IN THE COURT OF APPEAL (CIVIL DIVISION) **C1/2014/0607**
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2014] EWHC 255 (Admin)

B E T W E E N :

The Queen on the application of

DAVID MIRANDA

Appellant

-and-

(1) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

(2) THE COMMISSIONER OF POLICE FOR THE METROPOLIS

Respondents

-and-

(1) ARTICLE 19, ENGLISH PEN, AND THE MEDIA LEGAL DEFENCE INITIATIVE

(2) LIBERTY

Interveners

WRITTEN SUBMISSIONS ON BEHALF OF ARTICLE 19, ENGLISH PEN, AND THE MEDIA LEGAL DEFENCE INITIATIVE

Introduction

1. Article 19, English PEN, and the Media Legal Defence Initiative ("the Free Speech Interveners") provide these written submissions pursuant to the permission of Lord Justice Richards by order dated 2 November 2015. These three organizations have long histories of working to support freedom of expression and journalists, writers and media outlets whose work both relies upon, and fosters, that freedom.[1]

2. This case raises difficult and important legal issues which are of considerable public importance.[2] It is one of a number of proceedings in which the use and scope of the powers contained in Schedule 7 to the Terrorism Act 2000 have been the subject of legal challenge.[3] It is, however, the

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[1] Further information about the objectives and work of these organizations was provided in the Free Speech Interveners' written submissions before the Divisional Court dated 25 October 2015, at §§4-6.

[2] See reasons given by Lord Justice Richards to grant permission to appeal to the Appellant by order dated 14 May 2014. See also *Regina (Miranda) v Secretary for the Home Department and another (Liberty and others intervening)* [2014] EWHC 255; [2014] 1 WLR 3140, at 3149C, [15], per Laws LJ: "*The issues which the claim raises are of substantial importance*". Hereinafter *Miranda*.

[3] *Beghal v Director of Public Prosecutions (Secretary of State for the Home Department and others intervening)* [2015] UKSC 49; [2015] 3 WLR 344; *Sabure Malik v United Kingdom*, ECtHR, App No. 32968/11; *Regina (Elosta) v Commissioner of Police of the Metropolis* [2013] EWHC 3397; [2014] 1 WLR 239.

only case that concerns the impact of Schedule 7 on the legitimate exercise of the right to freedom of expression.

3. At the time of his detention at Heathrow Airport on 18 August 2013, Mr. Miranda was in transit on his way back from Berlin to Rio de Janeiro, a trip that had been arranged specifically for him to assist in the journalistic activity of his partner, Mr. Greenwald.[4] The encrypted material Mr. Miranda was carrying on his person before it was taken from him was, he says, critical to Mr. Greenwald's work for *The Guardian* newspaper.[5] Mr. Greenwald is a well-known journalist. He has written stories for *The Guardian* and other leading newspapers around the world relating to the TEMPORA and PRISM mass surveillance programmes conducted by the United States and United Kingdom governments.[6]

4. Mr. Miranda is not a suspected terrorist. That he was detained and journalistic material was seized from him pursuant to Schedule 7 powers designed to deal with terrorism, apparently exercisable without judicial oversight or the need for suspicion that he might be a terrorist, raised very serious concerns about the adequacy of the safeguards available in the United Kingdom for those undertaking, or assisting in, journalist work in the public interest, or their sources.

5. Set against that background and those concerns, the Free Speech Interveners were one of three groups that intervened in the judicial review proceedings before the Divisional Court.[7] The Free Speech Interveners' submissions were specifically directed to journalistic protections, including the legal protections for journalists' sources, at the level of comparative and public international law.[8] This Court is invited to read and consider each of the interveners' written submissions below, on that basis that they remain relevant to the issues in this appeal.

6. On 19 February 2014 the Divisional Court (Laws LJ, Ouseley J and Openshaw J) gave its judgment, holding that the Respondents' use of the Schedule 7 powers had been lawful. If the decision is allowed to stand, it will have very serious implications for press freedom that go well beyond the circumstances of Mr. Miranda's case. These include:

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4 *Miranda*, at 3146G, [8], per Laws LJ.

5 First Witness Statement of David Miranda, paragraph 11.

6 These programmes have themselves been the subject of legal challenge. See, for example, *Liberty & Ors v The Secretary of State for Foreign and Commonwealth Affairs & Ors* [2015] UKIPTrib 13 77-H; *Big Brother Watch & Ors v The United Kingdom*, ECtHR, App No. 58170/13; *ACLU v Clapper*, Case 14-42, 7 May 2015. In 2014, *The Guardian* and *The Washington Post* received the Pulitzer Prize for public service for their coverage of these surveillance programmes.

7 Written submissions provided pursuant to permission granted by the order of Lord Justice Laws dated 8 October 2013.

8 Aside from the Appellant, various aspects of the position as a matter of domestic law and Convention case law were also addressed in the written submissions of the Coalition of Media and Free Speech Organisations, as well as Liberty, both interveners in the case.

6.1. The designation of a very wide range of politically-motivated writing as terrorism *per se*, such that a large number of journalists and media outlets become subject to counter-terrorism legislation;

6.2. The determination that the seizure and inspection of material provided by sources to journalists, so long as it occurs at a port or border area, is not afforded the basic procedural protection of prior judicial consideration;

6.3. The implication that, in assessing proportionality, the protection afforded the right of freedom of expression may be reduced by virtue of: the absence of formal designation of a person as a journalist; the fact that a source has voluntarily waived his or her anonymity; or the conduct of third party sources; and

6.4. A chilling effect on freedom of expression, in particular on the willingness of confidential sources to provide to journalists information on matters of public interest.

