Neutral Citation Number: [2016] EWCA Civ 6

Case No: C1/2014/0607

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEENS BENCH DIVISION
DIVISIONAL COURT
CO117322013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/01/2016

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE RICHARDS
and
LORD JUSTICE FLOYD

- -

Between :

REGINA (DAVID MIRANDA)	**Appellant**
- and -	
(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondents**
(2) COMMISSIONER OF POLICE OF THE METROPOLIS	
(1) LIBERTY	**Interveners**
(2) ARTICLE 19, ENGLISH PEN AND THE MEDIA LEGAL DEFENCE INITIATIVE	

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Matthew Ryder QC, Daniel Squires and Edward Craven (instructed by **Bindmans LLP**) for the **Appellant**
Steven Kovats QC and Julian Blake (instructed by the **Government Legal Department**) for the **First Respondent**
Jason Beer QC, Ben Brandon and Ben Watson (instructed by the **Directorate of Legal Services, Metropolitan Police**) for the **Second Respondent**
Alex Bailin QC and Ben Silverstone for the **First Intervener** (intervening by written submissions only)

Can Yeginsu and Anthony Jones for the **Second Intervener** (intervening by written submissions only)

Hearing dates : 08 & 09/12/2015

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Approved Judgment

Master of the Rolls:

INTRODUCTION

1. I cannot improve on the introduction to the judgment of Laws LJ (with which Ouseley and Openshaw JJ agreed). He said:

> "1. This case arises from the detention of the claimant by officers of the Metropolitan Police at Heathrow Airport on 18 August 2013, purportedly under paragraph 2(1) of Schedule 7 to the Terrorism Act 2000. He was questioned and items in his possession, notably encrypted storage devices, were taken from him. He says that all this was done without any legal authority.
>
> 2. The claim raises three questions. The first is whether, on the facts of the case, the power conferred by para 2(1) of Schedule 7 to the Terrorism Act 2000 to stop and question a person at a port or border area for the purpose of determining whether he appears to be "concerned in the commission, preparation or instigation of acts of terrorism" allowed the police to stop Mr Miranda on 18 August. The second is whether, if it did, the use of the power was nevertheless disproportionate to any legitimate aim. The third is whether upon its true construction the para 2(1) power is repugnant to the right of freedom of expression guaranteed by Article 10 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention").

THE TERRORISM ACT 2000 ("TACT")

2. Section 1 provides:

"(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. Section 40 provides:

"(1) In this Part 'terrorist' means a person who—
...
(b) is or has been concerned in the commission, preparation or instigation of acts of terrorism."

4. Schedule 5 is material to the issue of proportionality and the fourth ground of appeal. It is not necessary to set it out here. I have set out the material parts of it at para 85 below.

5. Schedule 7 provides in part:

"1

In this Schedule 'examining officer' means any of the following—

(a) a constable...

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) 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…….

(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).

5

A person who is questioned under paragraph 2... must—
(a) give the examining officer any information in his possession which the officer requests;

(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.

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(1) For the purposes of exercising a power under paragraph 2 or 3 an examining officer may-

(a) stop a person or vehicle;

(b) detain a person.

…….

(4) A person detained under this paragraph shall …..be released not later than the end of the period of nine hours beginning when his examination begins"

THE FACTS

6. The following account of the facts is derived to a considerable extent from the judgment of Laws LJ. Mr Miranda is a Brazilian citizen and the spouse of Mr Glenn Greenwald, a journalist who at the material time was working for the *Guardian* newspaper. Some months after an initial contact made in late 2012 Mr Greenwald and another journalist, Laura Poitras, met Mr Edward Snowden. He provided them with encrypted data which had been stolen from the National Security Agency (NSA) of the United States. The data included UK intelligence material. Some of it formed the basis of articles in the *Guardian* on 6 and 7 June 2013 and on later dates. On 12 August 2013, Mr Miranda travelled from Rio de Janeiro to Berlin in order to meet Laura Poitras. He was carrying encrypted material derived from the data obtained by Mr Snowden. He was to collect computer drives containing further such material. He was doing it in order to assist in the journalistic activity of Mr Greenwald. He was stopped at 08.05 on Sunday 18 August 2013 at Heathrow where he was in transit on his way back to Rio de Janeiro.

7. The Security Service (for which the first defendant Secretary of State is responsible by statute) had undertaken an operation relating to Mr Snowden. They became aware of Mr Miranda's movements. At 08.30 on Thursday 15 August 2013 they briefed Detective Superintendent Stokley of SO 15, the Counter-Terrorism Command in the Metropolitan Police ("MPS"), the second defendant.

8. The Security Service told him that one of the individuals involved in disseminating the stolen intelligence material was Mr Greenwald, a freelance journalist for the *Guardian*, that Mr Miranda was married to him and was travelling from Berlin to Rio and may have some sensitive material in his possession. As Det Supt Stokley put it at para 10 of his first witness statement dated 23 September 2013, the Security Service wanted to explore "the various options around seizure and analysis of this material and what police colleagues could do to assist with that process."

9. Det Supt Stokley wanted to initiate further inquiries to see whether Mr Miranda or others had committed any criminal offences (including terrorist offences). He had a meeting with the Ports Team SO 15 officers who were responsible for Schedule 7 stops. They agreed that the best way to achieve the objectives of both the Security Service and SO 15 would be to conduct a port stop in this case. Det Supt Stokley then addressed his mind as to how SO 15 "could articulate the justification for the Schedule 7 stop in a way that was consistent with but also independent of the overall joint operational objectives of the operation which had been set by the Security Service" (para 20 of his first witness statement). It was decided that two levels of authorisation were required. The first was a request from the Security Service asking SO 15 to consider using police powers under Schedule 7 to conduct a port stop. The second concerned the tactical aspects of the proposed stop which had to be agreed between the examining officers and the Security Service.

10. The first stage of the authorisation process was contained in the Security Service's National Security Justification ("the NSJ"), a document emanating from the Security Service. The second stage was reflected in a Port Circulation Sheet ("PCS") which was completed by the Security Service following dialogue between the Security Service and the Ports Officers. A PCS is a form of document used by *inter alia* the Security Service to provide information to counter-terrorism police officers. Det Supt Stokley said that it was only when both stages in the authorisation process had been completed and the documents received that a port stop could take place. He saw his focus as being to seek to determine whether Mr Miranda appeared to be a person who was or had been concerned in the commission, preparation or instigation of acts of terrorism (para 24 of his first statement). The acts of terrorism that he had in mind when considering the justification for a Schedule 7 stop "were acts which endangered life, created a serious risk to the safety of the public or were designed to seriously disrupt an electronic system" (para 26).

11. Some time on Friday 16 August 2013, Det Supt Stokley received the NSJ that his commanding officer had requested from the Security Service. The redacted text included the following:

> "2... We strongly assess that MIRANDA is carrying items which will assist in GREENWALD releasing more of the NSA and GCHQ material we judge to be in GREENWALD's possession. Open source research details the relationship between POITRAS, GREENWALD and SNOWDEN which corroborates our assessment as to the likelihood that GREENWALD has access to the protectively marked material SNOWDEN possesses. Our main objectives against David MIRANDA are to understand the nature of any material he is carrying, mitigate the risks to national security that this material poses...
> 3. We are requesting that you exercise your powers to carry out a ports stop against David MIRANDA...
> 4. We judge that a ports stop of David MIRANDA is the only way of mitigating the risks posed by David MIRANDA to UK national security... Additionally there is a substantial risk that David MIRANDA holds material which would be severely damaging to UK national security interests. SNOWDEN holds a large volume of GCHQ material which, if released, would have serious consequences for GCHQ's collection capabilities, as well as broader SIA operational activities, going forwards..."

12. At para 29 of his first witness statement, Det Supt Stokley said:

> "It appeared from the national security justification that Edward SNOWDEN held a large amount of information the disclosure of which could be highly damaging to UK national interests. This reinforced my view that the value of the material that Mr MIRANDA might be carrying to a hostile state engaged in terrorist activity or a terrorist organisation was enormous and its disclosure to agents of a hostile state or a terrorist organisation elsewhere would be catastrophic. In the circumstances, I considered that Schedule 7 paragraph 8 in particular, permitted us to search him to ascertain whether he had the material in his possession to assist in the determination of whether or not he was a person concerned in the commission, preparation or instigation of acts of terrorism."

13. On Friday 16 August, a PCS was issued by the Security Service to the MPS and received at the National Ports Office at 21.59. On page 2, against a box asking for confirmation "that the purpose of an examination will be to assist in making a determination about whether the person appears to be someone who is or has been concerned in the Commission, Preparation or Instigation of acts of terrorism (CPI)", the Security Service had entered the words "Not Applicable". On the same page this was stated:

> "Intelligence indicates that MIRANDA is likely to be involved in espionage activity which has the potential to act against the interests of UK national security. We therefore wish to establish the nature of MIRANDA's activity, assess the risk that MIRANDA poses to UK national security and mitigate as appropriate. We are requesting that you exercise your powers to carry out a ports stop against MIRANDA."

14. This PCS was not actively considered by the MPS when it was received. A second PCS was received at the National Ports Office on Saturday 17 August at 12.47. This too contained the "Not Applicable" entry, and also the invitation to the police to carry out a port stop (plainly a reference to Schedule 7). Another section, headed "Guidance for Port Officers", was considerably expanded, setting out a series of questions which the Security Service desired should be asked of Mr Miranda.

15. Acting DI Woodford was the Ports Duty Officer for Heathrow Airport over the weekend 17 – 18 August. He viewed the second PCS at the request of PS Holmes, who had received it. He "immediately saw that the PCS did not give sufficient information to provide police with the assurance that the use of Schedule 7 would be appropriate and lawful" (para 11 of his witness statement). He considered that the "Not Applicable" entry was in conflict with the invitation to the police to carry out a port stop under Schedule 7. He thought that the Security Service "may have been reluctant to confirm that the stop was for the purposes of determining whether Mr MIRANDA was a person concerned in the commission, preparation or instigation of acts of terrorism ("CPI") in circumstances where their concern appeared to revolve around espionage and national security issues" (para 12). He agreed with PS Holmes that the PCS should be returned to the Security Service for confirmation that "the

purpose of the examination would be to assist in making a CPI determination about Mr MIRANDA" (para 13).

