, journalistic material.

79. Mr Robbins' second statement explains why Schedule 7 was used in this case. On the premise that Schedule 7 was used for a proper purpose, then the lack of feasible alternatives; the urgency; the gravity of what was at stake; the narrow window of opportunity; the absence of any attempt to identify journalistic sources or to curb the freedom of the press; constitute relevant and sufficient reasons for the proportionate action that was taken.

80. Turning to article 5 ECHR, if as the first defendant submits must be the case, the court proceeds on the footing that *Beghal* [tab 7] is correctly decided, then Schedule 7 is compatible with article 5 ECHR and the claimant was detained in accordance with a procedure prescribed by law in order to secure the fulfilment of an obligation prescribed by law (article 5(1)(b) ECHR): *Beghal* paragraph 113. The live issue here is therefore the proportionality of its use in this case. The claimant was detained for almost the maximum 9 hours permitted by paragraph 6(4) of Schedule 7.

81. As stated at paragraph 24 above, the use of Schedule 7 in this case was by the second, and not by the first, defendant. It was in the circumstances that pertained legitimate for the police to detain the claimant while attempts were made to identify the material he was carrying: see *Ramsingh v Attorney General of Trinidad and Tobago* [2012] UKPC 16 [tab 16].

82. As regards article 6 ECHR, the claimant's complaint is not that he has been deprived of his property. It is that he has been subject to "coercive questioning": paragraph 72(2) of his grounds [A33].

83. The first defendant submits that the claimant's rights under this article were not engaged, for the reasons set out at paragraphs 124-133 of the judgment in *Beghal* [tab 7]. The submissions made above about Schedule 7 not being in part materia with Schedule 5 are relevant here too.

84. As regards article 8 ECHR, in the absence of evidence from the claimant, there is factual foundation for a finding that the use of Schedule 7 in this case breached the claimant's right to respect for his private life or correspondence, even if, which the first defendant does not concede, it amounted to an interference with that right (as to which, see paragraphs 28 and 93(i) of *Beghal*). It should also be noted that, as mentioned at paragraph 23 above, the claimant implicitly concedes that it is not his data (and therefore not his "correspondence") that was held on the detained property. It may further be noted that in *Nagla*, the Court did not consider it necessary to examine the complaint under article 8 ECHR: [103-104].

**Relief**

85. Even if, contrary to the first defendant's submissions, the court were to find that the use of Schedule 7 in this case was unlawful, the court should nevertheless refuse the claimant any relief beyond a declaration that the use of Schedule 7 in this case was unlawful and damages for unlawful detention.

86. The first defendant resists any grant of relief that would order her to destroy the data, and copies of it, and to use her best endeavours to recall the data from third parties to whom it had been passed. This is for two reasons.

87. One, the defendants' access to and use of the data was and is lawful even if the use of Schedule 7 in this case was unlawful.

88. The defendants have statutory and common law duties to protect life, to prevent crime, to protect national security: see, for example, the Security Service Act 1989; the Intelligence Services Act 1994 and the Regulation of Investigatory Powers Act 2000. For the purpose of discharging those duties, the defendants need to be able to act upon information that they acquire, including by decrypting it. Hence s.114 of the Terrorism Act 2000 and s.59 of the Criminal Justice and Police Act 2001.

89. Take a hypothetical example. If there was an unlawful Schedule 7 stop in which was seized a paper containing the code to deactivate a ticking bomb, the defendants would not only be permitted, they would be duty bound, to act on that information. So a finding that the use of Schedule 7 is unlawful cannot of itself require a court to grant the claimant as of right (ex debito justitiae) the relief he seeks at paragraph 107(2) of his claim form grounds [A45], namely 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".

90. On the evidence in the present case, namely the statements of Mr Robbins, the statement of DSupt Goode, there is a compelling need for the defendants to be able to continue to access and to make use of the data (including by being able to

disclose the data to appropriate third parties, including non-UK third parties, and/or to seek the assistance of appropriate third parties to access it), to protect national security and to prevent and to investigate crime. This provides powerful, the first defendant submits overwhelming, grounds for the court to refuse to grant any relief that would have the effect of preventing the defendants from making use of the data, including by granting access to or seeking assistance from third parties.

91. The second reason why the first defendant resists any grant of relief that would order her to destroy the data, and copies of it, and to use her best endeavours to recall the data from third parties to whom it had been passed is that the evidence before the court is that the data is not the claimant's data. It is the first defendant's data. It would be worthy of Lewis Carroll if the first defendant were required to destroy, and to recall from third parties, her own data.

Conclusion

92. The first defendant submits that the court should dismiss this claim for judicial review.

93. If the court were to find that the use of Schedule 7 was unlawful here, the court should not grant the claimant any relief other than damages for unlawful detention and a declaration that the use of Schedule 7 in this case was unlawful, and that declaration should record that the first defendant may continue to use the data for the purposes permitted by the order made by consent on the application for interim relief, namely that the defendants shall not copy, disclose, transfer, distribute

(whether domestically or to any foreign government or agency) or interfere with the data held by the claimant and detained pursuant to Schedule 7 save:

(i) for the purpose of investigating whether the claimant is a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism or has committed an offence contrary to ss.58 or 58A of the Terrorism Act 2000 or the Official Secrets Acts 1911 and 1989; or

(ii) for the purpose of protecting national security, including by preventing or avoiding the endangering of the life of any person or the diminution of the counter-terrorism capability of Her Majesty's Government.

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24 September 2013

CO/11732/2012

R
on the application of
DAVID MICHAEL DOS SANTOS MIRANDA

and

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

FIRST DEFENDANT'S LIST OF AUTHORITIES

1. Terrorism Act 2000 ss.1, 40, 53, 58, 58A, 63A, 114, Schedule 7
2. Counter-terrorism Act 2008 ss.19-21
3. Police and Criminal Evidence Act 1984 ss.8-14, Schedule 1
4. Immigration Act 1971 s.11
5. R (Miranda) v Home Secretary et al [2013] EWHC 2609 (Admin)
6. R (CC) v Metropolitan Police Commissioner [2012] 1 WLR 1913
7. Beghal v DPP [2013] 2573 (Admin)
8. Nordisk Film v Denmark (2005)
9. Telegraaf Media Nederland Landelijke Media BV et al v Netherlands, application No.39315/06 (2012) 34 BHRC 193
10. Roemen and Schmit v Luxembourg, application No.51772/99 (2003)
11. Financial Times Ltd et al v United Kingdom, application No.821/03 (2009)
12. Weber and Saravia v Germany (2006) 46 EHRR SE5 47
13. Nagla v Latvia (2013)
14. R v Javaherifard [2006] IAR 185
15. Fairstar Heavy Transport NV v Adkins et al [2013] EWCA Civ 886
16. Ramsingh v Attorney General of Trinidad and Tobago [2012] UKPC 16

CO/11732/2013

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

IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW

R
on the application of
DAVID MICHAEL DOS SANTOS MIRANDA

Claimant

v

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

Defendants

**FIRST DEFENDANT'S GROUNDS FOR OPPOSING THE CLAIM**

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Ref: Z1317427/ZER/B4