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Case No: CO/11732/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/08/2013

Before:

LORD JUSTICE BEATSON
MR JUSTICE KENNETH PARKER

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Between:

The Queen on the Application of David Miranda	**Claimant**
- and -	
(1) Secretary of State for the Home Department	**Defendants**
(2) Commissioner of Police for the Metropolis	

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Matthew Ryder QC, Edward Craven and Raj Desai (instructed by Bindmans LLP)
for the Claimant
Steven Kovats QC and Julian Blake (instructed by The Treasury Solicitor)
for the First Defendant
Jonathan Laidlaw QC and Ben Brandon (instructed by The Treasury Solicitor)
for the Second Defendant

Hearing date: 22 August 2013

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Judgment Approved by the court for handing down (subject to editorial corrections)

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1. This is the judgment of the Court to which we have both contributed. We give the reasons for our decisions at the conclusion of the hearing yesterday, Thursday 22 August 2013. This case concerns the exercise of the extensive powers under Schedule 7 to the Terrorism Act 2000 and the detention of material in the possession of a person assisting a journalist and possibly identifying journalistic sources. The protection of journalistic sources has been stated to be of vital importance to press freedom, both in our domestic law and in the Strasbourg court: see, for example, Section 10 of the Contempt of Court Act 1981 and the decisions of this court in *R (Malik) v Manchester Crown Court* [2008] EWHC 1362 (Admin), *per* Dyson LJ as he then was, and of the Grand Chamber of the European Court of Human Rights in *Sanoma Uitgevers BV v The Netherlands* 14 September 2010. The sole questions for the court yesterday concerned interim relief, and the timetable for the future conduct of these proceedings. Before setting out the different positions of the parties as to the position pending the hearing, and their justifications for their positions on this, we summarise the facts.

2. In proceedings served late on Wednesday 21 August 2013, the claimant, David Miranda, applied for urgent consideration of his application for permission to apply for judicial review and the grant of interim relief in respect of his examination and detention on 18 August 2013 by Metropolitan Police officers exercising powers under Schedule 7 to the Terrorism Act 2000 while in the international transit area of Heathrow Airport. The defendants are the Secretary of State for the Home Department and the Commissioner of Police of the Metropolis. The incident has been extensively covered in national and international media.

3. Mr Miranda was detained for a period of almost nine hours between 8.05 and 17.00 while was travelling from Berlin to Rio de Janeiro via Heathrow Airport. During that time he was questioned and his laptop, telephone, memory sticks, portable hard drive and other items were taken by the officers and retained. The interim relief sought by the claimant is designed to stop the defendants examining the material detained or informing third parties of its contents.

4. Mr Miranda is a Brazilian citizen. He is the partner of Mr Greenwald, an American journalist who has written a series of stories for the *Guardian* and the *New York Times* relating to mass surveillance programmes by the agencies of the United States and the United Kingdom governments. A significant part of the underlying information for the stories in the *Guardian* has been provided by Mr Edward Snowden, a US citizen. The claimant's summary statement of facts and grounds states that Mr Miranda regularly assists Mr Greenwald in his journalistic work and was doing so at the time he was stopped and detained by the police officers. The summary statement of facts and grounds also states that the *Guardian* had paid for his flights to and from Berlin because his travel was directly connected to the assistance he was providing to Mr Greenwald, and that, while in Berlin, the claimant visited a documentary film maker, Ms Pritras, who had been working with Mr Greenwald.

5. The defendants have stated they will vigorously defend these proceedings. Not surprisingly, they were not able to serve any evidence in the hours between the issue of proceedings on Wednesday afternoon and the hearing yesterday. Their position is

contained in letters dated 21 August to the claimant's solicitors from Ms Rashid, a senior lawyer in the Treasury Solicitor's Department and Mr Fairbrother, a solicitor in the Metropolitan Police's Directorate of Legal Services. The claimant's applications are supported by the statements of Ms Morgan, a solicitor at Bindmans LLP and Mr Rusbridger, the editor of the *Guardian* and the editor in chief of *Guardian News and Media,* both dated 21 August 2013.

6. The parties have been unable to agree as to suitable undertakings by the defendants to deal with the position pending the full hearing. The claimant sought the following undertakings. First, that there would be no inspection, copying, disclosure, transfer, distribution or interference in any way with data seized from Mr Miranda. Secondly, that the product of any inspection that has already taken place will not be disclosed, shared or used further in any way and will be kept secure. Thirdly, that the defendants would take all necessary steps within their power to obtain undertakings that any third parties who had been granted possession or access to such data would not disclose, transfer, distribute or otherwise interfere in any way with the data pending the final determination of these proceedings.

