Neutral Citation Number: [2014] EWHC 255

Case No: CO/11732/2013

IN THE HIGH COURT OF JUSTICE
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2014

Before :

LORD JUSTICE LAWS
MR JUSTICE OUSELEY
MR JUSTICE OPENSHAW

- -

Between :

David Miranda	**Claimant**
- and -	
The Secretary of State for the Home Department	**1st Defendant**
The Commissioner of the Police of the Metropolis	**2nd Defendant**
- and -	
(1) Liberty	**Interveners**
(2) English Pen, Article 19 & Media Legal Defence Initiative	
(3) Coalition of Media & Free Speech Organisations	

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Mr Matthew Ryder QC, Mr Edward Craven and Mr Raj Desai (instructed by **Bindmans LLP**) for the **Claimant**
Mr Steven Kovats QC and Mr Julian Blake (instructed by **The Treasury Solicitor**) for the 1st Defendant **The Secretary of State**
Mr Jason Beer QC, Mr Ben Brandon and Mr Ben Watson (instructed by **The Directorate of Legal Services**) for the 2nd Defendant **The Commissioner of the Police of the Metropolis**
(1) Mr Alex Bailin QC and Ms Alison Macdonald, (2) Mr Can Yeginsu and Mr Anthony Jones and (3) Mr Guy Vassall-Adams and Mr Tim Cooke-Hurle for the **Interveners**

Hearing dates: 6 & 7 November 2013

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Approved Judgment

LORD JUSTICE LAWS:

INTRODUCTION

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 paragraph 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 the claimant 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 paragraph 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 (ECHR).

THE TERRORISM ACT 2000

3. S.1 of the Act of 2000 provides in part:

> "(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."

S.1(4) shows that neither the action, any victim, the public or the government are confined to events in connection with the United Kingdom.

4. S.40(1)(b):

> "(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."

5. Schedule 5 is material to the argument on proportionality. It is given effect by s.37, which appears in Part IV of the Act, cross-headed "Terrorist Investigations". It provides in part:

> "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."

By paragraph 4 of Schedule 5 "excluded material" has the meaning given by s.11, and "special procedure material" has the meaning given by s.14 of the Police and Criminal Evidence Act 1984. Thus "excluded material" includes "journalistic material" (viz. "material acquired or created for the purposes of journalism") held in confidence (s.11(1)(c) read with s.13(1)). "Special procedure material" includes "journalistic material, other than excluded material" (s.14(1)(b)).

6. Schedule 7 is given effect by s.53, which appears in Part V of the Act, cross-headed "Counter-terrorist Powers". It 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."

Paragraph 6 empowers an examining officer to detain a person subject to examination under paragraph 2 for up to 9 hours. Paragraph 7 provides:

> "For the purpose of satisfying himself whether there are any persons whom he may wish to question under paragraph 2 an examining officer may [carry out various searches]."

Paragraph 8 confers further powers of search upon "[a]n examining officer who questions a person under paragraph 2... for the purpose of determining whether he falls within section 40(1)(b)". Paragraph 9(1) provides:

> "An examining officer may examine goods to which this paragraph applies for the purpose of determining whether they have been used in the commission, preparation or instigation of acts of terrorism."

Paragraph 10(1):

> "An examining officer may authorise a person to carry out on his behalf a search or examination under any of paragraphs 7 to 9."

Paragraph 11 enables an officer to retain any item found on such a search for up to 7 days. Paragraph 18 criminalises wilful failure to comply with any obligation imposed by Schedule 7 on a person questioned under paragraph 2(1).

FACTS

7. I shall have to introduce some further details when I come to address the grounds of challenge, but the following narrative will suffice to set the scene.

8. The claimant 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 the claimant 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 0805 on Sunday 18 August 2013 at Heathrow where he was in transit on his way back to Rio de Janeiro.

9. 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 the claimant's movements. At 0830 on Thursday 15 August 2013 they briefed Detective Superintendent Stokley of SO15, the Counter-Terrorism Command in the Metropolitan Police, the second defendant. On Friday 16 August a Port Circulation Sheet (PCS), a form of document used to provide information to counter-terrorism police officers, was issued by the Security Service to the Metropolitan Police and received at the National Ports Office at 2159. 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."

This first PCS was not actively considered when it was received. A second PCS was received at the National Ports Office on Saturday 17 August at 1247. 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 the claimant.

10. Acting DI Woodford was the Ports Duty Officer for Heathrow over the weekend 17 – 18 August. He viewed the second PCS at the behest 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" (witness statement, paragraph 11). He considered that the "Not Applicable" entry was in conflict with the invitation to the police to carry out a port stop under the Schedule. He agreed with PS Holmes that the PCS should be returned to the Security Service for confirmation that any examination of the claimant following a port stop would be for the statutory purpose given by Schedule 7 (paragraph 13).

11. Meanwhile on Friday 16 August 2013 the Security Service had sent a note to D/Supt Stokley headed "National Security Justification for proposed operational action around David MIRANDA". The redacted text includes this:

> "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 1719 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 this:

> "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."

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" (statement paragraph 14). Meantime at about 1730 that day another officer, DS Bird, head of the Ports Team, told D/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". D/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": witness statement of 30 October 2013, paragraph 38).

13. DI Woodford saw the final PCS early in the morning of Sunday 18 August at Heathrow. He "did not know at the time what 'the material' referred to in the PCS consisted of" (paragraph 16). However "[w]ith regard to the PCS forms, if [he] had not been satisfied that the MPS would be acting lawfully in undertaking a Schedule 7 stop based on the information received, [he] would not have agreed to the examination" (paragraph 19). And so the stop went ahead, as I have said at 0805 on 18 August. It was executed by two SO15 officers, PC 206005 and PC 206610. They detained the claimant (for nine hours, the maximum permitted period – Schedule 7 paragraph 6) and questioned him. DI Woodford was with them to meet the aircraft at the gate. The claimant'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, indicates in his first witness statement (paragraph 6) that the encrypted data contained in the external hard drive taken from the claimant 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.