7. The sole purpose of this intervention and these written submissions is to address these wider concerns in the public interest. Accordingly, the Free Speech Interveners make the following three submissions to this Court:

7.1. The Divisional Court erred in construing the 2000 Act such that the publication, or threatened publication, of words may constitute terrorist action.

7.2. Schedule 7 as interpreted by the Divisional Court does not meet the requirement that a restriction of free expression must be "prescribed by law" under Article 10(2) of the Convention.

7.3. The Divisional Court's approach to proportionality was wrong in law.

8. Following the decision of the Coalition of Media and Free Speech Organisations, interveners in the proceedings below, not to proceed with an application to intervene in this appeal, the Free Speech Interveners have not limited the scope of these written submissions to the level of public international law and comparative law.

I: The Divisional Court erred in construing the 2000 Act such that the publication, or threatened publication, of words may constitute terrorist action.

9. Paragraph 2(1) of Schedule 7 provides that *'[a]n 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).*' A person falling within section 40(1)(b) of the 2000 Act is one who *'is or has been concerned in the commission, preparation or instigation of acts of terrorism.*' The Divisional Court held that being *'concerned*

in' the commission, preparation, or instigation of an act of terrorism would be made out where a person is *'involved … directly or indirectly*' in that commission, preparation, or instigation.[9]

10. In turn, under sections 1(1) and 1(2) of the 2000 Act, an act of terrorism means *'the use or threat of action*' capable of endangering *inter alia* human lives and public safety, where such activities, or the threats of the same, are designed to influence the government or intimidate the public, with the purpose of advancing a political, religious, or ideological cause.

11. There has never been a suggestion that Mr. Miranda, or the journalist he was assisting Mr. Greenwald, were themselves committing, preparing to commit, or instigating, an act of violence. On the contrary, the Divisional Court considered that the *'action*' falling within the scope of an *'act of terrorism*' in this case was journalism. Lord Justice Laws accepted the submission of the First Respondent to the effect that *'the publication or threatened publication of stolen classified information which, if published, would reveal personal details … thereby endangering … lives*' would qualify as an act of terrorism under the 2000 Act *'where that publication or threatened publication is designed to influence government policy on the activities or the security and intelligence agencies.*'[10]

12. The First Respondent's submission had been based on a series of unsubstantiated assumptions: that the leaked information carried by Mr. Miranda would itself be published by Mr. Greenwald or others (rather than, for instance, forming part of the corpus of research underpinning a publication); that such publication would be made with the motivation of influencing government policy (rather than, for instance, informing the public); and that there was a risk that any such published information would wrongfully be used by criminals to harm members of the British army, security services, or intelligence services. It is not the role of the interveners to seek to interrogate whether those factual assumptions were well-founded or not.

13. The concern of the Free Speech Interveners lies in the Divisional Court's finding that publication of information by journalists – even if motivated to change government policy, and even if wrongfully used by criminals to harm others – constitutes *'terrorism*' under the 2000 Act. Investigative journalism, which contains information that unconnected third parties may harmfully misuse, is thereby an act of terrorism, with the result that all those involved in its publication, both the journalists themselves and any other person *'concerned in*' that publication (in the sense of being *'involved … directly or indirectly*'), are now potentially subject to the coercive powers under the 2000 Act, including Schedule 7. This is a remarkable conclusion. If the approach taken by the Divisional Court to the definition of *'action*' under the 2000 Act is allowed to stand, the scope of the definition of terrorism will be widened even beyond the already extremely broad bounds recognized by the Supreme Court in the decision of *R v Gul (Muhammed).*[11]

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9 *Miranda*, at 3154A-B, [32], per Laws LJ.
10 *Miranda*, at 3154D, [33], per Laws LJ.
11 [2013] UKSC 64; [2014] AC 1260.

14. The Free Speech Interveners endorse the analysis of the Independent Reviewer of Terrorism Legislation, David Anderson QC:[12]

> 'The basic ingredient of terrorism is the use or threat of "action" which involves, in particular, serious violence against a person, serious damage to property, the endangering of a person's life or the creation of a serious risk to public health or safety. Bombings, shootings, hostage-takings and punishment beatings are classic and familiar types of "action". What the *Miranda* judgment reveals is that ***the publication (or threatened publication) of words may equally constitute terrorist action***. It seems that the writing of a book, an article or a blog may therefore amount to terrorism if publication is "*for the purpose of advancing a political, religious, racial or ideological cause," "designed to influence the government*" and liable to endanger life or create a serious risk to health or safety'. [Original emphasis]

15. The Divisional Court's interpretation is not limited to journalism which encourages or induces violent terrorist acts, or even intends to do so.[13] Such journalism, along with all types of encouragement or inducement of violent acts of terrorism, is already covered by section 1 of the Terrorism Act 2006. Instead, as the Independent Reviewer observes, *'[t]he significance of Miranda is to demonstrate that the publication of facts and opinions may itself be an act of terrorism, on no other basis than that it is politically motivated and is considered to endanger life or create serious risk to public health or safety*.'[14]

16. The definition of terrorist *'action*' as endorsed by the Divisional Court takes it well beyond the sphere of national security. The example given by the Independent Reviewer is instructive:

> 'Take an article or blog that argues (on religious or political grounds) against the vaccination of children for certain diseases. If it were judged to create a serious risk to public health, and if it was designed to influence government policy, its publication would be classed by the law as a terrorist action.'[15]

So too, would newspaper articles or blogs advocating against water fluoridation, or against tobacco plain packaging legislation, on, for instance, libertarian political grounds, fall within the Divisional Court's definition of terrorism under the 2000 Act.

