IN THE HIGH COURT OF JUSTICE **CO/1052/2017**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N :

REGINA
on the application of
LIBERTY

Claimant

-and-

(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT

(2) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Defendants

-and-

NATIONAL UNION OF JOURNALISTS

Intervener

SKELETON ARGUMENT OF THE INTERVENER

References to the trial bundle are given as [TB/ Volume Number /Page Number].
References to the authorities bundle are given as [AB/ Volume Number / Tab Number].

A. Introduction and Summary

1. The protection of journalistic sources is one of the basic conditions for freedom of expression. If journalists and their sources have no expectation of confidentiality, they may decide against exchanging information on sensitive matters of public interest for fear of consequences. 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.

2. The Intervener ("the NUJ") supports the Claimant's challenge to the "*bulk"* surveillance powers in the Investigatory Powers Act 2016 for the reasons given by the Claimant. In particular, these powers permit an interference with

journalistic communications, even where that is not the express purpose of the use of the powers. There are inadequate safeguards in place to provide the protection that freedom of expression requires.

3. In particular:

   a. The Defendants are wrong to suggest that the strict safeguards in article 10 only apply where a measure is targeted at identifying a journalist's source. They apply to both intentional and incidental intrusions into journalistic materials and sources. There is inadequate protection for journalistic sources or materials outside deliberate targeting;

   b. It is a requirement of article 10 that there is independent pre-authorisation of interception of journalistic material or (if it occurs urgently) of any use that may be made of the intercepted material. The statutory and policy framework in place does not provide for adequate independent authorisation when journalistic material may be selected, examined, or searched;

   c. The ability of the intelligence services to search and examine journalistic material will only be in accordance with the law where there are adequate "*above the line*" arrangements that make it clear that any such step must be "*justified by an overriding requirement in the public interest".* This is not only the correct approach to proportionality in this context, but it is a quality of law requirement. This requirement is not mentioned in the Investigatory Powers Act 2016 and is only included in the codes of practice where they regulate warrants that are targeted at revealing a journalist's sources;

   d. The definitions of "*journalistic material*" and "*confidential journalistic material*" are overly narrow and do not comply with article 10.

B. The Intervener

4. The NUJ was founded in 1907 and has 30,000 members. It is the trade union for journalists across the United Kingdom and Ireland. It represents journalists in all sectors of the media, including in newspapers, news agencies, broadcasting, magazines, online, and photography. The NUJ provides legal advice and representation to its members, including in issues such as the

protection of sources, production order applications, and seizure of materials/equipment.

5. The NUJ also campaigns for press freedom through lobbying and public interest litigation. It has campaigned specifically in respect of the legislation under challenge in this claim. In December 2015, it provided a written submission to the Joint Committee on the Draft Investigatory Powers Bill; on 11th March 2016, 11th April 2016, and 10th October 2016, its Parliamentary group provided detailed briefing notes for members of both Houses as the Investigatory Powers Bill passed through Parliament; in April 2017 and on 18th January 2018,[1] it provided detailed responses to Government consultations on communications data and the codes of practice.

6. The NUJ's code of conduct states that a journalist must protect the identity of sources who supply information in confidence and material gathered in the course of her or his work. The NUJ, and its members, are concerned that the bulk surveillance powers in the Investigatory Powers Act 2018 undermine this ethical commitment and represent an unwarranted interference with press freedom.

C. Freedom of Expression

7. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring.[2] The existence of the free press "*is an essential element in maintaining parliamentary democracy and the British way of life as we know it … because the media are the eyes and ears of the general public*".[3] At common law, freedom of expression has "*the status of a constitutional right with attendant high normative force*".[4]

8. An important aspect of freedom of expression at common law is the protection of journalistic sources. Parliament has recognised this by introducing strict safeguards where prosecuting bodies or litigants seek to obtain journalistic material:

---

[1] The latter consultation response was provided on behalf of the NUJ, the Media Lawyers Association, the News Media Association, and the Society of Editors.
[2] *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, Lord Bingham, 290.
[3] *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, at 183.
[4] *McCartan Turkington Breen*, per Lord Bingham, at 297.

a. Section 9 of and Schedule 1 to the Police and Criminal Evidence Act 1984 empower a court to grant production orders, allowing the police to obtain evidence connected with the commission of criminal offences. But "*journalistic material*" falls within the categories of "*special procedure material*" or "*excluded material*" as defined in ss.11-14. Such material is afforded additional protections, such that access can only be gained on an *inter partes* application before a circuit judge, in which the stringent requirements of Schedule 1 are met;

b. Similarly, schedule 5 to the Terrorism Act 2000 empowers a court (again following an *inter partes* hearing) to order the seizure or production of special procedure and excluded material for the purpose of a terrorist investigation, where there are reasonable grounds for believing that (i) the material is likely to be of substantial value to that investigation, and (ii) it is in the public interest for the material to be disclosed, having regard to the benefit likely to accrue from the investigation, and the circumstances under which the person had the material in his or her possession;

c. Section 10 Contempt of Court Act 1981 protects journalists from a requirement to reveal their sources of information, save in exceptional circumstances. It requires a judicial balancing exercise of competing public interests. As Lord Bridge put it in *X Ltd. Respondents v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1, at 41, "*It is in the interests of all of us that we should have a truly effective press, and it seems to me that Parliament by enacting section 10 has clearly recognised the importance that attaches to the ability of the press to protect their sources*."

9. Freedom of expression is equally cherished under the European Convention on Human Rights ("the Convention"). It constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance. The gathering of information is an "*essential preparatory step in journalism and an inherent, protected part of press freedom*".[5] The protection of journalistic sources is also one of the basic conditions for press freedom. Without such protection, sources may be

[5] *Satakunnan Markkinaporssi Oy v Finland* (App. no. 931/13), §128. See also *Magyar Helsinki Bizottsag v Hungary* (App. no. 18030/11) **[AB/5/68]**, §130.

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 information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with article 10 of the Convention unless it is justified by an overriding requirement in the public interest*."[6]

10. The European Court has repeated this analysis in other cases involving orders requiring journalists to disclose their sources[7] and in cases about search warrants permitting the seizure of a journalist's documents and computer disks[8] or the secret surveillance of journalistic communications, even if no measures were ultimately taken against the journalist.[9] This approach has also been applied where the state seeks to obtain simple journalistic material, which could enable the identification of a source,[10] and to the previous bulk interception regime in operation in the United Kingdom: *Big Brother Watch v United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) **[AB/2/20]**, §488.

11. The rationale for applying this principle to each of these different kinds of case is easy to understand. Even if the initial stage of a bulk surveillance regime does not involve directly targeting an individual journalist, it can still have a significant chilling effect on the exchange of information between journalists and their sources. Once material has been obtained under a bulk surveillance regime, it can then be searched and examined, at which stage the chilling effect becomes greater still.

[6] *Goodwin v United Kingdom* (1996) 22 EHRR 123 **[AB/5/68]**, §39.
[7] See, for example, *Tillack v Belgium* (2012) 55 EHRR 25 **[AB/5/64]**, §53; *Financial Times Ltd v United Kingdom* (2010) 50 EHRR 46 **[AB/5/61]**.
[8] *Ernst v Belgium* (2004) 39 EHRR 35 **[AB/5/55]**, §91.
[9] *Weber v Germany* (2008) 46 EHRR SE5 **[AB/2/6]**, §§143, 144, and 149.
[10] The Grand Chamber decision in *Sanoma Uitgevers BV v Netherlands* [2011] EMLR 4 **[AB/2/9]**, §§50-1, which the Defendants wrongly interpret as a case about an order to disclose sources: detailed grounds of defence, at §45(3) **[TB/2/369]**.