THE PROCEEDINGS

14. Judicial review papers were lodged and served on 21 August 2013, naming the Secretary of State and the Metropolitan Police Commissioner as prospective defendants. There have been a number of interlocutory directions. On 22 August Beatson LJ and Kenneth Parker J heard an urgent application for interim relief. They gave judgment the next day, making limited orders: because the matter had come into court so quickly, there was by then no evidence from the Secretary of State or the police. It was contemplated that a full hearing of the application would take place on 30 August, and the case was restored on that day before Kenneth Parker J and myself. We made an agreed order for interim relief and adjourned the case for a full hearing of the application for permission, with the substantive judicial review to follow if permission were granted. On 9 October 2013 I granted permission to Liberty, the Coalition of Media and Free Speech Organisations, and three other parties acting together (Article 19, English Pen and the Media Legal Defence Initiative) to intervene in the proceedings by written submissions. I will refer to them collectively as the interveners. On 30 October my Lords and I heard and granted an application by the Secretary of State to withhold disclosure of certain documents or classes of documents on public interest grounds. We declined applications by the claimant for

further disclosure, leave to cross-examine defence witnesses, and the joinder of Mr Greenwald as a co-claimant. At length the substantive application – the rolled-up hearing which the court had directed on 30 August – came before us on 6 November.

15. The issues which the claim raises are of substantial importance. I would grant permission to seek judicial review.

16. The claimant submits that the use of the Schedule 7 powers against him on 18 August 2013 was unlawful for the three reasons I have already outlined: (1) because the powers were exercised for an improper purpose, that is a purpose not permitted by the statute; (2) because their use constituted a disproportionate interference with his right to freedom of expression; and (3) because the powers are incompatible with the rights guaranteed by ECHR Article 10. There has also been some reference to Articles 5 and 8, but the substance of the claimant's case on the Convention is focussed on Article 10. The interveners' written submissions are directed to the right of free expression. I turn first to the issue of improper purpose.

IMPROPER PURPOSE

17. For convenience I repeat paragraph 2(1) of Schedule 7:

> "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)."

Under this head I shall have to consider the true construction of the Schedule 7 powers. But first I will decide what was the purpose for which the powers were used in fact. This question is to be answered bearing in mind the correct approach in law to the nature of a relevant actor's purpose in a statutory setting such as that of Schedule 7. In *R v Southwark Crown Court ex p. Bowles* [1998] AC 641, [1998] UKHL 16, which was concerned with a production order granted under s.93H of the Criminal Justice Act 1988, the House of Lords approved a test of dominant purpose, citing Wade and Forsyth, *Administrative Law*, 7th edn. p. 436:

> "Sometimes an act may serve two or more purposes, some authorised and some not, and it may be a question whether the public authority may kill two birds with one stone. The general rule is that its action will be lawful provided that the permitted purpose is the true and dominant purpose behind the act, even though some secondary or incidental advantage may be gained for some purpose which is outside the authority's powers. There is a clear distinction between this situation and its opposite, where the permitted purpose is a mere pretext and a dominant purpose is *ultra vires*."

As I will show, Mr Ryder QC for the claimant submits that this test is not met in the present case.

THE PURPOSE IN FACT

18. The purpose to be considered is, of course, the purpose for which the "examining officers" executed the stop. It seems to me plain on the evidence that the examining officers were PCs 206005 and 206610. They stopped the claimant and questioned him. (In fact PC 206610 says that "PC 206005 exercised his powers of examination under Schedule 7".) However the only information these officers had was what was in the PCS. DS Stokley tells us at paragraph 39 that this was "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 case and the examination, to prevent any unwitting disclosures to the subject of the examination". How, then, should the court approach the ascertainment of the purpose for which the stop was executed under Schedule 7?

19. Mr Ryder submitted that the purpose in question is the purpose in the mind of the examining officers. He cited the judgment of Collins J in *CC v Commissioner of Police of the Metropolis* [2012] 1 WLR 1913: "all will depend on what the officers knew and why they decided to use their powers" (paragraph 32). But PCs 206005 and 206610 apparently knew very little – as I have said, no more than was set out in the PCS. Mr Ryder points out that they have not given evidence of the state of their knowledge or the nature of their purpose in effecting the stop. Accordingly, so it is argued, taken on its own such evidence as there is of the officers' state of mind cannot of itself establish that they acted for the purpose allowed by Schedule 7.

20. Mr Ryder submits that if the purpose of the stop is looked at more broadly, through the prism of D/Supt Stokley's evidence, two purposes can be discerned: (1) to assist the Security Service in obtaining access to the material in the claimant's possession, and (2) to determine whether the claimant appeared to be a person "concerned in the commission, preparation or instigation of acts of terrorism" – the statutory purpose. Mr Ryder accepts that the police entertained purpose (2). His case is that the dominant purpose of the stop – see *Ex p. Bowles* above – was purpose (1); but that was not a purpose for which the Act of 2000 authorised the use of the Schedule 7 power. He points to the terms of the first two PCSs, which on their face repudiated the statutory purpose ("Not Applicable"). He submits that "the entire background and context in which the Schedule 7 powers were exercised was prompted and driven by the Security Service request to obtain information for their national security/OSA operation" (skeleton argument, paragraph 78(1)).

21. The Schedule 7 purpose – "determining whether [the subject] appears to be a person falling within section 40(1)(b)" – must of course be the purpose for which the officers execute the stop if it is to be lawful. So much is common ground. But in 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.

23. Here there were (as Mr Kovats QC for the Secretary of State put it at paragraph 15 of his note of 7 November 2013) two levels of authorisation. The first level was provided by D/Supt Stokley, the second by DI Woodford. It is clear from D/Supt Stokley's October witness statement, and also his "Decision Log" of which we have a redacted copy, that he was closely involved in the judgments to be made by SO15 in response to the Security Service request for a Schedule 7 stop. He was the first point of contact with the Security Service, which as I have said briefed him at 0830 on Thursday 15 August 2013. He was "mindful of the Security Service priorities", but also concerned to establish whether any criminal offence had been committed (statement paragraph 12). He liaised with the police Ports Team and with the Security Service, which disclosed relevant sensitive material to him. His evidence at paragraphs 12 – 38 and 47 – 48 shows in summary that he was throughout concerned, in light of the information he had, to see that a Schedule 7 stop was "appropriate and justified in accordance with MPS policy and training". Thus D/Supt Stokley's level of authorisation may be said to have acted as a filter between the Security Service and the police, seeking to ensure that a request from the former would not go forward unless it yielded a proper basis for the latter to act under the Schedule.