17. The 2000 Act applies not only to activity designed to influence the UK government, but also that designed to influence governments of any country.[16] Equally it applies not only to acts endangering lives or creating serious risks to health or safety of the public in the UK, but also to persons[17] and the public wherever situated.[18] The effect of the approach adopted by the Divisional Court is that a politically motivated article advocating, say, a reduction in US funding to HIV prevention programs in South Africa could constitute terrorism, so long as the (entirely plausible) judgment

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12 David Anderson QC, *The Terrorism Acts in 2013*, at [4.16]. Hereinafter *2013 Anderson Report*.
13 *Miranda*, 3153D-F, [29], per Laws LJ.
14 *2013 Anderson Report*, p.30, fn 88.
15 *2013 Anderson Report*, p.30, [4.19].
16 Terrorism Act 2000, s1(4)(d).
17 Terrorism Act 2000, s1(4)(b).
18 Terrorism Act 2000, s1(4)(c).

were made that such advocacy either endangered a single person's life (other than that of the author) in South Africa or posed a serious risk to the health of a section of the South African public. Further still, a politically-motivated newspaper article advocating that the Russian air force campaign in Syria ought more directly to target Islamic State militants could also constitute, of itself, terrorism, so long as the article were judged capable (due to, say, the influence of its author at the international level) of actually endangering any of those militants.

18. The Free Speech Interveners submit that the Divisional Court's interpretation of the word *'action'* so as to include the act of writing and publication, is impermissibly broad for at least two reasons:

    18.1. It violates the principle of statutory construction that words ought to be afforded their common meaning, rather than purely their literal meanings; and

    18.2. It is inconsistent with the principle that expression ought only to be subject to criminal legal sanction where that expression is likely to incite violence.

19. It is accepted that as a matter of linguistic possibility the word *'action'* is capable of encompassing the acts of writing and publishing investigative journalism, which may well seek to influence government policy and which may, by virtue of the subsequent acts of third parties, create a risk to public health or safety. But the Free Speech Interveners invite this Court to adopt an interpretation of the word mindful that it is deployed in section 1(1) of the 2000 Act as a part of the definition of *'terrorism*.'[19] Bearing in mind that this Court may take into account, in interpreting a statutory definition, the common meaning of a term (if that diverges from the strictly literal),[20] it is submitted that the proper question is not what constitutes an *'action'* in isolation, but what constitutes a terrorist 'action'.

20. The Free Speech Interveners submit that the acts of writing and publication, where they do not incite violence, do not fall within any commonly-recognized meaning of terrorist action in domestic or international law. Definitions of 'terrorism' can be broad and, as a matter of international law, the definition is not precisely settled, but the concept of terrorism has an irreducible core component of violent activity. While the Supreme Court determined in *R v Gul* that the definition of terrorism in section 1 of the 2000 Act is *'very far reaching indeed*,'[21] it proceeded

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[19] The heading of the section is 'Terrorism: Interpretation.' While a statutory heading is not conclusive as to the construction of the words within it, it does provides relevant guidance which a court may properly take into account in construing those words: *R v Montila and ors* [2004] UKHL 50*;* [2004] 1 WLR 3141 (HL), [31]-[37], per Lord Hope on behalf of the Committee.

[20] The Free Speech Interveners note the Independent Reviewer's observation that the Divisional Court's interpretation of the 2000 Act departs from *'the principle that statutory definitions should be applied bearing in mind the common meaning of the word defined*'; *2013 Anderson Report*, fn 86, citing *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 (HL), [82]-[83], per Lord Scott.

[21] *R v Gul* [2014] AC 1260 (UKSC), [29], per Lord Neuberger and Lord Judge. The Court is invited to note the specific concerns voiced by the UN Human Rights Committee in its review of the UK's compliance with the ICCPR in 2015, in Concluding Observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, [14].

on the basis that *'the definition would seem to cover any violence or damage to property if it is carried out with a view to influencing a government or [inter-governmental organization] in order to advance a very wide range of cases*.'[22] Even on a broad reading of the term, the Supreme Court did not advert to action falling short of violence or damage to property itself.

21. It is accepted that there is no clear consensus at the international level as to what precisely constitutes terrorism. In *R v Gul*, the Supreme Court noted that the United Nations *'has attempted to identify a comprehensive definition of terrorism, but has so far failed.*'[23] That said, Security Council Resolution 1566/2004 sets out, in the context of condemning terrorism, a list of acts accepted by the Security Council as unjustifiable, namely:

> 'criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism.'[24]

22. This indicative statement, representing what is broadly contemplated by States when they address terrorism, is consistent with the approach of the Supreme Court in *R v Gul* insofar as it proceeds on the basis that intentional physical harm is involved. The Free Speech Interveners submit that, while there may well be uncertainty as to the scope of the definition of terrorism (especially where, as was the issue in *R v Gul*, unlawful violent activity may overlap with armed activities which are lawful under the law of armed conflict), high authority at both the domestic and international level proceeds on the assumption that the core of terrorist action lies in violent acts intended to cause harm.[25] To include, as the Divisional Court did, acts of writing and publication, which neither incite violence nor are intended to cause harm, within the scope of terrorist action represents a departure from the common position in domestic and international law, such that the construction of the 2000 Act for which the Divisional Court's judgment stands ought not to be upheld by this Court.