7. The Secretary of State and the Commissioner declined to give those undertakings. Paragraph 11 of the letter from the Treasury Solicitor's Department states that "based on information originally known to the Secretary of State it is necessary to continue to examine [the] data <u>without delay</u> because there are grounds to believe that it contains material, including tens of thousands of highly classified UK intelligence documents, the authorised disclosure of which would threaten national security, including putting lives at risk" (emphasis added).

8. In the written submissions of Mr Laidlaw QC and Mr Brandon on behalf of the Commissioner dated 21 August, it is stated that "the effect of an order granted in the terms sought by the claimant would be to prohibit the second defendant from performing its core, statutory function: the prevention and detection of crime. In particular, it would prohibit the second defendant from continuing to examine the material seized so as to determine whether the claimant is a person falling within Section 40(1)(b) of the [Terrorism Act] 2000; and to establish whether any material obtained from that examination may be needed for use as evidence in any future criminal proceedings". The submissions also state that the balance of justice weighs decisively against the grant of interim measures in the terms sought because of the limited seven day period the police have to examine the "things seized" under the relevant statutory provision. Since that period would expire at midnight on Saturday 24 August, the effect of the grant of interim relief in the terms of the undertaking would be final.

9. The defendants, however, offered to undertake not to inspect, copy, disclose, transfer, distribute (whether domestically or to any foreign government or agency), or interfere with the data held by Mr Miranda and detained save (1) for the purposes of a criminal investigation and use as evidence in criminal proceedings, and (2) for the purposes of protecting national security, including by preventing or avoiding the endangering of the life of any person or the diminution of a counter-terrorism capability of Her Majesty's Government. The defendants resist any interim relief pending the hearing beyond this.

10. During the course of the hearing it was agreed that the defendants would serve the evidence upon which they will rely to resist an order of interim relief by close of play on Tuesday 27 August and that interim relief should be considered on Friday 30 August. The question for the court yesterday on interim relief therefore changed, and concerned only the position pending the hearing on 30th August. As to the timetable, one was agreed, although, in the event that the Secretary of State gives notice that she wishes to apply for a closed hearing pursuant to CPR Part 82 and succeeds in that application, it will have to be revisited.

11. Before turning to the question of interim relief, we shall summarise the legal framework and the nature of the claimant's challenge to the action taken while he was in transit at Heathrow airport.

12. Schedule 7 of the Terrorism Act concerns port and border controls. It gives officers broad powers including the power to question specified persons to determine whether they appear to be a terrorist as defined by Section 40(1)(b) of the Act. Section 40(1)(b) provides that "terrorists" means a person who "is or has been concerned in the commission, preparation or instigation of acts of terrorism".

13. Section 1 of the Act provides that terrorism means the use or threat of action where the use or threat is designed to influence a government or governmental organisation or to intimidate the public or a section of the public. The action or threat must be made for the purpose of advancing a political, religious, racial or ideological cause.

14. Paragraph 2(2) of Schedule 7 provides that an examining officer may question a person if:

> "(a) he is at a port or in the border area, and
>
> (b) the examining officer believes that the person presence at the port or in the area is connected with his entering or leaving Great Britain or Northern Ireland or is travelling by air within Great Britain or within Northern Ireland."

15. Paragraph 2(3) provides that paragraph 2 "also applies to the person on a ship or aircraft which has arrived at any place in Great Britain or Northern Ireland (whether from within or outside Great Britain or Northern Ireland)". Significantly paragraph 2(4) provides that an examining officer may exercise the powers under paragraph 2 "whether or not he has grounds for suspecting that a person falls within Section 40(1)(b).

16. Paragraph 5 of Schedule 7 provides that a person questioned under paragraph 2 must give the examining officer any information in his possession which the officer requests, declare whether he has documents of a kind specified by the examining officer, and give the examining officer on request any document which he has with him which is of a kind so specified. Paragraph 11 of Schedule 7 deals with detention of property. It applies to anything given to an examining officer in accordance with paragraph 5, and to anything searched or found under a search. Paragraph 11(2) provides that "an examining officer may detain the thing – (a) for the purpose of examination, for a period not exceeding seven days beginning on the day in which the

detention commences, [and] (b) while he believes that it may be needed for use as evidence in criminal proceedings …"

17. The claimant challenges the legality of his detention on three grounds. The first is that the exercise of power under Schedule 7 was unlawful in this case because it was not used to determine whether the claimant appeared to be someone who is or has been concerned in the commission, preparation or instigation of acts of terrorism but in order to obtain material that may be sensitive or classified and which he did not possess lawfully.