24. D/Supt Stokley's acquiescence in the stop was influenced by his apprehension, given the connection with Mr Snowden and the latter's movements, that the claimant might have been concerned in acts falling within the definition of terrorism in s.1 of the 2000 Act which might be carried out by Russia and designed to influence the British government. Paragraphs 31 – 38 of his October witness statement show that he took that view. His particular focus was "the property that we thought might be found in [the claimant's] possession" (paragraph 32). The National Security Justification, though it made no mention of Russia, "reinforced [his] view... reached independent[ly] of the case made by the Security Service for the stop, that the value of the material that [the claimant] 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" (paragraph 36). In his view this justified the use of the Schedule 7 powers.

25. It was DI Woodford, at the second level of authorisation, who made the actual decision to conduct the stop: see paragraphs 14, 15 and 19 of his witness statement,

which I have cited. There is no evidence that D/Supt Stokley's apprehension of a conspiracy involving the Russians was communicated to DI Woodford. He went by the terms of the final PCS: he "satisfied [himself] that sufficient information had been provided to allow a lawful Schedule 7 examination to take place" (statement paragraph 15).

26. 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. I repeat these passages from those two documents:

> "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." (the PCS)
>
> "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... 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." (the National Security Justification)

27. 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. Was this within the meaning of paragraph 2(1) of Schedule 7, "determining whether he appears to be a person falling within section 40(1)(b)"? I turn to the construction of Schedule 7 and associated provisions contained within the Act of 2000.

THE PURPOSE IN LAW

28. The task of interpretation particularly concerns the words in paragraph 2(1) of Schedule 7 "whether he *appears to be*...", the formulation in s.40(1)(b) "*concerned in* the commission, preparation or instigation of acts of terrorism" (my emphasis) and the definition of terrorism in s.1. All of these features suggest that the potential reach of paragraph 2(1) is very wide. As regards s.1, in *R v Gul* [2013] 3 WLR 1207, [2013] UKSC 64 Lord Neuberger and Lord Judge said this:

> "29... [T]he definition of terrorism in section 1 in the 2000 Act is, at least if read in its natural sense, very far reaching indeed... [38]... For the reasons given by Lord Lloyd, Lord Carlile and Mr Anderson [the latter two were successive Independent Reviewers of the legislation appointed under s.36 of the Terrorism Act 2006], the definition of 'terrorism' was indeed

> intended to be very wide... [41]... [W]e conclude that, unless the appellant's argument based on international law dictates a different conclusion, the definition of terrorism as in section 1 of the 2000 Act is indeed as wide as it appears to be."

The argument based on international law (which did not concern the ECHR) was unsuccessful.

29. With great respect, the bare proposition that the definition of terrorism in s.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, s.1 does not create a criminal offence. The Act creates a separate regime of criminal offences: ss.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 s.1(2)(c) ("endangers a person's life") or 1(2)(d) ("creates a serious risk to the health or safety of the public"). S.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 s.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.

30. Next, as I have noted, the proper exercise of the Schedule 7 power does not require that the examining officer have any grounds whatever "for suspecting that a person falls within section 40(1)(b)" (Schedule 7 paragraph 2(4)); and the Schedule 7 purpose is not to determine whether the subject is, but only whether he "appears to be" a terrorist.

31. 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 s.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 s.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).

32. Putting all these features together, it appears to me that the Schedule 7 power is given in 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" – s.40(1)(b)), directly or indirectly, in any of a range of activities enumerated in s.1(2). If the possibility is established, the statute prescribes no particular consequence. What happens will depend, plainly, on the outcome of the Schedule 7 examination including any searches where those have been carried out. There may be a prosecution for an offence under the Act, or indeed some other offence; materials in the subject's possession may be retained if the general law allows it; the subject may be released with no further action.

33. The fact that the outcome of a Schedule 7 examination is open-ended is I think of some importance. It supports the submission of Mr Beer QC for the Commissioner that there is no principled distinction, for the purpose of a proper understanding of the power, between an interest in the person examined and an interest in what may be found in his possession. Specifically, as Mr Kovats submitted (skeleton argument, paragraph 59), the s.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": s.1(1)(b) and (c), and (2)(c).

34. It is worth repeating that the examining officers were not required, as a condition of the power's lawful use, to have concluded before they executed the stop that the claimant "[appeared] to be a person falling within section 40(1)(b)". I note that the Article 19 Interveners submit (paragraph 37) that "...the use of the Schedule 7 powers with respect to [the claimant] can only be lawful if the Second Defendant is able to demonstrate that [the claimant] at the material time 'appear[ed] to be a person falling within section 40(1)(b)...". This is a mistaken view of the statute's construction. The power's very purpose is to ascertain *whether* the subject so appeared.

35. The Article 19 Interveners also submit (paragraph 39) that "a reading of s.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 s.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.

36. 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.

PROPORTIONALITY

D/Supt Stokley

37. D/Supt Stokley expressly considered whether the stop would be a proportionate exercise of power before he authorised it: October statement, paragraphs 47 – 52. The whole passage repays attention; I will just give these short extracts:

> "50. It appeared to me on the basis of what I knew about the stolen material, that it could be used to endanger life and cause harm to members of the public... [51] It was very clear in my mind that this action was not being executed as a means to prevent political embarrassment in the UK... [52]... 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."

38. I see no reason to doubt this evidence as a true description of DS Stokley's state of mind. But it uses the term "proportionate" in isolation; that is to say, there is no explanation of relevant competing interests between which a proportionate balance fell to be struck. However at paragraph 58 he says this:

> "I did not address my mind at the time to applying to a circuit judge for a Schedule 5... production order as I considered that Schedule 7 represented the best and only method of achieving the dual objective of establishing what material [the claimant] may have had in his possession and questioning him about it."

The Proportionality Principle

39. Schedule 5 plays a significant part in Mr Ryder's argument, and I must return to that. His overall submission is that the use of Schedule 7 powers against his client was an unjustified and disproportionate interference with his right to freedom of expression. He refers to the recent restatement of the proportionality principle by Lord Sumption in *Bank Mellat v Her Majesty's Treasury (No 2) 3 WLR 170,* [2013] UKSC 39 at paragraph 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."