23. These are not interpretative concerns of abstract importance. Once the action of publishing investigative journalism which is considered to endanger public health or safety, qualifies *per se* as an *'act of terrorism*' under the 2000 Act, the full apparatus of criminal sanctions and ancillary powers (both under the 2000 Act and other counter-terrorism legislation such as the Terrorism Act 2006)

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22 *R v Gul*, [28].
23 *R v Gul*, [46].
24 UN Security Council Resolution 1566/2004, UN Doc. S/RES/1566 (2004), [3].
25 The broad scope of definitions at the international level are all predicated on core elements of violence or direct incitement to violence: Organisation of African States Convention on The Prevention and Combating of Terrorism 1999, Article 1(3)(a). AHG/Dec. 132 (XXXV); Council of the European Union Framework Decision 2004/475/JHA on Terrorism [2002] OJ L 164/3, Article 1; Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN Doc. E/CN.4/2006/98 (2005), [38].

may be applied to journalists and those directly or indirectly involved with them. The Independent Reviewer has highlighted a number of potential legal consequences, including that: any act preparatory to publication would be punishable by life imprisonment;[26] any other person who encouraged the writing of the relevant article could be imprisoned for seven years;[27] and that the media outlet employing the relevant journalist could be designated under asset-freezing legislation,[28] meaning that making resources available to that media outlet without a licence would be a criminal offence.[29] Taken to their logical limit, these provisions could in principle have extreme practical effects: there would be nothing to prevent the purchase of a newspaper (making resources available to a media outlet publishing politically-motivated articles) from making criminals of the entire readership; similarly, there would be nothing to prevent acts of research, which could be preparatory to a piece of politically-motivated journalism, from being similarly criminalized.

24. In the light of the criminal sanctions that might flow from the Divisional Court's expansive interpretation of terrorism to include journalism, the Free Speech Interveners invite this Court, in construing section 1 of the 2000 Act, to bear in mind the weight of international legal opinion, reflected in the jurisprudence of human rights courts and in the agreed statements of eminent international legal experts, that expression (including in the form of journalism) ought only to be subject to criminal sanctions in extreme cases.

    24.1. The EU Framework Decision on Combating Terrorism proceeds on the basis that, with respect to expression, only direct provocation to commit terrorist crimes falls within the proper scope of counter-terrorism efforts, and that expression of views, even radical or controversial ones, ought not to fall within the scope of criminal law.[30]

    24.2. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, compiled by eminent international lawyers as a statement of state practice and general principles of international law, and endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression,[31] record that free expression may lawfully be subject to criminal sanction only upon satisfaction of the cumulative criteria that *'the expression is intended to incite imminent violence*,' that the expression *'is likely to incite such violence*,' and that *'there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence*.'[32]

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26 Terrorism Act 2006, s5.
27 Terrorism Act 2006, s1.
28 Terrorism Asset-Freezing etc. Act 2010.
29 Terrorism Asset-Freezing etc. Act 2010, ss12 and 14.
30 Council Framework Decision 2008/919/JHA amending Framework Decision 2002/475/JHA on Combating Terrorism [2008] OJ L 330/21, recital 14.
31 UN Special Rapporteur on Freedom of Opinion and Expression, Report on Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc. E/CN.4/1996/39 (1996), [154].
32 Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1996), Principle 6.

24.3. Similarly, the Inter-American Commission on Human Rights has stated, with respect to the questions of restrictions on the right of free expression protected under Article 13 of the American Convention on Human Rights, that:

> 'the threshold of State intervention with respect to freedom of expression is necessarily higher [than in respect of other rights] because of the critical role political dialogue plays in a democratic society. The Convention requires that this threshold be raised even higher when a State brings to bear the coercive power of its criminal justice system to curtail expression. Considering the consequences of criminal sanctions and the inevitable chilling effect they have on freedom of expression, criminalization of speech can only apply in those exceptional circumstances where there is an obvious and direct threat of lawless violence.'[33]

25. If the Divisional Court's interpretation of section 1 of the 2000 Act is allowed to stand, whereby the definition of terrorist *'action'* includes some investigative journalism, the necessary result is that such journalism, its practitioners, and the media outlets associated with it, will be subject not only to the definitional provisions of the 2000 Act itself, but also to the wide range of related criminal and administrative sanctions set out above. As a matter of statutory interpretation and common sense, this Court is invited to reject such a result, since it departs from the common understanding of what constitutes terrorism, and is inconsistent with the principle that the application of criminal sanctions to expression ought to be avoided save in extreme circumstances.

II: Schedule 7 as interpreted by the Divisional Court does not meet the requirement that a restriction of free expression must be "prescribed by law".

26. It is well established that any restrictions to the right to freedom of expression must be "prescribed by law" under Article 10(2) of the Convention.

27. In the particular context of the journalistic protections provided for by Article 10, the Strasbourg Court has developed a clear position that state laws may not be used to force disclosure either of journalists' communications or the identity of their sources, save in exceptional circumstances and, even then, under strictly defined procedures of judicial oversight and approval.[34] The latter is an explicit requirement under Article 10 case law, endorsed at the highest level by the Grand Chamber.[35] The position is no different in public international law.

28. The rationale for this position is that, if journalists and their sources have no expectation of the security which confidentiality affords, they may decide against providing information on sensitive matters of public interest for fear of consequences. Further, this chilling effect on the provision of information by journalistic sources will arise by virtue of the potential for identification of sources

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33 Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights* (1994), p211.

34 *Telegraaf Media Nederland Landelijke Media BV v Netherlands* [2012] ECHR 1965.

35 *Samona Uitgevers BV v Netherlands* [2010] ECHR 1284.

and provision to authorities of journalistic communications, even if such outcomes do not occur on every occasion that journalists are targeted by the police or security services.[36]

29. In English law, access to journalistic materials is specifically regulated within the legislative regimes for search and seizure during criminal or terrorist investigations. Built into these regimes are the judicial safeguards adverted to, and required by, the Strasbourg and other international authorities. In particular:[37]

    29.1. The Police and Criminal Evidence Act 1984 codifies the rights of police to search premises and seize evidence during criminal investigations and regulates applications for access to confidential journalistic material and other journalistic material under its section 9 and Schedule 1. Such applications are made to a Circuit Judge.