12. The importance of protecting such material is therefore reflected in professional codes of conduct for journalists and in multiple international instruments, as the European Court has noted.[11] Amongst other examples:

   a. In 1994, the European Parliament called upon Member States to enact legislation to secure the confidentiality of journalists' sources.[12] In April 2018, it passed a resolution that "*whistle-blowers have proved to be a crucial resource for investigative journalism and for an independent press … guaranteeing the confidentiality of sources is fundamental to freedom of the press … whistle-blowers contribute to democracy, transparency of politics and the economy, and an informed public*";[13]

   b. The Council of Europe has repeatedly stressed the protection of the confidentiality of sources of journalists' information as a key element of the freedom of expression[14] and has adopted a specific recommendation providing guidance on the standards of legislation and practice relating to the confidentiality of journalists' sources and material;[15]

   c. The Inter-American Commission on Human Rights "*Declaration of Principles on Freedom of Expression*" is clear that: "*[e]very social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.*"[16] This is because: *"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*."[17] Similarly, the African Commission on

---

[11] *Goodwin* **[AB/5/68]**, §39.

[12] '*Resolution on Confidentiality for Journalists' Sources and the Right of Civil Servants to Disclose Information'* (18th January 1994), OJ C44/34.

[13] '*Resolution of 19 April 2018 on protection of investigative journalists in Europe: the case of Slovak journalist Ján Kuciak and Martina Kušnírová'*, OJ 2018/2628(RSP), at §8.

[14] '*Resolution on Journalistic Freedoms and Human Rights*,' adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7–8th December 1994); Parliamentary Assembly of the Council of Europe, '*Resolution 1636(2008), Indicators for Media in a Democracy*', at §8.8; Parliamentary Assembly, '*Resolution 2213 (2018): The status of journalists in Europe'*, §6.1.

[15] Committee of Ministers of the Council of Europe, '*Recommendation (2000)7 on Protection of Sources*.' **[AB/6/85]**

[16] Inter-American Commission on Human Rights ('IACHR'): "*Declaration of Principles on Freedom of Expression*" (October 2000), §8. For further detail on the international human rights law principles, see the report of the special rapporteur on the promotion and protection of the right to freedom of opinion and expression [A/70/361] **[AB/6/84]**.

[17] "*Report on the Situation of Human Rights in Venezuela*" (29th December 2003), §402.

Human and Peoples' Rights, in its "*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*";[18]

d. Just as the NUJ code of practice **[TB/5/663]** requires the protection of confidential journalistic material, the "*Editorial Code of Practice"* of the Independent Press Standards Organisation also provides, at §14, that, "*Journalists have a moral obligation to protect confidential sources of information*" **[TB/5/669]**.

13. It is also reflected in the evidence before this Court. As Ian Cobain, an NUJ member, explains in his witness statement, at §19: "*Sources … often face, and know they will face, retribution for disclosing information. This might be anything from a change to their relationship with their employer to losing their livelihood, pension, or their liberty or life, depending upon the nature of the activities or misconduct they are seeking to expose or other information they provide, who it relates to, and the power that party has*" **[TB/2/500]**. Without adequate protection for sources, they may not provide information to journalists and public interest stories may go unreported. Just as the "*menace of surveillance"*[19] can be claimed to restrict free communication and thereby constitute a direct interference with article 8, so too can it represent a serious interference with freedom of expression for the purposes of article 10.

D. The Safeguards

14. The high importance of protecting journalistic material and sources under article 10 means that strong safeguards are required where the state introduces a measure that interferes with this protection. The legal procedural safeguards must be commensurate with the importance of the principle at stake.[20]

---

[18] "*Declaration of Principles on Freedom of Expression in Africa*" (2002), §15.
[19] *Szabó and Vissy v Hungary* (2016) 63 EHRR 3 **[AB/2/14]**, §53.
[20] *Sanoma Uitgevers* **[AB/2/9]**, §88.