Lord Sumption indicated that these four points summarised the way in which later cases "had adapted and applied" the classic statement of the proportionality principle by the Privy Council in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80. There Lord Clyde said that the court should ask itself:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

40. Lord Sumption's formulation adds (iv): "whether... a fair balance has been struck between the rights of the individual and the interests of the community". This requirement appears to have been introduced into our law in *Razgar* [2004] 2 AC 368 (paragraph 20) and *Huang* [2007] 2 AC 167 (paragraphs 19 and 20), drawing on what was said by Dickson CJ in *R v Oakes* [1986] 1 SCR 103. I think it needs to be approached with some care. It appears to require the court, in a case where the impugned measure passes muster on points (i) – (iii), to decide whether the measure, though it has a justified purpose and is no more intrusive than necessary, is nevertheless offensive because it fails to strike the right balance between private right and public interest; and the court is the judge of where the balance should lie. I think there is real difficulty in distinguishing this from a political question to be decided by the elected arm of government. If it is properly within the judicial sphere, it must be on the footing that there is a plain case. I shall have more to say about point (iv) in discussing free expression and journalism.

Free Speech and the Protection of Journalistic Expression

41. Mr Ryder says that the Schedule 7 stop was a disproportionate interference with his client's right to "the protection of journalistic expression". I agree with his submission (skeleton argument, paragraph 91) that this ideal has received much emphasis in the law of England. I do not therefore think it necessary, on this part of the case, to place any reliance on the jurisprudence of the European Court of Human Rights; the common law is a sufficient arena for the debate. Dealing generally with the right of free expression, in *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109 Lord Goff said this at 283-4:

> "I can see no inconsistency between English law on this subject and article 10 of the European Convention on Human Rights. This is scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world. The only difference is that, whereas article 10 of the Convention, in accordance with its avowed purpose, proceeds to state a fundamental right and then to qualify it, we in this country (where everybody is free to do anything, subject

> only to the provisions of the law) proceed rather upon an assumption of freedom of speech, and turn to our law to discover the established exceptions to it."

More tersely, in *Verrall v Great Yarmouth Borough Council* [1981] 1 QB 202 Watkins J stated:

> "I am concerned with the fundamental freedom which this country has prided itself on maintaining, and for which much blood has been spilt over the centuries, namely freedom of speech."

42. It is clear from the cases that the protection of journalistic expression is an important sub-class of the law's more general care for free speech. Mr Ryder relies on *R v The Central Criminal Court ex p. The Guardian, The Observer and Bright* [2001] 1 WLR 662 in which Judge LJ as he then was cited the celebrated authority of *Entick v Carrington* (1765) 19 State Trials 1029, and continued at paragraph 98:

> "Inconvenient or embarrassing revelations, whether for the Security Services, or for public authorities, should not be suppressed. Legal proceedings directed towards the seizure of the working papers of an individual journalist, or the premises of the newspaper or television programme publishing his or her reports, or the threat of such proceedings, tends to inhibit discussion. When a genuine investigation into possible corrupt or reprehensible activities by a public authority is being investigated by the media, compelling evidence is normally needed to demonstrate that the public interest would be served by such proceedings. Otherwise, to the public disadvantage, legitimate enquiry and discussion, and 'the safety valve of effective investigative journalism', the phrase used in a different context by Lord Steyn in *R v Secretary of State for the Home Department ex parte Simms* [1999] 3 WLR 328 at 341, would be discouraged, perhaps stifled."

43. Before I leave the general legal position there is a point to be made about the justification of free expression as a fundamental value. I think it noteworthy that many of the leading *dicta* seem to treat free speech as an imperative because it is an ally of democratic government. Thus Lord Steyn in *Ex p. Simms* [2000] 2 AC 115, 126F-G: "freedom of speech is the lifeblood of democracy". In *Shayler* [2003] 1 AC 247 Lord Bingham said (paragraph 21):

> "The reasons why the right to free expression is regarded as fundamental are familiar, but merit brief restatement in the present context. Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments... [T]here can be no assurance that government is carried out for

> the people unless the facts are made known, the issues publicly ventilated."

44. The same theme appears in this passage from Lord Bingham's speech in *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, which introduces the particular importance of free expression for the media:

> "In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and enquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction."

45. Freedom of speech may indeed be "the lifeblood of democracy"; but the idea that the essential *justification* of free expression as a fundamental value is the promotion or betterment of democratic government (if that is what is suggested, not least in *Shayler*) seems to me, with respect, to be false. It has quite a pedigree in the literature: the American philosopher Alexander Meiklejohn was a leading proponent of the view that the free speech principle is a collective, not an individual, interest (see *The First Amendment is an Absolute*, [1961] Supreme Court Review 245). The perception of free expression as a servant of democracy, however, would tend to devalue non-political speech and justify the prohibition or abridgement of speech advocating undemocratic government, as Eric Barendt has pointed out (*Freedom of Speech*, Oxford 1985, 21). This would fuel what is anyway one of exuberant democracy's weaknesses, namely the intolerance of minorities. Everyone, even democracy's enemy, must surely be allowed his say provided he advocates no crime nor violates the rights of others. The reason is that free thought, which is a condition of every man's flourishing, needs free expression; and this is every person's birthright, in whatever polity he has to live. There are of course undemocratic societies in which free speech is an idle hope. But free speech is not a creature of democracy; if anything, the converse. The critics of democracy may keep democracy on its toes.

46. I introduce these reflections first because, it seems to me, they make the ideal of free speech larger not smaller. But more particularly, this approach exposes an important difference between the general justification of free expression and the particular justification of its sub-class, journalistic expression. The former is a right which belongs to every individual for his own sake. But the latter is given to serve the

public at large; it is here, rather than with free speech generally, that Lord Bingham's strictures on democracy – "[t]he proper functioning of a modern participatory democracy requires that the media be free, active, professional and enquiring" – surely have their proper place. It follows that so far as Mr Ryder claims a heightened protection for his client (or the material his client was carrying) on account of his association with the journalist Mr Greenwald, the application of requirement (iv) in the toll of proportionality – "whether... a fair balance has been struck between the rights of the individual and the interests of the community" – needs at least to be modified. The contrast is not between private right and public interest. The journalist enjoys no heightened protection for his own sake, but only for the sake of his readers or his audience. If there is a balance to be struck, it is between two aspects of the public interest.