16. At 17.19 on Saturday 17 August, a final PCS was delivered to the police from the Security Service. It had some text in common with earlier versions ("Intelligence indicates... ports stop against MIRANDA"), but also the following:

> "We assess that MIRANDA is knowingly carrying material, the release of which would endanger people's lives. Additionally the disclosure, or threat of disclosure, is designed to influence a government, and is made for the purpose of promoting a political or ideological cause. This therefore falls within the definition of terrorism and as such we request that the subject is examined under Schedule 7."

17. On his own account DI Woodford did not see the final PCS on the Saturday, but was told what it contained over the telephone. Accordingly he "indicated that [he] was satisfied that the use of Schedule 7 was appropriate" (para 14). Meanwhile, at about 17.30 that day another officer, DS Bird, head of the Ports Team, told Det Supt Stokley that following "dialogue" between the Security Service and the Ports Team, he (DS Bird) "was now satisfied that there was a justification for the Schedule 7 stop". Det Supt Stokley was given to understand that this was reflected in the PCS, which however he did not see ("it is not my role to approve them": see para 38 of his second witness statement dated 30 October 2013).

18. DI Woodford saw the final PCS early in the morning of Sunday 18 August at Heathrow. He satisfied himself that "sufficient information had been provided to allow a lawful Schedule 7 examination to take place". In particular, he considered that "there was now confirmation that the examination would assist in making a CPI determination" (para 15 of his witness statement). He "did not know at the time what 'the material' referred to in the PCS consisted of" (para 16). But he said at para 19:

> "With regard to the PCS forms, if I had not been satisfied that the MPS would be acting lawfully in undertaking Schedule 7 stop based on the information received, I would not have agreed to the examination. PCS forms are used to pass on information to police where there is concern about a risk from terrorism, and as I have mentioned earlier in this witness statement, in this case the PCS was completed by the Security Service. Where appropriate the MPS then acts in compliance with the police's duty to protect the public. The power remains a police power and the police have to be satisfied that it is an appropriate and lawful use of the power. Once we receive sufficient assurances from appropriate agencies that the purpose of the examination is to assist in making a determination about whether the person appears to be someone who is or has been concerned in the commission, preparation or instigation of acts of terrorism, there is an expectation that CT police officers will use all available powers in support of the UK's CT effort where it is appropriate to do so."

19. It was in these circumstances that the Schedule 7 stop went ahead, as I have said, at 08.05 on 18 August. It was executed by two SO 15 officers, PC 206005 and PC

206610. Det Supt Stokley says that the officers were only aware of the information in the PCS document, as is a standard practice for such stops. The examining officers are not told and do not know anything about the intelligence behind the stop, so as to introduce a firewall between the intelligence behind the stop and the examination "to prevent any unwitting disclosures to the subject of the examination" (para 32 of his first witness statement).

20. The officers detained Mr Miranda for nine hours, which was the maximum period permitted by para 6(4) of Schedule 7 at the time (this maximum has since been reduced to six hours) and they questioned him. DI Woodford was with them to meet the aircraft at the gate. Mr Miranda's hand luggage was examined, and items retained which as I have said included encrypted storage devices. Mr Oliver Robbins, Deputy National Security Adviser for Intelligence, Security and Resilience in the Cabinet Office, says in his first witness statement (para 6) that the encrypted data contained in the external hard drive taken from Mr Miranda contains approximately 58,000 highly classified UK intelligence documents. Many are classified SECRET or TOP SECRET. Mr Robbins states that release or compromise of such data would be likely to cause very great damage to security interests and possible loss of life. It is said by the defendants to be of significance that Mr Miranda did not claim to be a journalist or a lawyer; nor did he claim that any material that he was carrying was journalistic material or subject to legal professional privilege.

THE PROCEEDINGS

21. In judicial review proceedings issued on 21 August 2013, Mr Miranda claims that the use of the Schedule 7 power against him on 18 August 2013 was unlawful because (i) the power was exercised for a purpose not permitted by the statute; and (ii) its use constituted a disproportionate interference with his rights under article 5, 8 and 10 of the Convention. He also claims that the use of the power is incompatible with the rights guaranteed by article 10 of the Convention, at any rate in relation to journalistic material.

SUMMARY OF THE JUDGMENT OF THE DIVISIONAL COURT

22. The Divisional Court decided that (i) the power was exercised for a purpose permitted by the statute; (ii) its use was not a disproportionate interference with articles 5, 8 or 10 of the Convention; and (iii) the use of the power was compatible with article 10 of the Convention.

THE GROUNDS OF APPEAL

23. Mr Ryder QC has raised five grounds of appeal. Ground 1 is that the court erred in determining the purpose of the examining officers who conducted the stop by reference to information and judgments made by other persons, namely the Security Service. Ground 2 is that the court erred in assessing the dominant purpose for which the Schedule 7 power was in fact used. Ground 3 is that the court adopted a flawed approach to the question of proportionality, by failing to consider whether there was evidence of any actual risk to public safety that justified the use of the Schedule 7 power to seize journalistic material. Ground 4 (which is a subset of ground 3) is that the court erred in its assessment of proportionality in concluding that the use of Schedule 5 to TACT would not have been possible or practical. Ground 5 is that the

Schedule 7 power is not compatible with article 10 of the Convention because it is not "prescribed by law" as required by article 10(2).

24. The fact that the material was said to be journalistic material lies at the heart of the third, fourth and fifth grounds of appeal. It is the reason why the Interveners sought and were granted permission to intervene in the proceedings.

THE FIRST AND SECOND GROUNDS OF APPEAL

What was the purpose of the stop?

25. It seems to me to be logical to start with the question of what the purpose of the stop was before deciding whether a stop conducted for that purpose was permitted by Schedule 7.

26. Laws LJ considered the purpose for which the Schedule 7 power was used at paras 17 to 27 of his judgment. He said that this was a question of fact. That is plainly right. He also said that, where there is or may be more than one purpose, the correct test is to determine the "true and dominant" purpose, even though some secondary or incidental advantage may be gained for some purpose which is outside the authorised purpose: see *R v Southwark Crown Court, ex p Bowles* [1998] AC 641, [1998] UKHL 16. He said that the purpose to be considered was the purpose for which the examining officers executed the stop. I believe none of this to be controversial. He then said:

> "21. [I]n deciding whether the statutory purpose is made out I do not think the court is limited to a consideration of the examining officers' subjective state of mind. Given the context – the possible apprehension of terrorism – Parliament must have enacted Schedule 7 in the knowledge that there might be very good reasons why the examining officers (who might, as here, be junior in rank) should not be privy to the whole story. This is of a piece with D/Supt Stokley's reference at paragraph 39 of his witness statement to "a firewall between the intelligence case and the examination, to prevent any unwitting disclosures to the subject of the examination". It is noteworthy that by force of paragraph 2(4) of Schedule 7 an examining officer is not required to have any "grounds for suspecting that a person falls within section 40(1)(b)". Nor does Schedule 7 provide that an examining officer must be the one to determine whether the subject appears to fall within that subsection. It may well be someone else, to whom the results of the stop are referred.
>
> 22. In a case like this the primary evidence for the determination of the stop's purpose is likely to be the terms of the instructions given to the examining officers: here, in effect, the last PCS. Making the modest assumption that the officers will have executed their instructions in good faith, that ought to provide the essential, even if not the whole, rationale for the decision to carry out the stop. But I readily acknowledge that

> the PCS taken on its own might not merit the court's full confidence as a reliable indicator of the purpose of the exercise. The PCS is, with good cause, the tip of what may be a very large iceberg. It may give – in the worst case deliberately, in the best case unwittingly – a false or at least a distorted picture of the true reasons for the stop. It is important that the court should have some evidence of the hierarchy of decision-making behind and above the PCS; and there may be cases where there is no PCS."

27. At para 26, he said:

> "Given these successive levels of authorisation, the purpose of the stop may in my judgment confidently be gleaned from the final PCS considered in light of the National Security Justification. DI Woodford acted directly on the former, and D/Supt Stokley's acquiescence was reinforced by the latter".

28. At para 27, he summarised the position in these terms:

> "The purpose of the stop thus disclosed may be simply expressed. It was to ascertain the nature of the material which the claimant was carrying and if on examination it proved to be as was feared, to neutralise the effects of its release (or further release) or dissemination."

29. During the course of his oral submissions, far from challenging the finding summarised at para 27, it seemed to me that Mr Ryder embraced it. He used it as a springboard for his argument that the purpose found by Laws LJ was an improper purpose because (i) it was not for the purpose of determining whether Mr Miranda appeared to be concerned with CPI, but the national security purpose expressed by the Security Service in the NSJ and (ii) in any event, even if the stop was for the purpose stated in the final PCS, the acts described in that document (the release of the material that Mr Miranda was carrying) could not amount to "terrorism" within the meaning of section 1 of TACT.

30. In my view, the true and dominant purpose for which the stop was executed on the facts of this case emerges clearly from the considerable evidence that has been placed before the court. Importantly, although the process which led to the exercise of the stop power was *initiated* by the Security Service, the police were involved at an early stage. It is clear from the evidence of Det Supt Stokley that the police exercised their own judgment in deciding whether it was appropriate to conduct the stop. They recognised that they could not act as a conduit for the furtherance of the purposes of the Security Service. They had to be persuaded that the conditions for a lawful exercise of the stop power were satisfied in the circumstances of the case. That is why they rejected the second PCS, which was the first PCS that they considered. DI Woodford has explained why they were persuaded that the final PCS gave them proper authority to proceed under Schedule 7: see para 18 above.