18. The second ground is that the police had no jurisdiction to exercise the powers under Schedule 7 because those powers may only be used if the officer believes that the person's presence at the port in question is concerned with "his entering or leaving" Great Britain or Northern Ireland, his travelling by air "within Great Britain or Northern Ireland" or he "is on a ship or aircraft which has arrived at any place in Great Britain or Northern Ireland": Schedule 7, paragraph 2. The claimant's contention is that the power does not apply to a person in the international transit area of a port or airport and that since Mr Miranda was in transit between Germany and Brazil when he was stopped, and had not passed through immigration, he was not entering or leaving the UK or travelling within it or on an aircraft.

19. The third ground is that the Schedule 7 powers are disproportionate and lack adequate safeguards and thus are incompatible with the rights protected under Articles 5, 6, 8 and 10 of the European Convention for the Protection of Human Rights.

20. Mr Ryder emphasised the particular sensitivity of using Schedule 7 in respect of journalistic information. He submitted that by using Schedule 7 in the present context the defendants by-passed the appropriate statutory regimes for obtaining confidential journalistic information and circumvented important safeguards, including the requirement to obtain a court order before seizing material contained in those mechanisms.

21. While little is agreed, there is no issue between the parties as to the principles governing the grant of interim relief in proceedings such as these. The court must assess whether the balance of convenience favours the grant of interim measures and choose the course which in all circumstances appears to offer the best prospect that an eventual injustice can be avoided or minimised: *ex parte Factortame (No 2)* [1991] 1 All ER 70 at 107; *National Commercial Bank Ltd v Olint Corporation Ltd* [2009] UKPC 16 at [16]-[18].

22. Mr Kovats maintained that there is no triable issue in respect of the second ground. However, while reserving the Secretary of State's position for the future, for the purposes of the hearing before us only, he accepted that the first ground did raise a triable issue. Also, and again only for the purposes of the hearing yesterday, he accepted that damages would not compensate the claimant. The third ground is agreed not to be relevant to interim relief. Accordingly, the sole question before the court was the balance of convenience in the eight days between the hearing yesterday and Friday 30 August.

23. Mr Ryder submitted that to allow the defendants to investigate the material before Friday 30 August, when the court can have a full hearing with the evidence of all the parties before it, would defeat the primary purpose of the claim which is to protect the confidentiality of the journalistic material seized and the identity of journalistic sources. Mr Ryder submitted that unless the injunction was granted, the heart of the claim would be taken away and any ultimate success in the proceedings would be a phyrric victory because the defendants will have had access to the material. He relied on a number of factors. From a legal point of view he submitted that the decision of the Grand Chamber of the Strasbourg Court in *Sanoma Uitgevers BV v The Netherlands* showed the importance of a court as an independent and impartial body reviewing decisions which would lead to the disclosure of journalistic sources "prior to any disclosure and with reference to the material that it is sought to have disclosed so that the arguments of the authorities seeking the disclosure can be properly assessed": paragraph 92 of the judgment and see also paragraphs 88-91.

24. From a factual point of view Mr Ryder relied on the position taken by government in June and July this year in relation to material held by the *Guardian* which Edward Snowden had provided to it. Mr Rusbridger's evidence is that the *Guardian* was subjected to pressure from government contacts to retain or destroy such material which was said to be classified and sensitive material which had been taken improperly, and threatened with legal action to obtain the return of the material. However, the government contacts did not take such proceedings and agreed to, and on 20 July supervised, the destruction of computer hard disks containing information provided by Mr Snowden without first inspecting the material on the hard disks. Mr Ryder asked why, if inspection of such information is so vital for national security purposes, the authorities allowed the material held by the *Guardian* to be destroyed without such inspection.

25. Thirdly, Mr Ryder submitted that paragraph 11 of the letter from the Treasury Solicitor's Department does not state that, if the authorities desist from further inspection for the eight days until the inter-partes relief hearing, the risks to national security would increase.

26. The defendants submitted that the balance of the risk of injustice comes down decisively against interim relief in the terms sought by the claimant. The principal submissions were made by Mr Kovats QC. Save in respect of the point concerning the seven day limit on the examination of detained material relied on by Mr Laidlaw to which we have referred, he adopted those submissions.

27. We have referred to the principal reason relied on by the Secretary of State, that it is necessary on the basis of information already known to her to continue to examine the data without delay (our emphasis) because there are grounds to believe it contains material including highly classified intelligence documents, the unauthorised disclosure of which would threaten national security and put lives at risk. The writer of the Treasury Solicitor Department's letter stated at paragraph 11 that "it is not possible in this letter to give more particulars of this assertion. But we make it on instructions and after having taken advice from the relevant person. The extent to which the Secretary of State will make good the assertion by evidence will be established at the *inter-partes* interim relief hearing".