47. I shall have more to say about the protection of journalistic expression when I come to consider the proportionality principle in relation to the facts of the case.

Further Points on the Law

48. There are some other more specific preliminary points to be made. First, much of the learning on the particular claims of journalism is directed to the need to protect journalists' sources. In a passage which chimes with common law authority (such as *Ashworth Hospital Authority v MGN Ltd* [2001] 1 WLR 515: see paragraph 101) the Strasbourg court repeated in *Financial Times v UK* (2010) 50 EHRR 46 what it had said in *Goodwin v UK* (1996) 22 EHRR 123 at paragraph 39: "protection of journalistic sources is one of the basic conditions for press freedom". But no such issue arises here. The source is no secret: Mr Snowden stole the material, and the claimant (however indirectly) got it from Mr Snowden.

49. Secondly, it may be necessary to protect journalistic material even where it has been stolen: see for example *Secretary of State for Defence v Guardian Newspapers* [1985] AC 339; compare *Ashworth Hospital Authority v MGN Ltd* [2001] 1 WLR 515, paragraph 101. I do not think this position is materially affected by the planning case of *Welwyn Hatfield BC* [2011] 2 AC 304, to which the Secretary of State refers.

50. Thirdly, I accept Mr Ryder's submission that the protection of journalistic material is not in principle limited to cases where the complainant works as a journalist: see for example *Nagla v Latvia* [2013] ECHR 688, paragraph 81. The submission of the Coalition Interveners (paragraph 27) that journalism is a "collaborative activity" has obvious force. Non-journalists (cameramen, interpreters, administrative assistants) may be directly or indirectly involved. Everything will depend upon the particular facts, by reference to which the need to vindicate "the protection of journalistic expression" may vary very greatly.

This Case – the Facts

51. I have already briefly summarised the claimant's relevant activity. Though not a journalist, he has worked very closely with Mr Greenwald, who is. As I have said, his visit to Berlin in August 2013 to meet Laura Poitras was undertaken to assist Mr Greenwald. The *Guardian* made his travel reservations and paid for the trip. He states that the material he was carrying when he was stopped was very heavily encrypted – he was unable to open it himself (statement paragraph 18(2)(a)). It

included but was not limited to material from Mr Snowden, not all of which was "raw data" (paragraph 24). He says:

> "18(3) I was aware that this material was extremely important to Glenn for the continued public interest exposure of the NSA/GCHQ mass surveillance programme and that was why I was bringing it to him."

52. The starting-point for any consideration of proportionality's application to this case must be the purpose of the Schedule 7 stop. It was, as I have held, 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. For the reasons I have given Schedule 7 authorised a stop for this purpose. To that extent the stop was lawful; it was also, on the evidence, a pressing imperative in the interests of national security. I have already referred to the statement of Mr Robbins, Deputy National Security Adviser for Intelligence, Security and Resilience in the Cabinet Office, that release or compromise of such data would be likely to cause very great damage to security interests and possible loss of life. As I have indicated the external hard drive taken from the claimant contains approximately 58,000 highly classified UK intelligence documents. It is plainly to be inferred that in describing the actual or potential damaging effects of the dissemination of this material Mr Robbins has been as specific as open evidence allows. It is necessary to cite some of his testimony, taken from his second witness statement of 24 September 2013:

> "15. Since my first witness statement, there have been further damaging reports based on stolen classified material. It is obviously not possible in an open statement to go into detail about the real and serious damage already caused by the disclosures based on Mr Snowden's misappropriations, nor about what further damage may follow. However, given the volume of media reporting published over the past three months, and public statements from the UK and US Governments, 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."

There are other important passages in Mr Robbins' evidence, which should be read as a whole; a comprehensive account would unduly lengthen this judgment. As regards risk to life, I would note one particular sentence in paragraph 19 of his 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".

53. Detective Superintendent Caroline Goode of the Metropolitan Police, attached to SO15, has also described the concerns arising from the theft of the 58,000 documents. At paragraph 15 of her statement of 27 August 2013 she says:

> "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."

54. Is this evidence qualified or put in doubt by anything said for the claimant? The claimant's own statement is dated 23 October 2013, so he will have read the statements of Mr Robbins and D/Supt Goode. He says:

> "61(2)... I strongly challenge the suggestion that there was a genuine belief in a risk that my activity could endanger life or facilitate terrorist attacks...
>
> 62... [H]aving now seen the defendants' attempts to explain the action against me it is my belief that my detention and questioning was not genuinely based on the need to question me in relation to the commission, instigation and preparation of acts of terrorism. It was an effort to obtain journalistic material from me and the Schedule 7 powers were misused."

55. Mr Greenwald's witness statement of 23 October 2013 contains a similar theme at paragraph 9:

> "I believe the evidence will show that the defendants were well aware that the claimant's possession [sc. of the material seized] was in connection with journalism, not terrorism."

Mr Greenwald's account of the practice of "responsible journalism" has a didactic quality:

> "31. It is my view that there will be times when the publication of sensitive material, even national security material, is

> appropriate, provided the journalist and those working with him or her take great care and act responsibly.
>
> 32. But not to publish material simply because a government official has said such publication may be damaging to national security is antithetical to the most important traditions of responsible journalism. That approach is also deeply unhealthy for any democracy. It would have prevented some of the most important information in world current affairs ever coming to light. Publication of information contrary to the wishes of a government is, at times, both the role and the duty of the 'Fourth Estate'. The key is not for journalists to simply defer to the government view, but to act as responsibly and carefully as they can to determine if and when it is in the public interest to publish sensitive material. That is what we have done.
>
> 33. From my experience I can indicate that there are many ingredients to the sensible reporting of very sensitive information. They include, but are not limited to, the following:
>
> > (1) If possible, one should seek to use the skills and judgment of highly experienced journalists and legal experts. This is the most appropriate and safest way to decide whether to publish information and how much of it to disclose. That collective experience enables a careful judgment of both the public interest and any risks or dangers that may arise on publication.
> >
> > (2) Experienced editors and reporters are able to consider what, if anything, may be published without endangering innocent life. They cannot always, of course, do so with complete perfection. But the history of investigative journalism leaves no doubt that such judgments can be, and almost always are, made with great responsibility.
> >
> > (3) Editors and other journalists not only have experience, but they also have established methods through which to communicate with government officials in relation to publication. These can be both formal and informal. These procedures enable journalists to determine which stories may be sensitive because they pose a real danger to persons if there is publication; and which stories are sensitive, awkward, embarrassing for the government, or which the government feels may be undesirable to be made public."