31. I would hold that the true and dominant purpose of the stop was to give effect to the final PCS. On its face, the final PCS was a sufficient basis for authorising an

examining officer to question Mr Miranda for the purpose of determining whether he appeared to be a person falling within section 40(1)(b) of TACT. In my judgment, there was nothing to suggest that, following the receipt of the PCS, the MPS decided to execute the stop for any other purpose. It is, therefore, not necessary to go further than the examining officers' state of mind in executing the final PCS. But the purpose of the exercise of the stop powers can also be judged by reference to the state of mind of the examining officers' superior officers: see *R (Pearce) v Commissioners of Police of the Metropolis* [2013] EWCA Civ 866 at para 36. The superior officers were fully alive to the difference between a stop for Schedule 7 purposes and a stop for the Security Services' purposes. As Det Supt Stokley said at para 20 of his first statement, the objectives of the Security Service and the police were distinct: see para 9 above. He recognised that the stop power could not be exercised unless the statutory conditions for its exercise were met: see para 10 above. That is why he wanted to initiate further enquiries to see whether Mr Miranda or others were concerned in CPI. But the national security and counter-terrorism considerations in this case were linked and overlapped, as was reflected by the fact that this was a joint operation which had been initiated by the Security Service. The fact that the exercise of the Schedule 7 power also promoted the Security Service different (but overlapping) purpose does not, however, mean that the power was not exercised for the Schedule 7 purpose. The MPS exercised the power for its own purpose of determining whether Mr Miranda appeared to be a person falling within section 40(1)(b) of TACT.

Was the purpose improper?

32. Having decided what the purpose of the stop was in fact, Laws LJ considered whether that purpose fell within the scope of Schedule 7. At para 32, he said that the Schedule 7 power was given:

> "[I]n order to provide a reasonable but limited opportunity for the ascertainment of a possibility: the possibility that a traveller at a port may be involved ("concerned" – section 40(1)(b)), directly or indirectly, in any of a range of activities enumerated in section 1(2)."

33. And at para 36, he effectively repeated what he had said at para 27:

> "In all the circumstances, given the facts stated in the last PCS and the National Security Justification, I conclude that the purpose of the stop – to ascertain the nature of the material which the claimant was carrying and if on examination it proved to be as was feared, to neutralise the effects of its release (or further release) or dissemination – fell properly within Schedule 7 of the 2000 Act on the latter's true construction."

34. Mr Ryder submits that Laws LJ made three errors. First, the NSJ justification was the dominant purpose and was not, in itself, a purpose falling within Schedule 7. I have already dealt with this argument. The true and dominant purpose of the stop was not to give effect to the NSJ. It was to give effect to the PCS.

35. The second error identified by Mr Ryder is that Laws LJ appeared to take into account a purpose advanced by Det Supt Stokley that was "wholly speculative". This is a reference to para 36 of his second witness statement in which the officer said that the NSJ reinforced his view, reached independently of the case made by the Security Service for the stop, "that the value of the material that Mr MIRANDA might be carrying to a hostile state….was enormous and its disclosure to agents of a hostile state….or a terrorist organisation…..would be catastrophic" and that this justified the use of the stop power. Mr Ryder submits that this was mere speculation. He says that it was not derived from any information from the Security Service and was not communicated to the officers who exercised the stop power. It could not properly be included in the assessment of the purpose of the exercise of the powers let alone support the predominance of a permissible Schedule 7 purpose.

36. I would reject this criticism for the reasons advanced by Mr Beer QC. Whether Det Supt Stokley communicated the details of his thinking to the examining officers does not matter. It is sufficient that his assessment was a relevant part of the decision-making process which led to the stop. The examining officers are not required to carry out their own assessment. It is sufficient that their superior police officers do so. The criticism that the assessment of Det Supt Stokley was "wholly speculative" seems to be based on the idea that, in reaching his assessment, the officer was not entitled to rely on information provided by or assessments made by the Security Service. But as Mr David Anderson QC (the Independent Reviewer of Terrorism Legislation) said when considering the utility of Schedule 7 at para 9.46 of his report dated June 2012:

> "It is fair to say that the majority of examinations which have led to convictions were intelligence-led rather than based simply on risk factors, intuition or the "*copper's nose*". Indeed, despite having made the necessary enquiries, I have not been able to identify from the police any case of a Schedule 7 examination leading directly to arrest followed by conviction in which the initial stop was not prompted by intelligence of some kind."

37. I do not find this in the least surprising. The police are plainly entitled to rely on intelligence emanating from the Security Service in exercising their powers under Schedule 7, unless it is unreasonable for them to do so. In my view, Det Supt Stokley was entitled to rely on the Security Service assessment contained *inter alia* in the fourth paragraph of the NSJ. He had no reason to disagree with it.

The meaning of terrorism in section 1 of TACT

38. The third error alleged by Mr Ryder is that the court failed properly to analyse whether Det Supt Stokley erred in his approach as to what could, in law, be defined as an act of terrorism.

39. I do not believe it to be controversial that section 1(1) and (2), when read together, define "terrorism" as (i) the use or threat of action which (ii) (relevantly for the present case) "endangers a person's life, other than that of the person committing the action" where (iii) the use of threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the

public and (iv) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.

40. Laws LJ accepted that the definition of terrorism in section 1 is very broad. But after referring to the Supreme Court's concern at the potential breadth of the definition of terrorism in the case of *R v Gul* [2014] AC 1260, [2013] UKSC 64, he said at para 29:

> "With great respect, the bare proposition that the definition of terrorism in section 1 is very wide or far reaching does not of itself instruct us very deeply in the proper use of Schedule 7. There are however particular aspects which seem to me to be important for the ascertainment of the reach of the Schedule. First, section 1 does not create a criminal offence. The Act creates a separate regime of criminal offences: section 54 ff. That being so, we should not assume that foundational concepts of the criminal law, such as intention and recklessness, are to be read into provisions such as section 1(2)(c) ("endangers a person's life") or 1(2)(d) ("creates a serious risk to the health or safety of the public"). Section 1(2) is concerned only to define the categories of "action" whose use or threat may constitute terrorism: not to impose any accompanying mental element. Similarly, the expression "concerned in" in section 40(1)(b) is not to be taken to import the criteria for guilt as a secondary party which the criminal law requires in a case of joint enterprise".

41. At para 33, he accepted the submission of Mr Kovats QC that:

> "the section 1 definition is 'capable of covering the publication or threatened publication [for the purpose of advancing a political, religious, racial or ideological cause] of stolen classified information which, if published, would reveal personal details of members of the armed forces or security and intelligence agencies, thereby endangering their lives, where that publication or threatened publication is designed to influence government policy on the activities of the security and intelligence agencies': section 1(1)(b) and (c), and (2)(c)."

42. At para 35, he said:

> "The Article 19 Interveners also submit (paragraph 39) that 'a reading of section 40(1)(b) which permits the type of activity carried out by [the claimant] to fall within the definition [set out in the subsection] is overbroad and inconsistent with well-recognised international principles that media reporting on terrorism ought not to be considered equivalent to assisting terrorists". They cite a number of materials, including a declaration of the Committee of Ministers of the Council of Europe adopted in 2005, calling upon Member States to "refrain from adopting measures equating media reporting on terrorism with support for terrorism". This mischaracterises the

> defendants' case. There is no suggestion that media reporting on terrorism ought *per se* to be considered equivalent to assisting terrorists. The construction advanced allows as I have said for the ascertainment of the possibility that a traveller at a port may be involved, directly or indirectly, in any of a range of activities enumerated in section 1(2) of the Act. Not least given the requirement that the power must be exercised upon some reasoned basis, proportionately and in good faith, I cannot conclude that any of the international materials relied on points towards a different construction."

43. Mr Ryder submits that what he calls the literal interpretation of the definition of terrorism advanced by Mr Kovats and accepted by Laws LJ is too broad. It would include activity that is entirely non-violent; is in pursuit of a legitimate and mainstream political cause; may "endanger life" by accident; and where the person may be "concerned" in such activity wholly accidentally or even without knowledge. This broad interpretation of section 1 also affects the interpretation of other provisions of TACT. For example, section 41 gives a constable the power to arrest, without a warrant, any person "whom he reasonably suspects to be a terrorist". On this interpretation of "act of terrorism", section 41 would allow a power of arrest, detention and questioning of any person on reasonable grounds to suspect that he was accidentally or unknowingly involved in non-violent political activity that indirectly, inadvertently and unintentionally happened to endanger life.

44. Mr Ryder accepts that the literal interpretation is a possible interpretation. But he submits that there is an alternative preferable interpretation which he set out in a note dated 18 November 2015 as follows:

> "[I]t is what the action 'involves', or what its consequence 'creates' etc, and not merely the action itself, which must be used or threatened for political ends. Thus it would constitute terrorism to use or threaten serious violence or the creation of a serious risk to health and safety in order to influence the Government and to advance a political or religious cause. If, however, an individual was unaware that his actions created a serious risk to health and safety, those actions could not be said to be 'the use or threat' of such a risk for the purpose of advancing a political cause and influencing the Government."

45. Mr Ryder relies on paras 4.14 to 4.21 of the July 2015 report of Mr Anderson which expresses concerns about the apparent breadth of the literal interpretation. At para 4.19, Mr Anderson instances the publication of a blog or an article that argues (on religious or political grounds) against the vaccination of children for certain diseases. Mr Anderson points out that, on this interpretation, if the publication were judged to create a serious risk to public health, and if it was designed to influence government policy, it would be classified as a terrorist action.

46. Mr Ryder gave another example: a group of junior doctors wishes to erect a sign to protest about Government policy towards the NHS. Inadvertently, some members of the group erect it in a way that accidentally endangers the life of a passer-by. Mr Ryder submits that, if the literal interpretation of "act of terrorism" adopted by Laws

LJ is right, the junior doctors erecting the sign with a political message have committed acts of terrorism. They have taken an action designed to influence the Government to advance a political cause, which (even if entirely unknown to them) endangered the public or created a risk to health and safety.