    29.2. Schedule 5 of the 2000 Act regulates the conduct of terrorist investigations and requires approval of the application for disclosure of journalistic materials by a Circuit Judge.

30. Schedule 7 is, on its face, the notable outlier. It contains no express provision for judicial supervision, whether prior to, or immediately after, the exercise of the power by the examining officer. There is no requirement even to make enquiries as to whether or not the items to be seized under the Schedule 7 power are capable of engaging the journalistic protections under Article 10. There is, therefore, no provision at all for an independent assessment as to whether the interests of a terrorist investigation override the public interest in the protection of the confidentiality in the journalistic material seized.

31. In its judgment, the Divisional Court made no attempt to read any judicial safeguards into the exercise of the Schedule 7 power, and held that the "prescribed by law" requirement under Article 10(2) was nevertheless satisfied, in their absence. Its basis for so holding was that: (i) the Strasbourg Court has not developed an absolute rule of prior judicial scrutiny for cases involving state interference with journalistic freedom; and (ii) in any event, there exist other important constraints upon the use of the Schedule 7 power.[38]

32. The Divisional Court's approach is inconsistent with the fundamental principle that there must be independent judicial or quasi-judicial scrutiny of the process whereby a person is compelled to hand over journalistic material to the authorities. If left undisturbed by this Court, it would significantly undermine the strong safeguards for the confidentiality of journalist's sources, and the information they provide to journalists, as recognized by the domestic and international authorities.

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36 *Sanoma Uitgevers*, at [71]; *Financial Times v United Kingdom* [2009] ECHR 2065, [70].

37 See Liberty's Written Submissions dated 25 October 2013, at §§6-11; and the Coalition's Written Submissions, at §§20-25.

38 *Miranda*, 3171F-H, [88].

(i) Judicial safeguards are required in cases involving journalistic activity

33. The press must be free to provide the forum in which opinions may be expressed and must be able to provide the access to information on which free expression depends:

> '[P]rotection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital "public watchdog" role of the press may be undermined and the ability of the press to provide accurate and reliable reporting may be adversely affected.'[39]

34. Accordingly, the Strasbourg Court has developed, in cases already cited to this Court such as *Telegraaf Media Nederland Landelijke Media BV v Netherlands* and *Sanoma Uitgevers v Netherlands*, a clear principle that state laws may not be used to force disclosure either of journalists' communications or the identity of their sources, save under strictly defined procedures of judicial or quasi-judicial oversight and approval.

35. Notwithstanding the clear position, the Divisional Court accepted the First Respondent's submission that the Strasbourg Court had not developed an absolute rule of prior judicial scrutiny. There is no explanation for why that submission was accepted. And it is not clear on what basis it could be: each and every authority cited to the court on this point involved cases in which the Strasbourg Court clearly set out the procedural requirement of judicial or quasi-judicial scrutiny, prior to any permissible access and use by the authorities of the journalistic materials in question.

36. Just as in the jurisprudence of the Strasbourg Court, it has been consistently recognised in international law that the full realisation of the right to freedom of expression relies upon the comfort that journalists and their sources have that the information provided to journalists, and the identity of the persons providing it, will remain confidential. In particular:

    36.1. The UN Human Rights Committee, the authoritative interpretative body for the ICCPR, in its General Comment 34 on the right to freedom of opinion and expression noted that:[40]

> '[a] free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Convention rights'
> […]
> 'States parties should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources.'

[39] *Financial Times v United Kingdom*, [59].
[40] UN Human Rights Committee, General Comment 34 (2011), UN Doc. CCPR/C/GC/34, [13] and [45].

36.2. The UN Special Rapporteur on Freedom of Opinion and Expression has long emphasized the necessary link between the protection of journalists' sources and communications and the respect for freedom of expression, employing the same rationale as the Strasbourg Court, *viz* that a chilling effect on the provision of information will occur if States too readily compel disclosure of information and sources: [41]

> '[T]he protection of sources assumes primary importance for journalists, as a lack of this guarantee may create obstacles to journalists' right to seek and receive information, as sources will no longer disclose information on matters of public interest. Any compulsion to reveal sources should therefore be limited to exceptional circumstances where a vital public or individual interest is at stake.'

36.3. The UN Special Rapporteur has reiterated the need for particular protection of journalists, including the requirement that any attempt by State authorities to compel disclosure of sources or information will only be compatible with human rights where the authorities' request for disclosure has been specifically approved by an independent judicial body: [42]

> 'Journalists should not be held accountable for receiving, storing and disseminating classified data which they have obtained in a way that is not illegal, including leaks and information received from unidentified sources.
> […]
> Journalists should never be forced to reveal their sources except for certain exceptional cases where the interests of investigating a serious crime or protecting the life of other individuals prevail over the possible risk to the source. Such pressing needs must be clearly demonstrated and ordered by an independent court.'

37. The principle that States, as part of their duty to protect freedom of expression, are necessarily required to provide strong safeguards for the confidentiality of journalists' sources and the information they provide to journalists is one on which there has long been widespread international agreement.

37.1. Almost twenty years ago, the European Parliament called upon Member States to enact legislation to secure the confidentiality of journalists' sources.[43] For just as long, the Council of Europe has considered the protection of the confidentiality of sources of

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41 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Addendum: Report on the Mission of the Special Rapporteur to the Republic of Poland (1998), UN Doc. E/CN.4/1998/40/Add.2.

42 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012), UN Doc. A/HRC/20/17, [107] and [109].