The nearest Mr Greenwald gets to an engagement with the defendants' evidence as to the actual or potential damaging effects of the dissemination of material seized from the claimant is at paragraphs 51 – 52:

> "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."

56. I am afraid I have found much of this evidence unhelpful. First, the claimant and Mr Greenwald both appear prepared to accuse the defendants of bad faith. The claimant at paragraphs 61(2) and 62, and Mr Greenwald at paragraph 9, suggest that the defendants deployed the Schedule 7 powers for what they – the defendants – believed was an improper purpose. It is true that the premise of these observations in their evidence is that the identification and neutralisation of the material which the claimant was carrying was not a permitted purpose; and I have held the contrary. But the sting (especially that of paragraph 61(2) of the claimant's statement) is that the defendants did not believe that the claimant's possession of the material presented any real danger to national security or risk of loss of life. I bear in mind the limits of evidence not cross-examined; but there is no perceptible foundation for such a suggestion.

57. Secondly, the evidence for the claimant simply does not engage with the defendants' testimony as to the substance of the threat posed by the theft of the security material and its possession by the claimant. Mr Greenwald's statement at paragraph 32 that "not to publish material simply because a government official has said such publication may be damaging to national security is antithetical to the most important traditions of responsible journalism" is true but trivial. Of course a bare, wholly unqualified assertion by government will not be enough. But that is not this case; the defendants' evidence plainly goes much further.

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."

59. In the result, I conclude that nothing said for the claimant qualifies or puts in doubt the evidence of Mr Robbins and DS Goode as to the dangers inherent in the release (or further release) or dissemination of the material in the claimant's possession. Neither the claimant nor Mr Greenwald is in a position to form an accurate judgment on the matter.

This Case – the Nature of the Argument

(1) Schedule 5

60. As I have said, Mr Ryder submits that the use of the Schedule 7 powers against his client was an unjustified and disproportionate interference with his right to freedom of expression. There were a number of strands to his argument. One was that any pursuit of the claimant to gain access to what he was carrying should have been effected by means of Schedule 5 of the Act of 2000, and application made to a circuit judge for an order under paragraph 5(3)(a) that the claimant "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". That, it is said, would have been a proportionate response to such exigency as arose (or was perceived to arise) in the events which had happened.

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.

(2) No Fair Balance in any Event

63. The premise of Mr Ryder's submission on paragraph 5 is, of course, that the claimant was carrying "journalistic material", whether "excluded material" or "special

procedure material". By force of that premise he would also submit that even if Schedule 5 was in practice unavailable for reasons I have given, still it was disproportionate and therefore unlawful for the defendants to deploy Schedule 7: the terms of Schedule 5 (and Schedule 1 of the Police and Criminal Evidence Act 1984) "reflect Parliament's recognition of the need for all interferences with journalistic material to be authorised by an independent judge giving full weight to the important freedom of expression rights engaged" (skeleton argument, paragraph 97). I did not understand this to amount to a suggestion that Schedule 5 (and Schedule 1 of PACE) excluded the application of Schedule 7 to the case as a matter of statutory construction; simply that it was necessarily disproportionate for the State to perpetrate such an interference with journalistic freedom without the safeguard of judicial authorisation.

64. Mr Ryder submitted in terms that the *whole* of the material carried by the claimant fell to be treated as "journalistic material". Some of it, I accept, was documentation created or worked on for journalistic purposes: the claimant refers (statement paragraph 24(2)) to a "file containing an index and a summary that had been created after the material had been provided by Mr Snowden". There were also some personal items. But the 58,000 highly classified UK intelligence documents constituted raw data stolen from GCHQ. Mr Kovats did not accept that this amounted to "journalistic material". I think this is right, notwithstanding the wide words of s.13(1) of the Police and Criminal Evidence Act ("'journalistic material' means material acquired or created for the purposes of journalism"): taken literally, the s.13(1) definition would potentially embrace instances of the plainest turpitude, provided only there was some journalistic purpose. But the point is not straightforward, given the proposition (which I have accepted) that there are cases where the law should protect stolen journalistic material.

65. 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.

66. This submission on proportionality placed much emphasis on "responsible journalism". In response to an invitation from the court Mr Ryder has since the hearing helpfully produced a note containing some references in the learning to this concept. However they arose in the context of defamation claims; thus in *Bonnick v Morris* [2003] 1 AC 300 Lord Nicholls stated at paragraph 23 that "responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals".

67. That does not assist us here; and in any event given the substantial, often insuperable, difficulty a journalist faces in seeking to determine what classified material may be

safely published and what may not (paragraph 58 above), the notion of "responsible journalism" throws little light on the proportionality issue. However Mr Ryder's note also draws attention to passages in the defendants' skeleton arguments (Secretary of State, paragraph 46; the Commissioner, paragraph 42) which refer to a supposed risk that *all* the material carried by the claimant might be released, and it is then submitted that there is no evidence that such a risk might materialise: the evidence was that there had been very limited publication to date.

68. Notwithstanding those references in the defendants' skeletons, the danger sought to be averted by the Schedule 7 stop was by no means limited to the "worst case scenario" of total publication. Mr Robbins (second statement, paragraphs 2, 13 – 15) makes plain the Secretary of State's apprehension of the damage to national security caused by the publications to date. Neither the National Security Justification, nor the final PCS, nor the witness statements filed for the defendants, can sensibly be read as suggesting that damage would only ensue if *all* the material were released.

69. However, what I have called the heart of the point in Mr Ryder's argument does not, I think, depend on any such proposition. His submission in reply was broader: he said that there was no evidence of the degree of danger posed by the claimant's possession of the material. The suggestion is that risk to security – or to life – must be demonstrated to some higher standard than was done here if State interference with journalistic freedom (at least by such means as Schedule 7) is to be justified, if it can be justified at all. The implication appears to be that such risks as the defendants' witnesses describe, not being more precisely specified, must by law be accepted for the sake of journalistic freedom's integrity.