47. Mr Anderson also says that the penumbra of ancillary offences and powers has the potential to magnify the chilling effect of the literal interpretation. He gives the example of a newspaper article, politically motivated and aimed at influencing the Government, whose publication is said to endanger lives. It would follow on the literal interpretation that (i) the possession of any article for a purpose connected with the publication, or of any document likely to be useful to persons publishing material of that kind would be punishable by up to 15 years or 10 years imprisonment (sections 57 and 58 of TACT respectively); (ii) acts preparatory to publication would be punishable by up to life imprisonment (section 5 of the Terrorism Act 2006); (iii) anyone who encouraged the writing of similar articles, or circulated such encouragement to others could be imprisoned for up to seven years (sections 1 and 2 of the Terrorism Act 2006); and (iv) the newspaper in question could be proscribed (with the consent of Parliament) as an organisation concerned in terrorism (section 3).

48. Mr Ryder submits that Parliament cannot have intended "terrorism" to have such an unreasonable meaning. He also submits that the court should be slow to adopt an interpretation of statutory words that is inconsistent with the way the words are normally understood: see *Oxford County Council v Oxfordshire City Council* [2006] 2 AC 674, [2006] UKHL 25 at para 82 per Lord Scott. "Terrorism" as it is ordinarily understood is the attempt to advance some political or religious cause not by persuasion but by violence, the endangerment of life etc. To describe a newspaper writing political stories that inadvertently reveal the identity of members of the intelligence service or oppose government policy on vaccination as committing an act of "terrorism" is to use the word "terrorism" in a way that bears no relationship to any ordinary understanding of the concept.

49. Mr Ryder also relies on (i) the Explanatory Note to section 20 of the Prevention of Terrorism Act 1989 (the predecessor to TACT), the 1996 report of Lord Lloyd of Berwick "Inquiry into Legislation against Terrorism"(Cmd 3420) and the legislative history of the 2000 Act; and (ii) statements made by Ministers in Parliament during the passage of TACT in support of his submission that Laws LJ adopted too broad an interpretation. Thus, for example, the Home Secretary explained when introducing the Terrorism Bill in the House of Commons: "Terrorism involves the threat or use of serious violence for political, religious or ideological ends. It is premeditated, and aims to create a climate of extreme fear" (HC Deb 14 December 1999, col 156). Introducing the Terrorism Bill in the House of Lords on its Second Reading, Lord Bassam of Brighton, Parliamentary Under-Secretary of State said: "the Bill is not intended to threaten the right to demonstrate peacefully; nor will it do so….This Government would not seek to introduce a Bill which we believe would threaten the right to peaceful protect" (HL Deb 6 April 2000 col 1427).

50. In summary, Mr Ryder submits that Parliament cannot have intended that section 1 should be read to include publication of material as an "act of terrorism". He says that the alternative interpretation (para 44 above) is to be preferred on the grounds that (i) it corresponds with the ordinary meaning of the word "terrorism"; (ii) it reflects the intention of Parliament in enacting section 1 of TACT; and (iii) avoids the

unacceptable consequences of the literal interpretation, examples of which I have mentioned above.

51. To a large extent, I accept Mr Ryder's submissions. First, the literal interpretation involves according to the word "terrorism" a meaning which is far removed from its ordinary meaning. The submission which I have summarised at para 48 above is a powerful one. But I accept that it is not decisive. Secondly, the fact that the literal interpretation potentially gives rise to unpalatable consequences of the kind that I have described raises a serious question as to whether it can have been intended by Parliament. It is true that it is most unlikely in the real world that measures of the extreme kind described at para 47 above would actually be taken against someone seeking to publish an article, at any rate unless they intended the publication to seriously endanger life (or were reckless as to whether it would have that effect). But the fact that these ancillary offences and powers exist is relevant to what Parliament must be taken to have intended acts of terrorism to mean. Thirdly, the interpretation does not reflect the aim and intention of the promoters of the Bill as expressed to Parliament.

52. In my view, these three factors when taken together provide a powerful reason for rejecting the literal interpretation. The question remains, however, how as a matter of analysis and construction one can arrive at the interpretation for which Mr Ryder contends.

53. I would approach the matter in this way. Three categories of action are described in section 1(2). The first is action falling within section 1(2)(a) and (b). This is the only category which is defined exclusively by reference to the *nature* of the action itself. It is not an ordinary use of language to describe a person as being "involved" in violence or damage to property if he is not aware that he is being so involved or if what he does is accidental. On this point, I respectfully disagree with what Laws LJ said at para 29 of his judgment (see para 40 above). The second category is action falling within section 1(2)(c) and (d). This is defined by reference to the *consequences* of the action: endangering a person's life and creating a serious risk to health or safety. The third category is action falling within section 1(2)(e). This is action which is defined by reference to its *aim*: action which is *designed* seriously to interfere with or disrupt an electronic system.

54. The third category of action is, therefore, clearly defined by reference to the state of mind of the actor. For the reasons that I have given, I consider that the first category of action must also be considered as importing a mental element. I accept that, on a literal interpretation, the second category could include acts which endanger a person's life even if the actor is not aware that they do. But such an interpretation would dispense with the need for a mental element in the second category, whereas it is required in the first and third categories. It is unlikely that Parliament would have intended to make such a distinction between the three categories. If Parliament had intended to provide that a person commits an act of terrorism where he unwittingly or accidentally does something which in fact endangers another person's life, I would have expected that, in view of the serious consequences of classifying a person as a terrorist, it would have spelt this out clearly.

55. It does not follow that publication of material cannot amount to an act of terrorism. If (i) the material that is published endangers a person's life (other than that of the

person committing the action) or creates a serious risk to the health or safety of the public or a section of the public; and (ii) the person publishing the material intends it to have that effect (or is reckless as to whether or not it has that effect), then the publication is an act of terrorism, provided, of course, that the conditions stated in section 1(1)(b) and (c) are satisfied.

56. I return to the publication of a blog that argues (on religious or political grounds) against the vaccination of children. On the interpretation which I would adopt, such a blogger would not be a terrorist even if his blog were judged to create a serious risk to public health, unless he intends his publication to create the risk (or is reckless as to whether his blog will have that effect). Likewise, on this interpretation the junior doctors mentioned at para 46 above would not be terrorists either.

CONCLUSION ON THE FIRST AND SECOND GROUNDS OF APPEAL

57. For the reasons that I have given, the true and dominant purpose of the Schedule 7 stop of Mr Miranda was to give effect to the final PCS. I have rejected Mr Ryder's submission that this was a "speculative" purpose. I have also rejected the literal interpretation of "terrorism" which was accepted by the Divisional Court. But the question remains whether the exercise of the power to stop was lawful on the facts of this case. It is necessary to repeat that Schedule 7 para 2(1) provides that an examining officer may question a person to whom the paragraph applies (and it is common ground that the paragraph did apply to Mr Miranda) "for the purpose of determining whether he appears to be a [terrorist]". It is also relevant that para 2(4) provides that an examining officer may exercise this power "whether or not he has grounds for suspecting that a person [is a terrorist]".

58. As we have seen, the final PCS stated: "We assess that MIRANDA is knowingly carrying material, the release of which would endanger people's lives. Additionally, the disclosure or threat of disclosure is designed to influence a government, and is made for the purpose of promoting a political or ideological cause". Mr Ryder submits that there is no suggestion that the Security Service or the MPS believed that Mr Miranda, Mr Greenwald, the *Guardian* or others in the press publishing the Snowden material were advancing a political cause. But Parliament has set the bar for the exercise of the Schedule 7 power at quite a low level. As Laws LJ put it at para 32 of his judgment, the power has been given to provide an opportunity for the ascertainment of the *possibility* that a traveller at a port may be concerned in the commission, preparation or instigation of an act of terrorism: see para 32 above. The evidence is that the terms of the PCS led DI Woodford to decide that the use of the stop power was "appropriate" (see para 17 above). It was not necessary for the MPS to have formed the view that the material *would* be released in order to advance a political cause. It was sufficient for them to have considered that it *might* be released for that purpose. On the facts of this case, therefore, I consider that the power was exercised for a lawful purpose.

THE THIRD GROUND OF APPEAL: PROPORTIONALITY

59. Mr Ryder submits that the use of Schedule 7 power against Mr Miranda was an unjustified and disproportionate interference with his right to freedom of expression guaranteed by article 10 of the Convention. The proportionality principle is now well

established in our law. As Lord Sumption said in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700, [2013] UKSC 39 at para 20:

> "… [T]he question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to that objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community."

60. The issue raised by the third ground of appeal is whether the Divisional Court adopted a flawed approach to the fourth limb of the test for proportionality. In short, Mr Ryder submits that Laws LJ erred in considering that there was evidence that demonstrated that a fair balance had been struck between Mr Miranda's article 10 rights (derived from his involvement in journalistic activity) and the wider security interests of the community.

61. An assessment of the proportionality of a decision to exercise the stop power is fact-sensitive. It is necessary to have regard to the interests of the person who is to be stopped on the basis of the facts as they were or ought to have been known to those who exercised the power. Against those interests there must be weighed (on the facts of this case) the national security interests of the community. At the heart of Mr Miranda's case is the submission that the material that he was carrying was "journalistic material" whose publication engaged article 10 of the Convention. It is common ground that, for present purposes, "journalistic material" is to be taken to mean "material acquired or created for the purposes of journalism": see the definition in section 13(1) of the Police and Criminal Evidence Act 1984 ("PACE").

Is the balancing exercise to be conducted on the basis that the material was journalistic material?