15. The Court of Appeal considered the safeguards set out in the European Court jurisprudence in *R (Miranda) v Secretary of State for the Home Department* [2016] 1 WLR 1505 **[AB/2/15]**. Of particular relevance are the following findings of Lord Dyson MR: (a) there is no reason in principle for drawing a distinction between disclosure of journalistic material *simpliciter* and disclosure of journalistic material which may identify a confidential source (§107), (b) although there is often an overlap between articles 8 and 10, they are distinct, particularly where article 10 concerns freedom of journalistic material (§110), (c) the availability of judicial review, after the event, cannot restore the confidentiality of journalistic sources once it is destroyed (§§110 and 113), (d) disclosure of journalistic material (whether or not it involves the identification of a journalist's source) undermines the confidentiality that is inherent in such material and which is necessary to avoid the chilling effect of disclosure (§113), (e) "*prior judicial or other independent and impartial oversight (or immediate post factum oversight in urgent cases)"* was *"the natural and obvious adequate safeguard against the unlawful exercise"* of Schedule 7 powers "*in cases involving journalistic freedom"* (§114). For these reasons, Lord Dyson held that the general stop-and-search provisions of Schedule 7 Terrorism Act 2000 breached article 10 (§115).

16. It follows that the Defendants are wrong to seek to suggest that the article 10 safeguards only apply where a search is intended to identify a source.[21] Whilst the chilling effect is most severe where the state deliberately seeks to obtain confidential journalistic material, the same principles and safeguards apply in respect of any "*documentation held by [a] journalist*" whether strictly confidential or otherwise[22] and whether the state knows the identity of the source or not.[23] The article 10 safeguards are required where the application of a measure "*could*" lead to identification of a source or "*is capable*" of doing so, not just where the intention is to do so.[24]

17. The article 10 safeguards apply where it is the purpose of a search to identify a journalistic source (as the Defendants accept), where a journalist's materials are obtained, and where state action is capable of revealing a journalistic

[21] Detailed grounds of defence **[TB/2/368]**, §40.
[22] *Sanoma Uitgevers*, **[AB/2/9]**, §§67 and 72. This includes "*research material"*: §§65-6.
[23] *Nagla v Latvia* (App. no 73469/10) **[AB/2/11]**, §101.
[24] *Sanoma Uitgevers* **[AB/2/9]**, §88.

source. They apply to both intentional and incidental intrusions into journalistic materials and sources.[25]

18. It also follows that the Defendants are wrong to suggest that compliance with the requirements of article 8 will satisfy article 10. The protections under article 10 have developed since *Weber v Germany* (2008) 46 EHRR SE5, the case on which the Defendants effectively rely.[26]

19. Strict safeguards are required.[27] The European Court jurisprudence establishes the following principles, and there is no reason that these should not apply equally where secret surveillance powers are, or may be, applied to journalists:

   a. The decision to intercept and use intercepted material should be made by a judge or another independent and impartial decision-making body. The authorising body must be "*impartial*" and "*separate from the executive and other interested parties*", i.e. not an official or institution "*defending interests potentially incompatible with journalistic source protection*";[28]

   b. This independent decision must occur before interception occurs or (if it occurs urgently) before any use is made of the intercepted material, and the reviewing body must have the power to prevent interception or use. This is because "*the exercise of any independent review that only takes place subsequently to the handing over of material capable of revealing such sources would undermine the very essence of the right to confidentiality*";[29]

   c. There must be an overriding public interest to justify such interception and use of the intercepted material.[30] The independent body must therefore be "*invested with the power to determine whether a requirement in the public*

---

[25] *Big Brother Watch* **[AB/2/20]**, §492.
[26] Detailed grounds of defence **[TB/2/368]**, §41.
[27] *News Group Newspapers Limited and others v The Commissioner of Police of the Metropolis* [2015] UKIPTrib 14_176-H, §§104-111 **[AB/4/47]**.
[28] *Sanoma Uitgevers* **[AB/2/9]**, §§90-93 and 97; *Telegraaf Media Nederland Landelijke Media BV v Netherlands* (App. no. 39315/06) **[AB/2/10]**, §100; *Nagla* **[AB/2/11]**, §87, *Szabó and Vissy* **[AB/2/14]**, §77, *Miranda* **[AB/2/15]**, §114.
[29] *Sanoma Uitgevers* **[AB/2/9]**, §§91 and 99; *Telegraaf Media* **[AB/2/10]**, §§99-102.
[30] *Sanoma Uitgevers* **[AB/2/9]**, §100; *Nagla* **[AB/2/11]**, §§88, 95, and 97.

interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identity if it does not" and it must "*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*";[31]

d. The decision to be taken *"should be governed by clear criteria, including whether a less intrusive measure can suffice to serve the overriding public interests established*." The independent body must have power to "*refuse to make a disclosure order or to make a limited or qualified order so as to protect sources from being revealed, whether or not … specifically named in the withheld material*."[32]

20. These requirements reflect the recommendations made by the Council of Europe's Committee of Ministers on the agreed standards for legislation and practices relating to the confidentiality of journalists' sources and information.[33] Principle 3 sets out requirements regarding the disclosure of journalistic sources, which reflect those set out above and which are said to apply "*at all stages of any proceedings where the right of non-disclosure might be invoked".* Principle 5(b) explains that journalists must be informed of their right not to disclose information identifying a source "*before a disclosure is requested*". Principle 6(a) provides that interception orders, "*or actions concerning communication of correspondence of journalists"*, surveillance orders or actions concerning journalists, or search or seizure orders or actions concerning journalists "*should not be applied if their purpose is to circumvent the right of journalists, under the terms of these principles, not to disclose information identifying a source."* Principle 6(b) provides that, "*Where information identifying a source has been properly obtained by police or judicial authorities by any of the above actions, although this might not have been the purpose of these actions, measures should be taken to prevent the subsequent*

[31] *Sanoma Uitgevers* **[AB/2/9]**, §§90 and 92. This requirement is also relevant to consideration of whether a particular interference is necessary in a democratic society: *Becker v Norway* (App. no. 21272/12), §66.
[32] *Sanoma Uitgevers* **[AB/2/9]**, §92.
[33] **[AB/6/85]**. As set out above, at §12(b)

use of this information as evidence before courts, unless the disclosure would be justified under Principle 3".

21. Consistent with these principles, the European Court in *Big Brother Watch* **[AB/2/20]** found, at §492, that an interference with article 10 rights will be greater should a journalist's communications be selected for examination following the interception of material under a bulk interception warrant. Such selection "*will only be 'justified by an overriding requirement in the public interest' if accompanied by sufficient safeguards relating both to the circumstances in which they may be selected intentionally for examination, and to the protection of confidentiality where they have been selected, either intentionally or otherwise, for examination*".

22. The European Court also made clear that special safeguards apply even in the context of a regime to collect communications data, and at the least where the material of a journalist is sought or and where there may be collateral intrusion: **[AB/2/20]**, §499.

D. The Application of the Safeguards

23. The interception, retention, examination, storage and dissemination of information through bulk surveillance engages article 10, in particular where used in a way that is capable of identifying journalistic sources or revealing journalistic material. The NUJ agrees with and adopts the specific criticism of the protections for journalistic sources and material in the Claimant's re-amended grounds. Overall, and applying the safeguards set out above:

(1) Prior independent authorisation of the obtaining or use of journalistic materials

24. The Defendants' approach to this safeguard is that there is no requirement for a review by an independent body at any stage of the bulk surveillance regime under the Investigatory Powers Act 2016. They argue that no previous case has applied this requirement to the particular circumstances that arise under the Investigatory Powers Act 2016.[34]

---

[34] Detailed grounds of defence **[TB/2/400]**, §117.

25. This is wrong in principle. The Defendants undertake bulk surveillance. They are public authorities for the purposes of s.6 Human Rights Act 1998. They must therefore comply with the requisite Convention safeguards.