70. It is not immediately clear why that should be so. But Mr Ryder's case was to my mind illuminated by three propositions which he articulated in reply. The first was that journalists, "like judges", have a role in a democratic State to scrutinise action by government. The second was that the function of the free press is inhibited by an insistence that anything (in the security field) which the journalist seeks to publish must be stifled because it may be part of the "jigsaw" from which a knowing terrorist may draw harmful inferences. The third was that there is a balance to be struck, again in the security field, between the responsibility of government and the responsibility of journalists.

71. In my judgment, taken at their height these propositions would confer on the journalists' profession a constitutional status which it does not possess. They suggest, as Mr Greenwald's evidence suggested, that journalists share with government the responsibility of measuring what is required by way of withholding publication for the protection of national security. Journalists have no such *constitutional* responsibility. They have, of course, a *professional* responsibility to take care so far as they are able 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. 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. The constitutional responsibility for the protection of national security lies with elected government: see, amongst much other authority, *Binyam Mohamed* [2011] QB 218 *per* Lord Neuberger MR at paragraph 131. The authorities I have cited on the importance of press freedom nowhere ascribe such a responsibility to the journalists'

profession. Their effect, rather, is to acknowledge the high public interest inherent in press freedom, and to stipulate accordingly that any interference with it stands in need of substantial objective justification. Of that the courts are the judge; and they will require "compelling evidence" (*per* Judge LJ in *Ex p. Bright*) before they will validate the interference.

Conclusions on Proportionality

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.

ARTICLE 10

74. As is well known ECHR Article 10 provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in

> confidence, or for maintaining the authority and impartiality of the judiciary."

75. My conclusions on proportionality mean at least that the Schedule 7 power is capable, depending on the facts, of being deployed so as to interfere with journalistic freedom without violating the principle of proportionality: it was not violated in this case. But that is not the whole of the argument on Article 10. The Interveners submit that Schedule 7 does not meet the requirement of Article 10(2) that a restriction of free expression must be "prescribed by law". It is said to be over-broad and arbitrary, and to lack effective safeguards against misuse, and in particular express protections for confidential journalistic sources or materials (see for example Liberty's submissions, paragraph 1(8)). I will first address the argument that the Schedule 7 power is over-broad and arbitrary.

Legal Certainty

76. The Coalition Interveners cite the well known *Sunday Times* case ((1996) 22 EHRR 1234): "49… [A] norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct…" The claimant and all the Interveners rely on *Gillan and Quinton v UK* (2010) 50 EHRR 45, in which the Strasbourg court found that the stop and search powers contained in s.44 of the 2000 Act were repugnant to ECHR Article 8 because they were not sufficiently circumscribed and lacked adequate legal safeguards.

77. In *Gillan* the court repeated (paragraph 76) its well known formulation of the standard of legality (imposed in Article 8 by the words "in accordance with the law"), that it "require[s] the impugned measure both to have some basis in domestic law and to be compatible with the rule of law", and continued at paragraph 77:

> "For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise … The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed…"

78. This line of authority goes to legal certainty; the principle is very familiar. The power to stop and search which may be authorised under s.44 of the 2000 Act is very lightly circumscribed: the person giving the authorisation must consider it "expedient for the prevention of acts of terrorism" (s.44(3)), and the power "may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism" (s.45(1)(a)). There is no requirement of reasonable suspicion (s.45(1)(b)).

79. In *Beghal [2014] 2 WLR 150,* [2013] EWHC 2573 (in which the claimant has leave to appeal to the Supreme Court) this court held that Schedule 7 is compatible with ECHR Article 8. It was submitted (as it happens by Mr Ryder) "that the reasoning of *Gillan (Strasbourg)* applied to the present case in that there was no distinction to be drawn between s.44 and the provisions of Schedule 7" (paragraph 25). However the court concluded, having regard to *Kay v Lambeth LBC* [2006] 2 AC 465, that if it found the case before it indistinguishable from *Gillan* it would be bound by the decision of the House of Lords in the same case (*Gillan* [2006] 2 AC 307) which in contrast to the later judgment of the Strasbourg court had held that s.44 of the 2000 Act was compatible with the Convention: see paragraph 71 of *Beghal*.

80. The court decided that the case was distinguishable from *Gillan.* Giving the judgment of the court Gross LJ said this:

> "91… [I]n our view crucially, the distinction between this case and *Gillan* is one of substance, turning on the starkly different context of the powers in issue. In our judgment port and border control is very different from a power to stop and search, potentially exercisable anywhere in the jurisdiction. Conclusions as to the arbitrariness of the latter do not readily, still less necessarily, translate into conclusions as to the former. As Schedule 7, para. 2 makes clear, the relevant powers apply only to a limited category of people - namely those 'at a port or in the border area', where 'the examining officer believes that the person's presence…. is connected with his entering or leaving…' the country and also to a person on a ship or aircraft which has arrived at any place in Great Britain or Northern Ireland. That the category of persons to whom Schedule 7 powers are applicable may itself be numerically large is neither here nor there; port and border controls cannot be simplistically assimilated with generalised powers of stop and search exercisable anywhere in any circumstances. Although it could not be said that the references in *Gillan (HL)* (at [9] and [28]) to the Schedule 7 powers and searches at airports, or the like reference to airports in *Gillan (Strasbourg)* (at [64]), of themselves make good the distinction, they certainly point to a significant contextual difference. As has been shown by reference to both Lord Lloyd's Report ['*Inquiry into Legislation Against Terrorism*', Command Paper No. 3420 of 1996] and the views of the Independent Reviewer [The *Independent Reviewer of Terrorism Legislation*, David Anderson QC: 2012 Report] the Schedule 7 powers have a long history. At least in significant part, they plainly reflect that this country, as 'an island nation' concentrates controls at its national frontiers. We venture the view that the Strasbourg Court would accord a wide margin of appreciation for individual states in respect of port and border controls…"

81. The court in *Beghal* proceeded to consider whether, given that the House of Lords' decision in *Gillan* did not conclude the Schedule 7 issue against the appellant, Mr

Ryder's submission that Schedule 7 was repugnant to Article 8 was good on its merits. It held that it was not. Amongst other reasons the court indicated (paragraph 94) that "the arguments which serve to distinguish *Gillan* serve likewise to emphasise the important and particular position of port and border controls"; "the Schedule 7 powers are applicable only to a limited category of people, as explained earlier: namely, travellers in confined geographical areas" (paragraph 95) and (paragraph 96) only for the purpose specified in paragraph 2(1) of the Schedule; "the Schedule 7 powers, though principally exercised by police officers, are an aspect of port and border control rather than of a criminal investigation" (paragraph 97); and (paragraph 98) "the exercise of Schedule 7 powers is subject to cumulative statutory limitations".