62. Mr Kovats and Mr Beer QC submit that, if those who authorised and conducted the port stop did not know (and could not reasonably have been expected to know) that Mr Miranda was in possession of journalistic material, then the proportionality of the decision to conduct the stop cannot be assessed on the basis that he was carrying such material. This is reflected in the Grand Chamber decision of the ECtHR in *Pentikainen v Finland* (App no 11882/10, judgment of 20 October 2015). In that case, the applicant (a journalist) was sent by his employer (a weekly magazine) to take photographs of a demonstration and to write a report for the magazine. He was apprehended and detained by the police. He was later charged and found guilty by the domestic courts of disobeying the police. He complained that this was in breach of his article 10 rights. It was held by the court that there had been an interference with his article 10 rights. The real issue was whether the interference was proportionate to the legitimate aims pursued. In relation to his apprehension, the court said at para 95:

> "…the Court will pay attention to whether the police orders were based on a reasonable assessment of the facts and whether the applicant was able to report on the demonstration. It will

> also have regard to the applicant's conduct, including whether he identified himself as a journalist."

63. The fact that the applicant was not "readily identifiable as a journalist prior to his apprehension" was one of the factors that led the court to decide that the domestic authorities had struck a fair balance between the competing interests at stake. Accordingly, the apprehension, detention and conviction of the applicant were justified and not a violation of article 10.

64. I do not find this a surprising approach for the ECtHR to have taken and I agree with it. It would be unreasonable to criticise an authority for failing to give weight to the importance of the freedom to publish journalistic material if the authority did not know (and could not reasonably have known) that it was journalistic material. It is, therefore, necessary to examine the evidence to see whether the MPS knew or ought to have known that Mr Miranda was in possession of journalistic material.

65. The examining officers were only aware of the information that was contained in the final PCS. This said nothing about the nature of the material except that its release would endanger people's lives and that its disclosure or the threat of its disclosure was designed to influence a government and was made for a political or ideological cause. It did not refer to Mr Snowden, Mr Greenwald, the *Guardian* or journalism. Moreover, when he was questioned by the examining officers, Mr Miranda did not say that he was a journalist or that the material that he was carrying was journalistic material.

66. Det Supt Stokley was, however, aware of the contents of the NSJ, which did refer to the assessment that Mr Miranda was carrying items which would "assist in GREENWALD releasing more of the NSA and GCHQ material we judge to be in GREENWALD's possession".

67. Although Mr Miranda was not a journalist, he worked very closely with Mr Greenwald who was. Det Supt Stokley knew this and that the Security Service had made the assessment stated in the NSJ that Mr Miranda was carrying items that would assist in Mr Greenwald releasing more of the material that was judged to be in Mr Greenwald's possession. Mr Miranda therefore appeared to Det Supt Stokley to have in his possession journalistic material. In my view, the fact that the examining officers were not aware that Mr Miranda was or might be carrying journalistic material is not a trump card in the hands of the defendants. I can see no justification for disregarding the knowledge and belief of those who were directing the examining officers when considering whether the MPS knew or believed that Mr Miranda was carrying journalistic material. In view of what Det Sup Stokley knew, the balancing exercise must be conducted on the basis that the material was or might have been journalistic material.

The assessment of the threat to national security

The judgment of the Divisional Court

68. At para 52 of his judgment, Laws LJ said that, on the evidence, the stop was "a pressing imperative in the interests of national security". The external hard drive

taken from Mr Miranda contained approximately 58,000 highly classified UK intelligence documents. At para 15 of his second witness statement, Mr Robbins said:

> "…..I can say with confidence that the material seized is highly likely to describe techniques that have been crucial in life-saving counter-terrorism operations, the prevention and detection of serious crime, and other intelligence activities vital to the security of the UK. The compromise of these methods would do serious damage to UK national security, and ultimately put lives at risk. Following the article jointly published by the Guardian, New York Times and ProPublica on 5 September, for example, the US Office of the Director of National Intelligence said on the following day that the article revealed *'specific and classified details about how we* [ie, the US] *conduct this critical activity'*, and that it provided a *'roadmap to our adversaries'* about surveillance issues."

69. Laws LJ placed particular weight on the following sentence in para 19 of Mr Robbins's first statement:

> "It is known that contained in the seized material are [*sic***]** personal information that would allow staff to be identified, including those deployed overseas."

70. Det Supt Caroline Goode of the Metropolitan Police attached to SO 15 described her concerns arising from the theft of the 58,000 documents. At para 15 of her witness statement, she said:

> "The material needs to be examined as a matter of urgency to identify the nature of the material stolen in order to enable the MPS to mitigate the risks posed by the theft, the unlawful possession and disclosure of this material. For example, should the identity of individuals working for HMG be revealed their lives and the lives of their families could be directly at risk. Similarly should details of ongoing/historic operations and/or methodology be revealed the operation itself could be rendered ineffective. This will consequently put the lives of the general public at risk as we would be less able to counter the threat from terrorism. If the MPS was able to identify what identities and information are contained within the material we would be able to mitigate the risk posed to those individuals, those operations and the general public at large by putting appropriate measures in place."

71. At para 52 of his second witness statement, Det Supt Stokley said:

> "I believed that the information in [the claimant's] possession could potentially compromise the UK's ability to monitor terrorist networks, posing a threat to the safety of the public... In particular, I considered that the release of information about PRISM technology into the public domain was of use to

> terrorists. My understanding of the technology from material in the public domain is that it enables security and intelligence services to monitor email traffic. Accordingly, I considered that if nothing was done to try to prevent further damaging disclosures which could directly benefit terrorists, the MPS and I personally would be failing in our obligation to prevent the loss of life, safeguard the public to [*sic*] prevent and detect crime. For all these reasons I considered that the use of a Schedule 7 stop was proportionate."

72. Mr Miranda challenged the evidence that there was a genuine belief that his activity could endanger life or facilitate terrorist attacks. Both he and Mr Greenwald asserted in their witness statements that the defendants were well aware that Mr Miranda's possession of the material that was seized was in connection with journalism, not terrorism.

73. Laws LJ rejected the suggestion that the defendants did not believe that Mr Miranda's possession of the material presented any real danger to national security or risk of loss of life. He said at para 56 that there was "no perceptible foundation for such a suggestion". He added that Mr Miranda's evidence did not engage with the defendants' evidence as to the substance of the threat posed by Mr Miranda's possession of the material. The nearest Mr Greenwald came to an engagement with the defendants' evidence as to the actual or potential damaging effects of the dissemination of material seized from Mr Miranda was in the following paragraphs of his witness statement:

> "51. It is absurd to suggest that because the material, if it ever fell into the hands of terrorists *could* in theory be used for terrorist purposes, then there is a justification for using counter-terrorist measures to take that material from responsible journalists publishing material through respected international media organisations (original emphasis).
>
> 52. Nowhere in their evidence do the defendants' witnesses positively indicate that any disclosure has actually threatened or endangered life or any specific operation. In my view, this is not surprising, given the care we took not to create such a risk."

Responsible journalism

74. Mr Miranda and Mr Greenwald placed much weight on the need to have regard to the importance of "responsible journalism" as a factor when weighing the competing interests in this case. Laws LJ dealt with this issue at para 58:

> "Thirdly, Mr Greenwald's account (paragraph 33) of the "many ingredients to the sensible reporting of very sensitive information" is insubstantial; or rather, mysterious – the reader is left in the dark as to how it is that "highly experienced journalists and legal experts" (paragraph 33(1)) or "[e]xperienced editors and reporters" (33(2)) are able to know what may and what may not be published without endangering

> life or security. There may no doubt be obvious cases, where the information on its face is a gift to the terrorist. But in other instances the journalist may not understand the intrinsic significance of material in his hands; more particularly, the consequences of revealing this or that fact will depend upon knowledge of the whole "jigsaw" (a term used in the course of argument) of disparate pieces of intelligence, to which the classes of persons referred to by Mr Greenwald will not have access. At paragraph 26 of his first statement Mr Robbins says this:
>
> > 'Indeed it is impossible for a journalist alone to form a proper judgment about what disclosure of protectively marked intelligence does or does not damage national security... The fragmentary nature of intelligence means that even a seemingly innocuous piece of information can provide important clues to individuals involved in extremism or terrorism.'"

75. At para 65, he said:

> "In my judgment, however, Mr Ryder's broader argument on proportionality – that the use of Schedule 7 is in any event unjustified – does not in truth depend on the categorisation of the GCHQ documents as journalistic material. The heart of the point is that the claimant was assisting in the conduct of responsible journalism, and the law's duty to protect that activity means that interference with it by the summary and unsupervised process of Schedule 7 was disproportionate and unlawful whether or not any intercepted documents strictly fell within the statutory definition of "journalistic material": no "fair balance [was] struck between the rights of the individual and the interests of the community" – requirement (iv) in the restatement of the proportionality principle in *Bank Mellat*: though, as I have held (paragraph 45), where journalistic freedom is involved the balance is not between private right and public interest, but between two aspects of the public interest."

76. At paras 66 to 71, he made some interesting observations about the notion of "responsible journalism" in the context of publishing material which poses a threat to national security. He acknowledged that journalists have a professional responsibility to take care to see that the public interest, including the security of the State and the lives of other people, is not endangered by what they publish. He added:

> "But that is not an adequate safeguard for lives and security, because of the "jigsaw" quality of intelligence information, and because the journalist will have his own take or focus on what serves the public interest, for which he is not answerable to the public through Parliament".