26. It is not inconsistent with *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 **[AB/4/30]** for there to be a requirement for independent authorisation; rather this is the result of the application of well-established principles to this regime. Even if the Court is persuaded that it is permissible to obtain information from the population on "*bulk"* scale, the case law summarised above makes it clear that there is a need for independent authorisation where:

    a. The state has an intention of selecting, examining, or searching material is to identify a journalistic source[35] or to obtain journalistic materials;[36]

    b. State searches "*could"* reveal the identity of a source or journalistic material,[37] or

    c. It is realised that material being examined is journalistic.

27. *Big Brother* Watch **[AB/2/20]** did not find that independent authorisation was required when journalistic material may be examined, but it did not reject this as a Convention requirement either.[38] The point was not formally determined because a breach of article 10 was found due to the lack of any adequate "*above the waterline"* arrangements to require that the intelligence services' ability to search and examine material other than where "*it is justified by an overriding requirement in the public interest*". There was no need for the Court to go any further. Similarly, in the case of the RIPA Part 1 Chapter 2 communications data regime, the Court accepted that (as a matter of EU law) there was a requirement for prior judicial or independent authorisation for access to communications data (§497), so there was no occasion to consider whether the absence of judicial or independent authorisation was a further breach of Article 10 (§499). It follows that it is wrong to read the judgment as

---

[35] *Telegraaf* **[AB/2/10]**, §100.
[36] *Nagla* **[AB/2/11]***,* §101, and *Miranda* **[AB/2/15]**, §114.
[37] *Sanoma Uitgevers* **[AB/2/9]**, §88.
[38] Where the Court rejected arguments advanced by the applicants, it formally said so. See, for example, its rejection, at §316, of the applicants' invitation to update the requirements in the previous case law on the general Convention requirements for secret surveillance regimes.

permitting the examination of journalistic material without independent authorisation.

28. Assuming, as the Court accepted in *Big Brother Watch*, at §314, that it is permissible to operate a bulk surveillance regime,[39] it is, once material has first been obtained under bulk warrant, possible in principle to impose requirements as to the processing of and access to that material. Applying the well-established requirements in the case law mentioned above, it follows that there ought to be a requirement for independent authorisation: (1) before any processing, search or examination that is (a) intended to identify a journalistic source or other journalistic material or (b) which is capable of doing so (which ought to consider both the proposed search and subsequent use of the material), which for the avoidance of doubt includes all situations in which a journalist's communications are intercepted or information is obtained; and (2) where it is realised that material being processed or examined in journalistic material, before that material is used further for any purpose.

29. This not only reflects the authority set out above, but it also reflects the practical reality of journalism and the findings on the necessary points to address in *Big Brother Watch*. As Ian Cobain's witness statement explains, at §§64-8, "*once the state knows who a journalistic source is, the damage is done*". That will be so in particular if further use and dissemination is permitted notwithstanding the realisation that materials are journalistic.

30. Applying this safeguard to the detail of the statutory regime:

    a. There is no statutory provision in Part 6 Chapter 2 (bulk acquisition warrants) for any approval of selection for examination by an independent body, so there is never any judicial or other independent approval of access to obtained communications data. Further, the Bulk Communications Data Code of Practice expressly permits someone of the rank of Director within the organisation to authorise the selection for examination of bulk communications data for the <u>purpose</u> of identifying a journalistic source: **[AB/3/25]** §6.28. The Code expressly <u>disclaims</u> any requirement even for approval by a Director where a journalist's communications data is to be examined but there is no intention to identify

[39] It is understood that this is being challenged by the applicants in the Grand Chamber.