43 European Parliament, Resolution on Confidentiality for Journalists' Sources and the Right of Civil Servants to Disclose Information (18 January 1994), OJ C44/34.

journalists' information a key element of the freedom of expression and the media which is itself a *'fundamental condition of a genuine democratic society.*'[44]

37.2. In 2000 the Council of Europe's Committee of Ministers adopted a specific recommendation providing detailed guidance on the agreed standards for legislation and practices relating to the confidentiality of journalists' sources and information.[45] Further, in 2008, the Parliamentary Assembly of the Council of Europe issued a renewed call for national parliaments to reconsider legislation according to a range of principles giving effect to freedom of expression, including that *'the confidentiality of journalists' sources of information must be respected.*'[46]

37.3. Beyond Western Europe, the Organisation for Security and Co-operation in Europe ("OSCE"), with 56 member states across Europe, Central Asia, North America, has similarly considered the protection of journalistic information and sources from forced disclosure, save in exceptional circumstances, to be a fundamental requirement of respect for human rights. The OSCE Representative on Freedom of the Media has recommended harmonization of Member State laws to ensure explicit protection of journalistic information and source confidentiality, even going so far as to consider that journalists ought not to be compelled to testify in court.[47]

37.4. The Inter-American Commission on Human Rights has also agreed, as part of its Declaration of Principles on Freedom of Expression, that: *'[e]very social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.*'[48] Again, the rationale is that *'revealing sources of information has a negative and intimidating effect on journalistic investigations [meaning that] future sources of information will be less willing to assist reporters.*'[49] Similarly, the African Commission on Human and Peoples' Rights ("ACHPR"), in its equivalent Declaration of Principles on Freedom of Expression in Africa, has declared that: *'[m]edia practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with [principles including that] disclosure has been ordered by a court, after a full hearing.*'[50]

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44 See Council of Europe, 4th European Ministerial Conference on Mass Media Policy (7-8 December 1994), Resolution No 2: Journalistic Freedoms and Human Rights.

45 Committee of Ministers of the Council of Europe, Recommendation No. R (2000) 7 on Protection of Sources.

46 Parliamentary Assembly of the Council of Europe, Resolution 1636(2008), Indicators for Media in a Democracy, [8.8].

47 OSCE, Representative on Freedom of the Media, Access to Information by the Media in the OSCE Region: Trends and Recommendations, Summary of Preliminary Results of the Survey (30 April 2007).

48 Inter-American Commission on Human Rights ('IACHR'), Declaration of Principles on Freedom of Expression (October 2000), [8].

49 IACHR, Report on the Situation of Human Rights in Venezuela (29 December 2003), OEA/Ser.L/V/II.118 doc.4 rev.2.

50 African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression in Africa (2002), [15].

38. There exists an equally widespread consensus as to the procedural requirements with which any attempt by State authorities to breach that confidentiality must comply. Just as in the jurisprudence of the Strasbourg Court,[51] a forced disclosure of journalistic information or sources will only be lawful where there has been specific authorization by an independent judicial body. This requirement was set out within the ACHPR 2002 Declaration,[52] just as it had been previously in the Council of Europe's Committee of Ministers 2000 Recommendation.[53] Most significantly, perhaps, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media, the Organization of American States ("OAS") Special Rapporteur on Freedom of Expression, and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information all jointly issued a declaration in 2008 relating to the treatment of the media in the context of terrorism which described the requirement for a court order authorizing breach of journalistic confidentiality as one of the *'[n]ormal rules on the protection of confidentiality of journalists' sources of information*.'[54]

39. These international standards have been incorporated into national law both within and outside Europe in comparable jurisdictions. For instance, German law requires prior judicial approval for warrants of search and seizure of journalistic material,[55] as does Poland[56] and much of Eastern Europe.[57] The United States established prior judicial authorization as a minimum protection,[58] and certain European jurisdictions go even further, such as Sweden and Switzerland, where any material subject to journalistic confidentiality is for that reason immune from seizure.[59]

40. The Free Speech Interveners submit that Schedule 7, when applied to persons in possession of journalistic material, must be read in such a way as to provide for the prior judicial authorisation adverted to in the Strasbourg and international authorities, as well as the specific statutory protections governing access to such material in the 1984 Act, or pursuant Schedule 5 of the 2000 Act. If that is impossible, Schedule 7 will be incompatible with Article 10 of the Convention.

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51 See, for instance, *Sanoma Uitgevers*, [88]-[100].

52 ACHPR, Declaration of Principles on Freedom of Expression in Africa (2002).

53 Committee of Ministers of the Council of Europe, Recommendation No. R (2000) 7 on Protection of Sources.

54 UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression, and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation, December 2008.

55 Code of Criminal Procedure (Germany), s 98.

56 Code of Criminal Procedure (Poland), Art 180, Law No. 97.89.555.

57 Radio and Television Law (Bulgaria), s 15, Decree No. 406; Law on Radio and Television Broadcasting (Romania), Art 7, Law No. 504; Law on Dissemination of Mass Information (Armenia), Art 5; Media Act (Croatia), Art 30, Official Gazette No. 59/2004; Lithuanian Constitutional Court, Decision of 23 October 2002.

58 28 Code of Federal Regulations (USA) §59.4.

59 See Freedom of Press Act (Sweden), Ch 27, Art 2; Ch 38, Art 2; and Ch 39, Art 5; and Penal Code (Switzerland), Art 28a.

(ii) The constraints on the Schedule 7 power identified by the Divisional Court do not constitute adequate safeguards in cases involving journalistic activity

41. The Divisional Court identified a number of "*important constraints upon the use of the Schedule 7 power*" which it suggested were sufficient to satisfy the "prescribed by law" requirement in Article 10(2). In particular:[60]

    41.1. Although the examining officer need not have grounds for suspecting that the subject falls within the statutory definition of terrorist, the general law requires that the Schedule 7 power be exercised upon some reasoned basis, proportionately and in good faith.