Divisional Court's conclusion on proportionality

77. Laws LJ concluded that the Schedule 7 stop of Mr Miranda was a proportionate measure in all the circumstances. He summarised his view as follows:

> "72. How do these considerations bear on the present case? The claimant was not a journalist; the stolen GCHQ intelligence material he was carrying was not "journalistic material", or if it was, only in the weakest sense. But he was acting in support of Mr Greenwald's activities as a journalist. I accept that the Schedule 7 stop constituted an indirect interference with press freedom, though no such interference was asserted by the claimant at the time. In my judgment, however, it is shown by compelling evidence to have been justified. I have described the testimony of Mr Robbins and DS Goode (and DS Stokley). There is no reason to doubt any of it. In contrast, (1) the evidence of the claimant and Mr Greenwald is unhelpful, to the extent I have explained. (2) There is no question of a source being revealed; though I accept there is some force in the Article 19 Interveners' submission (paragraph 17) as to "the potential discouragement of future journalistic sources who may not elect to waive their anonymity". (3) The fact that the material was stolen, though it does not exclude the law's intervention to protect free speech, goes in the scales in favour of the defendants. "
>
> 73. In my judgment the Schedule 7 stop was a proportionate measure in the circumstances. Its objective was not only legitimate, but very pressing. The demands of journalistic free expression were qualified in the ways I have explained. In a press freedom case, the fourth requirement in the catalogue of proportionality involves as I have said the striking of a balance between two aspects of the public interest: press freedom itself on one hand, and on the other whatever is sought to justify the interference: here national security. On the facts of this case, the balance is plainly in favour of the latter."

Mr Ryder's arguments on proportionality

78. Mr Ryder submits that Laws LJ erred in finding that there was "compelling evidence" of a serious risk of harm to the public or national security arising from Mr Miranda being in possession of the material in question. He says that the evidence of the defendants' witnesses indicated no more than a "theoretical" risk that would arise only if key parts of the data (for example, the identity of individual agents), potentially possessed by Mr Miranda, were released into the public domain. He submits that there was no evidence to suggest that Mr Miranda or anyone else associated with him would release data of that kind into the public domain. As regards the "jigsaw" point mentioned at para 58 of the judgment of Laws LJ, the two examining officers had no knowledge themselves of any of the information that could form part of the "jigsaw". In short, all that was presented to the court was a theoretical risk. The crucial evidence that would have indicated the extent to which

that theoretical risk might materialise, and which would have enabled the court to balance that risk against the infringement of the rights of Mr Miranda, was absent. Mr Ryder also criticises the approach adopted by Laws LJ to the issue of "responsible journalism". He submits that there was nothing to suggest that Mr Miranda, Mr Greenwald and the *Guardian* would not approach the question of publication with the degree of responsibility that was appropriate to the circumstances of the case.

Conclusion on proportionality

79. I start with a proposition to which Mr Ryder readily and properly acceded during the course of oral argument. When determining the proportionality of a decision taken by the police in the interests of national security, the court should accord a substantial degree of deference to their expertise in assessing the risk to national security and in weighing it against countervailing interests. This is because the police have both the institutional competence and the constitutional responsibility to make such assessments and decisions. As regards the latter, they are ultimately accountable to Parliament and the constitutional responsibility for the protection of national security lies with the elected government: see, for example, *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2011] QB 218, [2010] EWCA Civ 158, per Lord Neuberger MR at para 131.

80. In *Secretary of State for Foreign and Commonwealth Affairs v Assistant Deputy Coroner for Inner London* [2013] EWHC 3724 (Admin), Goldring LJ having reviewed some of the authorities said at para 57 that, when carrying out the balancing exercise of weighing national security against (in that case) the proper administration of justice:

> "….the Secretary of State's view regarding the nature and extent of damage to national security which will flow from disclosure should be accepted unless there are cogent or solid reasons to reject it."

81. All risks are concerned with future possibilities. That is in their nature. Some risks may be assessed as being so unlikely to materialise that they can be dismissed as fanciful. Others may be assessed as very likely to materialise. Between these two extremes there is a wide band of degrees of likelihood of a risk materialising. The more likely the risk is assessed to be, the greater the weight that should be accorded to it when balancing it against a countervailing factor. By using the word "theoretical" in this case, I understand Mr Ryder to be saying that the risk in question is very unlikely to materialise. He may even be saying that it is fanciful.

82. I do not accept that the evidence of Det Supt Stokley, Mr Robbins and Det Supt Goode can be brushed aside in this way. Laws LJ was right to describe it as "compelling". I have in mind, in particular, the evidence of Mr Robbins that the material seized was "*highly likely* to describe techniques that have been *crucial* in *life-saving* counter-terrorism operations, the prevention and detection of *serious* crime and other intelligence activities *vital* to the security of the UK" (emphasis added). The evidence of Det Supt Stokley was to similar effect: see para 71 above. There is no reason to disagree with their assessment of the risk. Indeed, the court is ill equipped to do so. The police and the Security Service have the expertise and access to secret

intelligence material which rightly make it very difficult to challenge such an assessment in a court of law.

83. I would add that, when conducting the balancing exercise, the court should also have regard to the harm that might be caused to the community if the risk does materialise. The greater the potential harm, the greater the weight that should be accorded to the community interests. The potential harm in this case was very substantial.

84. In conclusion, I substantially agree with what Laws LJ said at paras 72 and 73 of his judgment. I approach the issue on the footing that the Schedule 7 stop was an interference with press freedom. But the compelling national security interests clearly outweighed Mr Miranda's article 10 rights on the facts of this case. In reaching this conclusion, I also bear in mind the considerable deference that the court should accord to a decision to invoke the Schedule 7 power in a case of this kind. It follows that, subject to the point raised by the fourth ground of appeal, the decision to exercise the power was proportionate on the facts of this case.

THE FOURTH GROUND OF APPEAL: SCHEDULE 5

85. Schedule 5 provides so far as material:

> "1(1) A constable may apply to a justice of the peace for the issue of a warrant under this paragraph for the purposes of a terrorist investigation.
>
> (2) A warrant under this paragraph shall authorise any constable—
>
> (a) to enter premises mentioned in sub-paragraph (2A) [whose details are not material],
>
> (b) to search the premises and any person found there, and
>
> (c) to seize and retain any relevant material which is found on a search under paragraph (b).
>
> ...
>
> 5(1) A constable may apply to a Circuit judge or a District Judge (Magistrates' Courts) for an order under this paragraph for the purposes of a terrorist investigation. "
>
> (2) An application for an order shall relate to particular material, or material of a particular description, which consists of or includes excluded material or special procedure material.
>
> (3) An order under this paragraph may require a specified person—
>
> (a) to produce to a constable within a specified period for seizure and retention any material which he has in his

> possession, custody or power and to which the application relates...
>
> (4) For the purposes of this paragraph—
>
> (a) an order may specify a person only if he appears to the Circuit judge or the District Judge (Magistrates' Courts) to have in his possession, custody or power any of the material to which the application relates...
>
> 6(1) A Circuit judge or a District Judge (Magistrates' Courts) may grant an application under paragraph 5 if satisfied—
>
> (a) that the material to which the application relates consists of or includes excluded material or special procedure material...
>
> (c) that the conditions in sub-paragraphs (2) and (3) are satisfied in respect of that material.
>
> (2) The first condition is that—
>
> (a) the order is sought for the purposes of a terrorist investigation, and
>
> (b) there are reasonable grounds for believing that the material is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation...
>
> 10(1) An order of a Circuit judge or a District Judge (Magistrates' Courts) under paragraph 5 shall have effect as if it were an order of the Crown Court...
>
> 13(1) A constable may apply to a Circuit judge or a District Judge (Magistrates' Courts) for an order under this paragraph requiring any person specified in the order to provide an explanation of any material—
>
> …....
>
> (b) produced or made available to a constable under paragraph 5.

86. By para 4 of Schedule 5 "excluded material" has the meaning given by section 11, and "special procedure material" has the meaning given by section 14 of PACE. Thus "excluded material" includes "journalistic material" (viz. "material acquired or created for the purposes of journalism") held in confidence (section 11(1)(c) read with section 13(1)). "Special procedure material" includes "journalistic material, other than excluded material" (section 14(1)(b)).

87. As I have said, the fourth ground of appeal is a sub-set of the third ground. Mr Ryder submits that the use of Schedule 7 was disproportionate in the present case (involving

as it does journalistic material) because there was available an alternative, less intrusive mechanism, namely a production order under Schedule 5.

88. Laws LJ rejected this submission for the following reasons:

> "61. This submission lacks all practicality. I will assume that the defendants (rather the second defendant: the application is made by "a constable" – paragraph 5(1)) could have got before a judge before the claimant left Heathrow for Brazil. But there are other insuperable difficulties. (1) Paragraph 5(4)(a) could not have been satisfied. The application must relate to "particular material, or material of a particular description, which consists of or includes excluded material or special procedure material" (paragraph 5(2)), and the order may only specify an individual if "he appears to the [judge] to have in his possession, custody or power any of the material to which the application relates" (5(4)(a)). But the police did not know what the claimant was carrying: neither the National Security Justification nor the final PCS contained particulars remotely sufficient for the Schedule 5 process. (2) Paragraph 6(1)(a) could not have been met. The police could not have satisfied the judge "that the material to which the application relates consists of or includes excluded material or special procedure material". (3) The claimant would not have been obliged to answer any questions about what he was carrying: the power in paragraph 13 to require an explanation only relates to material already produced or made available. (4) It appears that the only sanction for disobedience to any order that might be obtained would have been contempt proceedings after the event: paragraph 10 provides that a judge's order "under paragraph 5 shall have effect as if it were an order of the Crown Court". "
>
> 62. Given all these difficulties, an application under Schedule 5 would have been pointless and ineffective."

89. Mr Ryder takes issue with each of these reasons. As regards (1), he says that it was not necessary for the police to "know" what Mr Miranda was carrying. They knew that he was working with Mr Greenwald and Ms Poitras in relation to articles based on the Snowden material. It was only necessary for a judge to be satisfied that he "appeared" to have in his possession the material to which the application related. As regards (2), Mr Ryder submits that the court overstated the difficulty the police would have had in satisfying it that the material contained excluded or special procedure material, given his work with journalists. As regards (3), the power to require an explanation is only *exercisable* in relation to material produced by the individual (it may not be used to compel an explanation of other material not the subject of the production order). But there is nothing in Schedule 5 to prevent a constable from *applying* for a warrant order under para 13 at the same time as the application for a production order.