28. The second reason given in the letter is the "it is necessary for the police to be able to obtain the assistance of other agencies, and to do so without delay, in order to assist any criminal investigation that may be undertaken": see paragraph 12. The third reason is that "once material has been lawfully obtained pursuant to Schedule 7, it may be disclosed to the intelligence service who may then use it for their statutory purposes: Counter Terrorism Act 2008, Section 19; *R (CC) v Metropolitan Police Commissioner & Ors* [2011] EWHC 3316 (Admin) at [21]. The Treasury Solicitor Department's letter also refers to the fact that the police intend to retain some or all of the detained material so as to determine whether the claimant is a person falling within Section 40(1)(b) of the 2000 Act and to establish whether any material obtained from the examination may be needed for use in any further criminal proceedings in which such material would (see *R v Hundal v Dhaliwal* [2004] EWCA (Crim) 389) be admissible in evidence.

29. The issue before the court yesterday therefore involved balancing two interests of high importance, the protection of journalistic sources and the protection of national security. To some extent the former has been compromised in that the defendants have been examining the material obtained in the period since it came into their possession on 18 August. But that examination has led those advising the Secretary of State to maintain that there are grounds to believe that it contains material the unauthorised disclosure of which would threaten national security, including putting lives at risk., The implication of Mr Kovats QC's submissions, although he was careful not to go beyond his instructions, was that the authorities needed to examine the material in order to decide how to counter the threat to national security and the risk to lives.

30. The Court is mindful of its duties as a public authority where Convention rights are in play. Its difficulty was that because the hearing was less than twenty four hours after proceedings were instituted it did not, and understandably did not, have any evidence from the defendants. But, as Mr Kovats observed, what the court does have are serious assertions by responsible persons. To grant the relief sought by the claimant at this stage would be to deal with the matter without evidence from the defendants, notwithstanding those "serious assertions by responsible persons" and although, when the evidence is served it may fully support the contents of Ms Rashid's letter. To refuse to grant the relief sought in its entirety beyond what the defendants are prepared to undertake voluntarily would be for the court to conduct the balancing exercise, albeit for a very short time, on the assumption that the evidence will not support the contents of Ms Rashid's letter. Either course of action has unattractive features and the disadvantage of to some extent pre-empting the task of the court at the *inter-partes* interim relief hearing.

31. The court concluded that to exclude from the prohibition of inspection and disclosure any inspection and prohibition for the purposes of a criminal investigation and use in criminal proceedings is too broad. If the defendants prevail at the *inter-partes* interim relief hearing they will be able to undertake these activities. We do not consider that it has been shown that it is necessary for them to do so in the next eight days. As the court made clear during the hearing, it did not accept the submission on behalf of the Commissioner that any interim relief would be final and would prevent the police and other agencies from completing the examination of the "things" seized within the seven days permitted by Schedule 7 to the 2000 Act. The seven day period relates to

the "thing" detained. It does not appear to preclude mirroring or copying of computer hard drives. Nor did Mr Ryder on behalf of the claimant contend that it did this. Indeed, his response to the Commissioner's position during the hearing was that such copies could be made, although that response may have been in the light of a misunderstanding of Mr Laidlaw's submission.

32. The court did, however, consider that inspection for the purpose of considering whether the claimant falls within Section 40(1)(b) of the 2000 Act and more generally for the purpose of protecting national security should be permitted pending the *inter-partes* interim relief hearing.

33. A principal purpose of the Terrorism Act 2000 is to enable the police to determine whether there are reasonable grounds for suspecting that a person "is or has been concerned in the commission, preparation or instigation of acts of terrorism" (Section 40(1)(b)). Paragraph 2(1) of Schedule 7 to the Act itself specifically provides that the questioning of any person is restricted to the purpose of determining whether the person falls within Section 40(1)(b). The second exception to the prohibition in the order that the court is making will enable the police, until 30 August 2013 when the application for interim relief is restored, to continue to examine the material seized so as to determine whether the claimant is a person falling within Sections 40(1)(b) of the Act. The reason for the exception, therefore, is simply to allow the police to continue, for a relatively short period, to perform a central and important task that Parliament has laid upon them. The court is satisfied that, notwithstanding the competing interests, the public interest in the investigation, detection and prosecution of those who are reasonably suspected to be terrorists plainly justifies the specific and relatively short (at this stage) exception. For the avoidance of doubt, and in the light of a concern expressed by Mr Ryder QC, the court emphasises that the exception is not intended to help the police to bolster the case that, at the time of the claimant's questioning under Schedule 7, the purpose of that questioning was genuinely to determine whether he was a terrorist as defined in Section 40(1)(b).