82. The Divisional Court is not bound by the law of precedent to follow an earlier decision of another Divisional Court, but will do so it unless convinced that it is wrong: *R v Greater Manchester Coroner ex p. Tal* [1985] QB 67. Far from being so convinced, I am with respect entirely clear that the reasoning in *Beghal* is correct. In those circumstances I would reject the submission that the Schedule 7 power is over-broad or arbitrary, and for that reason not "prescribed by law".

83. Before leaving this aspect of the Article 10 issue, however, there is a more general point to make. As I have shown the Strasbourg court in *Gillan* stated (paragraph 77) that "[i]n matters affecting fundamental rights it would be contrary to the rule of law… for a legal discretion granted to the executive to be expressed in terms of an unfettered power". Schedule 7 is plainly not so expressed; but it is in any case worth having in mind that in English law the executive never enjoys unfettered power. All State power has legal limits, for it is conferred on trust to be exercised reasonably, in good faith, and for the purpose for which it was given by statute; and where a discretionary power touches a fundamental right, its use must fulfil the proportionality principle. It is always for the court to ascertain the statute's purpose as a matter of construction. It is not a general, certainly not an absolute, requirement of the law of human rights in England that the Act of Parliament must spell out the constraints upon the power which it confers. That is not to say that the disciplines of the common law will always save a statute couched in seemingly unfettered terms; I recognize of course that "[t]he exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly-accessible rules of law" (*Gillan* (UK) *per* Lord Bingham at paragraph 34). But the position in this jurisdiction is with respect more nuanced than the Strasbourg court would appear to acknowledge in the passage cited.

Effective Safeguards

84. Here the essence of the claimant's argument is that, at least *vis-a-vis* cases touching journalistic freedom, Article 10 is violated for want of any provision for prior judicial scrutiny in Schedule 7. *Beghal* was not, of course, concerned with the public interest in journalistic free expression.

85. Reliance is placed (see for example Liberty's submissions, paragraph 8) on the contrast with Schedule 5 and its requirement for application to a judge. A number of Strasbourg authorities are cited, not least *Sanoma Utigevers BV v Netherlands* (2010) 51 EHRR 31, in which the Grand Chamber held that a Dutch law authorizing the compulsory surrender of material to the police for use in a criminal investigation was repugnant to Article 10. It is to be noted that the judgment at paragraph 82 contains

the same statement as appears in *Gillan* at paragraph 77: "[i]n matters affecting fundamental rights it would be contrary to the rule of law… for a legal discretion granted to the executive to be expressed in terms of an unfettered power". Later the court said this:

> "89. The Court notes that orders to disclose sources potentially have a detrimental impact, not only on the source, whose identity may be revealed, but also on the newspaper or other publication against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on members of the public, who have an interest in receiving information imparted through anonymous sources…
>
> 90. First and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body…
>
> 92. Given the preventive nature of such review the judge or other independent and impartial body must thus be in a position to carry out this weighing of the potential risks and respective interests prior to any disclosure and with reference to the material that it is sought to have disclosed so that the arguments of the authorities seeking the disclosure can be properly assessed."

86. *Telegraaf Media Nederland Landelijke Media BV v Netherlands* (2012) 34 BHRC 193 concerned the targeted surveillance of journalists with a view to obtaining knowledge of their sources. There was no prior review by an independent body; *post factum* review could not "restore the confidentiality of journalistic sources once it is destroyed" (paragraph 101). "The Court thus finds that the law did not provide safeguards appropriate to the use of powers of surveillance against journalists with a view to discovering their journalistic sources. There has therefore been a violation of Articles 8 and 10 of the Convention" (paragraph 102).

87. *Nagla v Latvia* [2013] ECHR 688 concerned the execution of a search warrant at a journalist's home; the search warrant was retrospectively approved by an investigating judge. At paragraph 90 the court stated:

> "The Court notes that unlike in the *Sanoma Uitgevers* case, the investigating judge has the authority under Latvian law to revoke the search warrant and to declare such evidence inadmissible… Moreover… the investigating judge also has the power to withhold the disclosure of the identity of journalistic sources… The Court considers that the last two elements pertaining to the investigating judge's involvement in an immediate *post factum* review are sufficient to differentiate this case from the above-mentioned *Sanoma Uitgevers* case (see also *Telegraaf Media…* where a similar distinction was made). The Court, therefore, does not deem it necessary to examine the Government's submissions concerning the role of

> the supervising prosecutor in authorising searches under the urgent procedure."

The Coalition Interveners lay emphasis on the fact that the judge reviewing the case "under the urgent procedure on the day following the search" (paragraph 89) was in a position to prevent disclosure of the journalist's source before any use was made of it.

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, 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.

89. In the result I conclude that Schedule 7 of the 2000 Act does not offend Article 10. No complaint relating to Article 5 or 8 can survive my agreement with the court's judgment in *Beghal.*

CONCLUSION

90. I would dismiss the application for judicial review.

MR JUSTICE OUSELEY:

91. I agree. Paragraph 34 makes an important point about the construction of the Act, in the light of which paragraphs 31 and 35 need to be read. The very reason for the stop is to see if someone appears to fall within s40(1)(b). The reason for the stop will therefore be yet less firmly grounded than the mere appearance that someone falls within the section. An officer must act in good faith, for the purposes of the Act and he should be able to explain why he acted as he did. He cannot act on a merely arbitrary basis, but he can act on for example, no more than hunch or intuition, especially given the speed with which he may have to act. This is not a power of last resort.

MR JUSTICE OPENSHAW:

92. I agree with both judgments.