90. It is not necessary for me to decide whether Mr Ryder's answers to (1) and (2) are correct, because in my view there is no answer to (3) and this alone justifies Laws

LJ's conclusion that Schedule 5 did not afford an effective mechanism for the MPS to invoke in order to obtain the information that they wanted. Det Supt Stokley has stated at para 50 of his first witness statement why he opted for the Schedule 7 route. He said:

> "I did not address my mind at the time to applying to a circuit judge for a Schedule 5 TACT production order as I considered that Schedule 7 represented the best and only method of achieving the dual objective of establishing what material Mr MIRANDA may have had in his possession and questioning him about it. I may have been able to obtain access to the material had I obtained a Schedule 5 order, but I would not have been able to ask Mr MIRANDA what his intentions were in relation to it unless I had arrested him and conducted a PACE interview under caution at a police station. Secondly, I believed that it was important to act as swiftly as possible, as Mr MIRANDA was only going to be in the UK in transit for a short period of time. A Schedule 5 production order process followed by an arrest and interview would have taken much longer, and would have inevitably resulted in a much greater interference in Mr MIRANDA's private life and would have seriously disrupted his travel arrangements."

91. It was reasonable for him (and he was entitled) to consider that questioning Mr Miranda in exercise of the Schedule 7 stop power was likely to be more effective than seeking an explanation under para 13(1) of Schedule 5. So far as concerns the present case, there were two principal weaknesses in Schedule 5 from Det Supt Stokley's point of view. First, the primary purpose of the stop was to enable the police to question Mr Miranda and Schedule 5 did not allow for this. It would only have allowed the MPS to seek Mr Miranda's explanation of the material that he was carrying. Secondly, the Schedule 5 process was slower process than the Schedule 7 stop process. As the officer explains, speed was particularly important in this case.

92. There is the further point made by Laws LJ that para 2(5) of Schedule 7 provides that a person who is questioned under para 2 must "(a) give the examining officer any information in his possession which the officer requires". Para 18 provides that a person commits an offence punishable with a sentence of imprisonment and/or a fine if he "(a) wilfully fails to comply with a duty imposed under or by virtue of this Schedule". On the other hand, the only sanction for disobedience to an explanation order made under para 13 of Schedule 5 (which has effect as if it were an order of the Crown Court: see para 10(1)) is proceedings for contempt. This is a less effective sanction than that afforded by para 18 of Schedule 7.

93. I accept that an order under Schedule 5 would have been less intrusive than the exercise of the Schedule 7 stop power. But it would also have been less effective. Having regard to the seriousness of the security interests potentially at stake, Det Supt Stokley was entitled to adopt the procedure which he considered likely to be the most effective. The decision not to invoke Schedule 5 did not make the exercise of the Schedule 7 stop power disproportionate.

THE FIFTH GROUND OF APPEAL: INCOMPATIBILITY WITH ARTICLE 10

94. In the end, the incompatibility issue has been narrowly refined to the question of whether, as Mr Ryder contends, the Schedule 7 stop power, if used in respect of journalistic information or material, is incompatible with article 10 in that it is not "prescribed by law" as required by article 10(2). In essence, his case (supported by the Interveners) is that it is not prescribed by law because it is not subject to "sufficient legal safeguards to avoid the risk that power will be exercised arbitrarily and thus that unjustified interference with a fundamental right will occur": see per Lord Hughes at para 30 of *Beghal v Director of Public Prosecutions* [2015] 3 WLR 344, [2015] UKSC 49.

95. It is submitted that Schedule 7 suffers from two fundamental defects. The first is that it contains no requirement that an examining officer even takes into account the right to freedom of expression or, in particular, the risk that the examination of an individual, or the seizure, examination, retention and/or copying of documents or data may intrude upon confidential journalistic material or disclose the identity of a confidential source. This renders the circumstances in which the power can be used in relation to journalistic material unforeseeable and/or so broad as to require the strongest possible independent safeguards.

96. The second defect is that there is no provision for authorisation by a court or other independent and impartial decision-making body in a case involving journalistic material prior to the use of the Schedule 7 power or, in an urgent case, immediately after the obtaining of the material pursuant to the exercise of the power. In relation to urgent cases, where it would be impracticable to obtain such authorisation in advance of the acquisition of documents, Schedule 7 contains no bar on the inspection of such documents pending independent authorisation.

97. Although these two alleged defects were identified by Mr Ryder, the focus of his submission and those of the Interveners was on the lack of independent scrutiny of the exercise of the power. It is to this issue that I now turn.

98. The question of the compatibility of Schedule 7 with article 10 of the Convention did not arise in *Beghal*, which concerned only articles 5, 6 and 8. As I shall explain, article 10 imposes obligations which are materially different from those arising under these other articles. At paras 74 to 89 of his judgment, Laws LJ held that there was no incompatibility for two broad reasons. The first was founded on the reasoning of the Divisional Court in *Beghal*. It was for this reason that Laws LJ did not accept that the Schedule 7 power is "over-broad or arbitrary" (and on that ground is not "prescribed by law"). He expressed his second reason in these terms at para 88:

> "Mr Kovats submits that the Strasbourg court has not developed an absolute rule of prior judicial scrutiny for cases involving State interference with journalistic freedom. In my judgment that is right. Although the court's reasoning is sometimes expressed in very general terms (see in particular paragraphs 90 and 92 of *Sanoma*), in this area as in others its method and its practice is to concentrate on the facts of the particular case. And the Strasbourg court would itself acknowledge that the protections against excess of power by State agents, and the limitations which the law imposes on the power they enjoy, vary greatly from State to State: such

> differences illustrate the importance of the well known doctrine of the margin of appreciation. As I have indicated at paragraph 30 (sic), there are important constraints upon the use of the Schedule 7 power. The discipline of the proportionality principle is one of the foremost safeguards: its role in this case, I think, demonstrates as much. "

99. The "important constraints" to which Laws LJ referred at para 31 were:

> "At the same time there are important constraints on the use of the Schedule 7 power. First, although the examining officer need not have grounds for suspecting that the subject falls within section 40(1)(b), the general law of course requires that the power be exercised upon some reasoned basis, proportionately (as to which see paragraphs 39 – 46 below) and in good faith. Secondly, there is a limitation upon the meaning of terrorism given by reference to the mental or purposive elements prescribed by section 1(1)(b) ("designed to influence... or to intimidate...") and 1(1)(c) ("for the purpose of advancing a political, religious, racial or ideological cause"). Thirdly, the power may only be used where the subject is "at a port or in the border area" (Schedule 7 paragraph 2(2)(a)) intending (in the examining officer's belief) to enter or leave Great Britain or Northern Ireland (2(2)(b)). Fourthly, the examining officers' power of detention is limited to 9 hours (Schedule 7 paragraph 6). "

100. The ECtHR has considered the role of judicial oversight in the process of the acquisition or compulsory disclosure of journalistic material in a number of cases. Liberty submits that the following principles can be derived from these authorities. First, the protection of journalistic sources must be attended with legal procedural safeguards commensurate with the importance of the article 10 principle at stake: see the Grand Chamber decision in *Sanoma Uitgevers v The Netherlands* [2011] EMLR 4 at para 88. Secondly, first and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body of any requirement that a journalist hand over material concerning a confidential source: *Sanoma* at para 90. Thirdly, the judge or other independent and impartial body must be in a position to carry out the exercise of weighing the potential risks and respective interests *prior to disclosure*. The decision to be taken should be governed by clear criteria: *Sanoma* at para 92. Fourthly, the exercise of an independent review that takes place only *after* the handing over of material capable of revealing such sources would undermine the very essence of the right to confidentiality and cannot therefore constitute a legal procedural safeguard commensurate with the rights protected by article 10: *Sanoma* at para 91. Fifthly, however, in urgent cases, where it is impracticable for the authorities to provide elaborate reasons, 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 the public interest invoked by the investigating authorities outweighs the general public interest in source protection: *Sanoma* at para 91. Independent review after the

handing over of material but before access has been gained to its contents is referred to in the jurisprudence as *post factum* review.

101. It is clear enough that the Strasbourg jurisprudence requires prior, or (in an urgent case) immediate *post factum*, judicial oversight of interferences with article 10 rights where journalists are required to reveal their sources. In such cases, lack of such oversight means that there are no safeguards sufficient to make the interference with the right "prescribed by law". This is not surprising in view of the importance to press freedom of the protection of journalistic sources: see, for example, *Sanoma* at paras 88 to 92. As the ECtHR said in *Nordisk Film & TV A/S v Denmark:*

> "The protection of journalistic sources is one of the cornerstones of freedom of the press. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest".

102. But the present case is not about disclosure of a journalist's source. The source is known. The question, therefore, arises whether prior or (in an urgent case) immediate *post factum* judicial authorisation is required as an adequate safeguard before journalistic material can be obtained in a case where the identity of the source is known. Mr Kovats submits that there is a real difference between disclosure of a journalist's source and mere disclosure of journalistic material.

103. There has been debate as to whether the decision in *Nagla v Latvia* (App. No. 73469/10, 16 July 2013) sheds light on the question whether judicial authorisation is required for the disclosure of journalistic material, as opposed to a journalist's source. The applicant was a television investigative reporter. She alleged that she received an email from a source revealing that there were security flaws in a database maintained by the State Revenue Service. The applicant announced this during a television report. The applicant's home was searched and material seized by a police investigator. She issued proceedings complaining that, in breach of article 10, she had been compelled to disclose information that had enabled a journalistic source to be identified. The Latvian Government pointed out that the search had not been carried out with a view to establishing the identity of the applicant's source (which it knew at that point in the investigation). Rather it was to gather evidence in the criminal proceedings against the informant.

104. But that did not affect the court's approach to whether article 10 was engaged: see paras 78 to 83. The court distinguished *Sanoma* on the ground that the search at the applicant's home had a statutory basis. Section 180 of the domestic statute provided for an investigating judge to authorise a search on application by the competent investigating authority. In an urgent case, a search warrant could be issued by the investigating authority, but only if authorised by a public prosecutor. Moreover, a warrant issued under the urgent procedure had to be submitted on the following day to the investigating judge who examined the lawfulness of and grounds for the search.