34. The court also considered inspection and disclosure for the purpose of protecting national security, including by preventing or avoiding the endangering the life of any person or the diminution of the counter-terrorism capability of Her Majesty's Government (the terms of the exclusion from the undertaking the defendants were prepared to make) should be permitted in the limited period until 30 August, notwithstanding the high importance of protecting journalistic sources.

35. In the light of what is stated in Ms Rashid's letter about the threat to national security, including putting lives at risk, the context of these proceedings is very different to the context in the *Sanoma* case. That case did not involve national security. It involved information concerning an illegal street race held in the outskirts of the town of Hoorn in the Netherlands, and the suspicion that one of the vehicles in the race had been used as a getaway car in a ram raid in the previous year. The statements of the Grand Chamber as to the need for the independent body whether the judge or prosecutor to conduct the balancing exercise prior to any disclosure of such material should be seen in that context and also because in that case there does not appear to have been urgency in the disclosure of the material. It is true that the court had stated that in situations of urgency there should be a procedure prior to the exploitation of such material by the authorities to identify and isolate information that could lead to the identification of sources. That, however, was not stated in a context where national

security was involved or where the position at the interlocutory stage presented the court with a real "Morton's Fork" of the sort we have described.

36. It is also significant that one of the exceptions in Section 10 of the Contempt of Court Act 1981 to the protection for journalistic sources and in Article 10(2) is where the interests of national security require disclosure. In *X v Morgan-Grampian (Publishers)* [1996] 1 AC 1 at 43 it was stated that, once it is shown that disclosure will serve one of the interests specified in Section 10, ie. national security and interests of justice, "the necessity of disclosure follows almost automatically".

37. Secondly, while the argument that any denial or limitation of interim relief would make future success by the claimant a phyrric victory has force in respect of a denial of any such relief pending the substantive hearing, the court did not consider that, given the volume of the material, this will be so in the period until 30 August when the matter can be properly determined by the court. It is to be noted that the authorities had been examining this material since some time on 18 August.

38. As to Mr Ryder's reliance on the treatment of the material that had been in the hands of the *Guardian* which was destroyed before it was inspected, the court rejected the submission that logically the position taken in respect of that material was compelling in respect of the material taken from Mr Miranda. The material which was in the possession of the *Guardian* and which was destroyed was different material to that in the possession of Mr Miranda. There was no information, save of the most general sort, about it before the court. For example it was not known whether the authorities had been able to ascertain what was in that material by other means. The fact that in respect of that material no statement similar to that made in paragraph 11 of Ms Rashid's letter has some limited force. But the material before the court is that examination is needed without delay because of the specified national security requirements.

39. Finally, to preclude the defendants from continuing to inspect the material would run the risk that they would be handicapped in developing their case at the restored hearing on 30 August that interim relief should be refused on grounds of national security.

40. We turn to the timetable after the hearing on 30 August. During the course of yesterday's hearing, the court raised the question of a "rolled up" hearing with the parties. After a short adjournment to enable Mr Kovats QC to take instructions it became clear that all the parties saw the advantages, in the particular circumstances of this case, of a "rolled up" hearing at which permission and, if permission is granted, the substantive hearing take place on the same occasion. As to the timetable towards such a hearing, the first defendant submitted that it needed thirty five days to serve its defence and the evidence, principally because there was more than one point of contact for the Treasury Solicitor's Department and counsel to liaise with and because of concern in the light of past cases, that the first defendant would be able fully to comply with its disclosure obligations. Mr Ryder contended for fourteen days, observing that as he understood the first defendant's position the concerns about disclosure concerned questions that went to relief rather than the principle substantive issues. In the event we have concluded that, in the light of the acceptance by all parties that expedition is necessary in these proceedings, the defendant should have up to twenty one days to serve their defence and evidence. The claimant is to serve any

evidence in reply within fourteen days thereafter, and skeleton arguments are to be exchanged within seven days thereafter. The hearing should be listed for two days, to commence a week after the exchange of skeleton arguments.

41. Mr Kovats stated that while the first defendant wished these proceedings to be entirely open, if she decided to apply for a closed hearing under CPR Part 82 she would do so by close of business on Thursday 29 August. If such an application is made that is almost bound to upset the timetable. As it will be known by the hearing next Friday whether such an application is to be made, it will be possible for the court to revisit the timetable at that stage. Any significant delay, however, may also affect consideration of the balance of convenience and the nature and extent of interim relief pending the substantive hearing.