    41.2. There is a limitation upon the meaning of terrorism given by reference to the mental or purposive elements prescribed by sections 1(1)(b) ("*designed to influence…or to intimidate…*") and section 1(1)(c) ("*for the purpose of advancing a political, religious, racial or ideological cause*").

    41.3. The power may only be used where the subject is "*at a port or in a border area*": Schedule 7, paragraph 2(2).

    41.4. The examining officers' power of detention is limited to nine hours: Schedule 7, paragraph 6.

    41.5. The discipline of the proportionality principle is one of the foremost safeguards.[61]

42. Even if this Court holds that the "prescribed by law" requirement under Article 10(2) does not necessitate prior judicial or quasi-judicial authorization, the constraints identified by the Divisional Court provide inadequate safeguards in the specific context of the right to freedom of expression. In the premises of the broad definition of terrorism which the Divisional Court has accepted, the asserted limitation on the scope of the power provided by the mental or purposive elements is illusory, since a wide range of investigative journalists will potentially be subject to Schedule 7. In addition, given the practical realities of the international media environment and the numbers of journalists and those assisting them passing through UK ports and border areas from time to time, the geographic limit on the power is, contrary to the Divisional Court's contention, a constraint of only minimal, if any, impact.

43. Most importantly, however, the *'proportionality principle'* to which the Divisional Court adverts implies that the person exercising the Schedule 7 power is in a position to carry out a proper assessment weighing the respective rights and interests involved in detention of a journalist or person assisting and, critically, seizure of the journalistic material. In cases such as Mr. Miranda's, where an officer at a port or border area is provided with minimal background as to the reasons for any proposed detention and seizure, there can be no realistic prospect of that officer being in a position to carry out a meaningful proportionality assessment. The officer, unlike an independent

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[60] *Miranda*, 3153G-H, [31], per Laws LJ.
[61] *Miranda*, 3171H, [88], per Laws LJ.

judicial body considering authorization of inspection of material held by a journalist, will likely have no mechanism to assess issues such as the nature of the material being carried, its potential public interest value, and the potential risk posed to any confidential source upon seizure and inspection of the material. In the absence of any capacity to carry out a proper proportionality assessment, it is submitted that the result will be that decisions to apply Schedule 7 to journalists, and those who assist them, cannot avoid being arbitrary and unforeseeable, in breach of the requirement that such decisions be *'provided by law*.'

44. As a result, the Free Speech Interveners submit that, even if prior judicial authorization were not an absolute requirement, the apparent safeguards on which the Divisional Court relies are insufficient to ensure that the application of Schedule 7 powers to journalists, and to those who assist them, will satisfy the threshold criterion of being *'provided by law'* under Article 10(2).

III: The Divisional Court's approach to proportionality was wrong in law.

45. In its proportionality analysis, the Divisional Court took into account three factors, which it ought not to have, to reduce the weight afforded to the right of free expression in the present case. Those factors were: [62]

    45.1. The Divisional Court's finding that Mr. Miranda was *'not a journalist*;'

    45.2. The Divisional Court's finding that, in the particular case, there was *'no question of a source being revealed*;'

    45.3. The Divisional Court's observation that *'the material was stolen*.'

46. As a starting point, the Free Speech Interveners note that the proportionality of any interference with rights ought to be assessed with respect to the factors relevant to the interference at the time at which it was applied.[63] The system endorsed by the Divisional Court is one in which an officer at any port or border area, provided with minimal background as to the reasons for any proposed detention and seizure under Schedule 7, is entitled to carry out that stop and to inspect material without any prior judicial consideration.

47. While, in hindsight, in a particular case, it may be determined that the source of the material being carried has elected to waive their anonymity, there can be no certainty, ahead of the exercise of Schedule 7 powers, that such a factor will be apparent to the decision maker in any instant case.

48. Further, there can be no certainty (even where a known source such as Mr. Snowden is suspected) that all of the relevant material has been provided by that one known source, rather than from a mixture of known and confidential sources. Given the absence of full information before the

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62 *Miranda*, 3166G-H, [72], per Laws LJ.

63 *R (on the application of Moos) v Commissioner of Police of the Metropolis* [2012] EWCA Civ 12, [93].

relevant decision-maker, namely the officer carrying out the detention and seizure under Schedule 7, the Free Speech Interveners submit that the approach approved by the Divisional Court provides no guarantee that the scope of interference with freedom of expression would be limited only to cases where the relevant traveller was not directly employed by a media outlet, where that material had been provided by a source the identity of whom was known, and where that material had been stolen.

49. In any event, even if it were possible for the use of Schedule 7 powers to be limited to circumstances directly equivalent to Mr. Miranda's case, it was still not open to the Divisional Court to reduce the relative weight to be afforded to the right of freedom of expression by reference to those three factors.

(i) Not a journalist

50. Any suggestion that the standards applicable to the treatment of journalists are limited only to persons formally accredited as such is highly artificial and inconsistent with the broad approach taken to the protection of freedom of expression worldwide.

    50.1. The UN Special Rapporteur has noted that persons not formally employed as journalists should *'benefit from the same safeguards as all journalists, since a person's status as a journalist is determined by the work that he or she performs and is not subject to any job title or form of registration.'*[64]

    50.2. The UN Human Rights Committee has observed that *'[j]ournalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet and elsewhere.'*[65]

    50.3. The principle that persons associated with journalists are due the same standard of treatment and rights protections has also been explicitly endorsed by the UN Security Council. Security Council Resolution 1738, relating to the protection of journalists in situations of armed conflict, expressed its objects in broad terms as *'journalists, media professionals and associated personnel.'*[66]

51. The rationale for this breadth of protection is plain: the nature and operations of journalism and the modern media require it. Journalism, especially where it seeks to investigate matters of international significance, necessarily requires the support of a network of persons, many of whom are not formally accredited as journalists. When it comes to a journalist's interactions with a confidential source, not only the accredited journalist, but also persons assisting the journalist, such as interpreters, drivers, video and sound recordists, all necessarily participate in that

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64 Annual Report of the Special Rapporteur on the Promotion and Protection of the Right of Freedom of Opinion and Expression (2010), UN Doc.A/HRC/14/23, [101].