105. The court held at para 87 that there were procedural safeguards in place by virtue of prior judicial scrutiny. The focus of the complaint was on the adequacy of the safeguards under the urgent review. The court held that, since the investigating judge had the power (i) to revoke the search warrant and to declare evidence obtained as a result of the search to be inadmissible in proceedings and (ii) to withhold the

disclosure of the identity of journalistic sources, the interference was "prescribed by law".

106. In my view, it would be wrong to make too much of this decision of one Section of the ECtHR, particularly since the Government was aware of the journalist's source. It is, however, worth noting that at para 101, the court said:

> "The Court considers that any search involving the seizure of data storage devices such as laptops, external hard drives, memory cards and flash drives belonging to a journalist raises a question of the journalist's freedom of expression including source protection and that the access to the information contained therein must be protected by sufficient and adequate safeguards against abuse. In the present case, although the investigating judge's involvement in an immediate post factum review was provided for in the law, the Court finds that the investigating judge failed to establish that the interests of the investigation in securing evidence were sufficient to override the public interest in the journalist's freedom of expression, including source protection and protection against the handover of the research material. "

107. It seems to me that the use twice of the word "including" in this paragraph suggests that protection of a journalist's sources is no more than one aspect of a journalist's freedom of expression, albeit a very important one. I can see no reason in principle for drawing a distinction between disclosure of journalistic material *simpliciter* and disclosure of journalistic material which may identify a confidential source.

108. It is against this background that I turn to consider the reasons given by Laws LJ for concluding that, notwithstanding the lack of a requirement of judicial or other independent and impartial oversight, Schedule 7 is compatible with article 10. The first broad reason he gave was based on the reasoning of the Divisional Court in *Beghal*. That reasoning has since been superseded by that of the Supreme Court. Lord Hughes explained at para 43 why he considered that, in the case of port questioning and search powers, there were sufficient effective safeguards in the manner of operation to meet the requirement that the interference with the article 5 and 8 rights were "in accordance with the law". The safeguards included:

> "(i) the restriction to those passing into and out of the country;
>
> (ii) the restriction to the statutory purpose;
>
> (iii) the restriction to specially trained and accredited police officers;
>
> (iv) the restrictions on the duration of questioning;
>
> (v) the restrictions on the type of search;
>
> (vi) the requirement to give explanatory notice to those questioned, including procedure for complaint;

> (vii) the requirement to permit consultation with a solicitor and the notification of a third party;
>
> (viii) the requirement for records to be kept;
>
> (ix) the availability of judicial review; the contention of the appellant and of Liberty that judicial review would be ineffective is overstated; judicial review is available if bad faith or collateral purpose is alleged, and also via the principle of legitimate expectation where a breach of the Code of Practice or of the several restrictions listed above is in issue; courts are well used to requiring police officers to justify their actions and to drawing the correct inference if there is material to do so; use of the power for a collateral purpose, such as to investigate a non-terrorism suspected offence, would be likely to become apparent, as it did in the case of section 44 – see para 41(f), (g) and (h) above.
>
> (x) the continuous supervision of the Independent Reviewer is of the first importance; it very clearly amounts to an informed, realistic and effective monitoring of the exercise of the powers and it results in highly influential recommendations for both practice and rule change where needed.

109. It is plain that most of these safeguards apply with equal force to an interference with article 10 rights. Mr Kovats submits that, if Schedule 7 is compatible with articles 5, 6 and especially 8, it must also be compatible with article 10. He makes the point that article 8 is of similar structure to article 10 and many factual situations fall within both articles. He illustrates this by reference to a number of Strasbourg decisions where complaints were made of violations of article 8 and 10 and where, having reached a decision in relation to one complaint, the court said that it was not necessary to express a view about the other: see, for example, *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45; *Nagla v Latvia;* and *McVeigh et al v United Kingdom* (1981) 5 EHRR 71. In *Telegraaf Media Landelijke BV v Netherlands* (2012) 34 BHRC 193, one of the complaints concerned the tapping of the applicant journalists' telephones. Mr Kovats relies on the fact that the court said at para 88 that it was appropriate to consider the matter under articles 8 and 10 "concurrently".

110. But although there is often an overlap between articles 8 and 10, they are distinct. That is particularly the case where article 10 concerns freedom of journalistic expression. I turn to the particular question of whether the safeguards which were held to be adequate in *Beghal* must by the same token be considered to be adequate in an article 10 case concerning journalistic material. I accept the submission of Liberty that safeguard (ix) is of very limited value in the context of protecting journalistic material. The availability of judicial review, after the event, cannot cure a breach of article 10 resulting from the disclosure of a confidential source or other confidential material. I develop this point at para 113 below. As the ECtHR put it in *Telegraaf Media Nederland* (2012) 34 BHCR 193 at para 101:

> "… review post factum,…..cannot restore the confidentiality of journalistic sources once it is destroyed."

111. I also accept the submission of Liberty that it would be impractical to assume that an average journalist passing through a port and detained under Schedule 7 would have the ability to obtain emergency interim injunctive relief preventing examination of his confidential journalistic material after it had been seized under Schedule 7 in advance of a judicial review hearing on the question of whether the seizure was compatible with his article 10 and common law rights. The differences between article 10 in relation to journalistic material on the one hand and articles 5 and 8 on the other are such that I do not consider that the reasoning in *Beghal* is dispositive of the present case. The considerations are materially different.

112. As regards the second set of reasons given by Laws LJ, I need to consider the constraints on the exercise of the power that he held to amount to adequate safeguards. These are (i) the requirements of the general law that the power be exercised on a reasoned basis, proportionately and in good faith; (ii) the limitation on the meaning of terrorism given by reference to the mental or purposive elements prescribed by section 1(1)(b) and (c) of TACT; (iii) the fact that the power may only be exercised "at a port or in the border area"; and (iv) the fact that the power of detention is limited to nine hours.

113. I accept that these are constraints on the exercise of the power, but in my judgment they do not afford effective protection of journalists' article 10 rights. The central concern is that disclosure of journalistic material (whether or not it involves the identification of a journalist's source) undermines the confidentiality that is inherent in such material and which is necessary to avoid the chilling effect of disclosure and to protect article 10 rights. If journalists and their sources can have no expectation of confidentiality, they may decide against providing information on sensitive matters of public interest. That is why the confidentiality of such information is so important. It is, therefore, of little or no relevance that the Schedule 7 powers may only be exercised in a confined geographical area or that a person may not be detained for longer than nine hours. I accept that the fact that the powers must be exercised rationally, proportionately and in good faith provides a degree of protection. But the only safeguard against the powers not being so exercised is the possibility of judicial review proceedings. In my view, the possibility of such proceedings provides little protection against the damage that is done if journalistic material is disclosed and used in circumstances where this should not happen. An important rationale for the principle of legal certainty that underpins the concept of "prescribed by law" is that there should be *adequate* safeguards against arbitrary decision-making. Unlike the position in relation to article 5 and 8, the possibility of judicial review proceedings to challenge the rationality, proportionality and good faith of a decision to interfere with freedom of expression in cases involving journalistic material cases does not afford an adequate safeguard.

114. Laws LJ may be right in saying that the ECtHR has not developed an "absolute" rule of judicial scrutiny for cases involving State interference with journalistic freedom. But prior judicial or other independent and impartial oversight (or immediate *post factum* oversight in urgent cases) is the natural and obvious adequate safeguard against the unlawful exercise of the Schedule 7 powers in cases involving journalistic freedom. For the reasons that I have given, the other safeguards relied on by Laws LJ provide inadequate protection.

115. TACT, therefore, contains no adequate legal safeguards relating to journalistic material *simpliciter* or to journalistic material the disclosure of which may identify a confidential source. Nor are any such safeguards to be found in any other rules operating within the framework of law: see per Lord Sumption in *R (Catt) v ACPO* [2015] AC 1065, [2015] UKSC 9 at para 11.

116. The contrast with other legal regimes is striking. Thus section 9 and Schedule 1 to PACE empower the court to grant production orders, allowing the police to obtain evidence connected with the commission of criminal offences (including terrorism). But "journalistic material" falls within the categories of "special procedure material" or "excluded material" as defined in sections 11 to 14 of PACE. Such material is afforded additional protections, such that access can only be gained on an *inter partes* application before a Circuit Judge, in which the stringent requirements of Schedule 1 are met.

117. Similarly, as we have seen, Schedule 5 to TACT empowers the court (again following in *inter partes* hearing) to order the seizure or production of special procedure and excluded material for the purpose of a terrorist investigation, where there are reasonable grounds for believing that (i) the material is likely to be of substantial value to that investigation, and (ii) it is in the public interest for the material to be disclosed, having regard to the benefit likely to accrue from the investigation, and the circumstances under which the person had the material in his or her possession.

OVERALL CONCLUSION

118. For the reasons that I have given, I would hold that the exercise of the Schedule 7 stop power in relation to Mr Miranda on 18 August 2013 was lawful, although my reasoning differs in one important respect from that of the Divisional Court. I have reached this conclusion despite my disagreement with the Divisional Court as to the meaning of "terrorism" in section 1 of TACT. I would, therefore, dismiss the appeal in so far as it relates to the exercise of the stop power in this case.

119. But in disagreement with the Divisional Court, I would declare that the stop power conferred by para 2(1) of Schedule 7 is incompatible with article 10 of the Convention in relation to journalistic material in that it is not subject to adequate safeguards against its arbitrary exercise and I would, therefore, allow the appeal in relation to that issue. It will be for Parliament to provide such protection. The most obvious safeguard would be some form of judicial or other independent and impartial scrutiny conducted in such a way as to protect the confidentiality in the material.

Lord Justice Richards:

120. I agree.

Lord Justice Floyd:

121. I also agree.