65 UN Human Rights Committee, General Comment 34 (2011), [44].

66 UN Security Council, Resolution 1738(2006), UN Doc. S/RES/1738 (2006).

interaction, with the result that material capable of identifying a source is likely to be held by any of those persons. The Divisional Court's decision to consider relevant that Mr. Miranda's role appeared to be that of a conduit, rather than that of accredited *Guardian* journalist, and accordingly to attach less weight to the protection of freedom of expression in this instance, is to adopt a formalism entirely inconsistent with the broad approach consistently endorsed by the authoritative international bodies.

52. A broad application of the internationally-agreed principles of journalistic protection from forced disclosure of information and sources is a logical consequence of the reasons for that journalistic protection in the first place. The rationale for respect for journalistic confidentiality as to information and sources lies in the recognition that, if such confidentiality is too readily breached, this will deter people from providing information to journalists on matters of public importance, with a consequent negative impact on the extent of important information provided to citizens.

53. Precisely the same rationale exists in relation to persons such as Mr. Miranda who act as conduits through which information is transmitted from source to journalist, and between journalists. Just as a wide power to detain and compel disclosure from journalists has a chilling effect on the willingness of sources to come forward, so too does a wide power to detain and compel disclosure from those who are directly assisting journalists, or are presumed to be doing so. The Free Speech Interveners submit that it was, therefore, wrong for the Divisional Court to consider Mr. Miranda's lack of formal status as a journalist as a factor affecting the proportionality of interference, since, both as a matter of international legal opinion and as a matter of logic, no distinction ought to be drawn between the protection afforded to the rights of those formally accredited as journalists and the rights of those who provide direct assistance to them.

(ii) Source already known

54. With respect to the Divisional Court's suggestion that the weight to be afforded to the right of freedom of expression ought to be reduced by the fact that, in this case, the source of the relevant material (Mr. Snowden) had voluntarily waived his anonymity, the Free Speech Interveners submit that such a suggestion is illogical.

55. As set out above, the interference in the present case extends beyond the instant rights of Mr. Miranda and those journalists and media outlets assisted by him: the interference also affects the field of journalism more broadly by virtue of the chilling effect which potentially prevents future sources from providing information to journalists, as indeed the Divisional Court acknowledged in its judgment.[67] Given that the field of future sources must include those who would <u>not</u> wish to waive their anonymity, the Free Speech Interveners submit that the revealed identity of the source in the present case is irrelevant. Since the chilling effect on future sources is in no way affected by

[67] *Miranda*, 3166G-H, [72], per Laws LJ.

the factor of Mr. Snowden's identity being known, there was no principled basis for the Divisional Court's decision to take that factor into account, or give it any weight, in its proportionality analysis.

(iii) Stolen material

56. Finally, it was wrong for the Divisional Court to place weight on the fact that the material provided to Mr. Miranda had previously been stolen by Mr. Snowden.

57. The Free Speech Interveners note that the Strasbourg Court, in the case of *Radio Twist v Slovakia*,[68] specifically rejected a submission from the Slovakian government to the effect that the fact of a recording having been illegally made by a source before its being provided to journalists ought to restrict the Article 10 rights of the relevant journalists. On the contrary, the Strasbourg Court held that *'the mere fact that the recording had been obtained by a third person contrary to law'*[69] did not deprive the journalists of their protections under Article 10.

58. The Free Speech Interveners submit that those who are due the protections afforded to journalism, required as an incident of the right to freedom of expression, do not forfeit those protections by virtue of receiving material from third party sources who have themselves acted in breach of the law. It follows that the actions of those third party sources should not form part of the assessment of the proportionality of the interference with those journalists' rights.

Conclusion

59. For all the reasons set out above, the Free Speech Interveners submit that this Court ought to overturn the flawed approach to freedom of expression adopted by the Divisional Court in the case of Mr. Miranda. The effect of the Divisional Court's decision in this case has been to expand the definition of terrorism beyond lawful bounds, such that a very wide range of legitimate journalistic activity is now potentially subject to counter-terrorism legislation, while at the same time removing the effective safeguards for journalistic materials recognised as a requirement by authorities at the highest level. If the decision is allowed to stand, it will have an inevitable chilling effect on the conduct of journalism, and deter the provision of information by potential sources on matters in the public interest.

CAN YEGINSU
ANTHONY JONES
16th November 2015

4, New Square,
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[68] *Radio Twist AS v Slovakia* [2006] ECHR 1129.
[69] *Radio Twist AS v Slovakia*, [62].

Appeal No: C1/2014/0607
IN THE COURT OF APPEAL (CIVIL DIVISION)

BETWEEN:

The Queen on the application of
DAVID MIRANDA

Appellant

-and-

(1) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

(2) THE COMMISSIONER OF POLICE FOR THE METROPOLIS

Respondents

-and-

(1) ARTICLE 19, ENGLISH PEN, AND THE MEDIA LEGAL DEFENCE INITIATIVE
(2) LIBERTY

Interveners

WRITTEN SUBMISSIONS ON BEHALF OF ARTICLE 19, ENGLISH PEN, AND THE MEDIA LEGAL DEFENCE INITIATIVE

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