a source: §6.30. This cannot stand with *Big Brother Watch* **[AB/2/20]**, at §495. It fails to accord the full protection required by an independent authorisation in all the circumstances identified;

b. Further, as the Claimant has set out in its re-amended grounds, there is limited, if any, requirement for independent pre-authorisation in the bulk interception powers of Part 6, Chapter 1,[40] in the bulk hacking powers of Part 6, Chapter 3.[41] There will be independent authorisation by default under the bulk hacking or bulk interception powers where a targeted examination warrant is sought.[42] But this is only where criteria referable to an individual in the British Islands are used in order to identify their communications. If either condition is not met, there is no need for a targeted examination warrant and so no independent judicial authorisation. Thus, for example, there will be no judicial commissioner or other independent approval where it is sought to select using criteria referable to J, a journalist who is in the British Islands, in order to identify the communications of S, J's source (who is not (known to be) in the British Islands). Similarly, there will be no judicial commissioner or other independent approval where criteria referable to J, a British journalist known to be overseas, are used in order to identify J's communications. Outside of where an examination warrant is required, s.154 (Part 6, Chapter 1) and s.195 (Part 6, Chapter 3) **[AB/1/1]** are the sum total of statutory provision. They make clear that, where a communication which has been intercepted in accordance with a bulk interception warrant is retained, following its examination and it is a communication containing confidential journalistic material, the person to whom the warrant is addressed must inform the Investigatory Powers Commissioner as soon as is reasonably practicable. But they do nothing more. The Interception of Communications Code **[AB/3/24]**, at §§9.84-9.87, and the Equipment Interference Code **[AB/3/22]**, at §§9.70-9.84, do not remedy these problems. They only purport to require that, where an authorised person intends to select for examination intercepted content in order to identify or confirm the identity of a journalistic source or which is believed to be

[40] Re-amended grounds of the Claimant **[TB/2/203]**, §118(1); s.154 Investigatory Powers Act 2016 **[AB/1/1]**.
[41] Re-amended grounds **[TB/2/208]**, §148.
[42] Detailed grounds of defence **[TB/2/401]**, §119(3).

confidential journalistic material (and no targeted examination warrant is required), a senior official is notified. These paragraphs state that the senior official must not be a member of the intercepting authority, but they do not require them to be independent of the executive;

c. Nor is there any provision for independent authorisation in relation to journalists sources in the bulk personal datasets power in Part 7.[43] There is no provision in Part 7 that requires judicial authorisation of selection for examination generally.[44] These powers therefore appear to permit the selection of material for examination, even where either is intended to or is capable of revealing journalistic material.

d. Requests for communications data under Part 3 will, once that Part of the Investigatory Powers Act 2016 is being "*operated*" and the Office for Communications Data Authorisations is providing approvals, satisfy the requirement for an independent authorisation. However, until that occurs and during the period for which the RIPA, Part 1, Chapter 2 communications data acquisition regime is being operated, that regime is plainly "*not in accordance with the law*" under Article 10: see *Big Brother Watch* **[AB/2/20]**, §495;

e. The Defendants' assertion that "*all the relevant Codes... contain robust safeguards for journalistic material*"[45] does not address the need for independent authorisation, as set out above. Further, the codes are, by Schedule 7 paragraph 6(1), only a relevant consideration. They are effectively policies, so they can be departed from if there is cogent reason to do so;

f. The high point of the Defendants' case is therefore that Part 5 contains requirements for prior approval by a Judicial Commissioner of thematic equipment interference warrants.[46] While this may be an answer to the

---

[43] Re-amended grounds **[TB/2/271]**, §201.
[44] In principle, if an application for an authorisation in relation to privileged information under s.221 happened also to relate to journalistic information, then there could be judicial authorisation *"by default*", but only where the purpose was to obtain privileged material: s.221(1)(a), (2)–(3) **[AB/1/1]**).
[45] Detailed grounds of resistance **[TB/2/401]**, §119.
[46] Detailed grounds of resistance **[TB/2/401]**, §118.

Claimant's re-amended grounds, at §164 **[TB/2/242]**, it does not assist the Defendants in any of the other powers in dispute in this claim.

31. None of the powers provide for there to be no use of journalistic material that is discovered unexpectedly until there has been an independent determination of whether they should be used. This is a further failure to comply with established Article 10 requirements.

(2) Overriding requirement in the public interest

32. As set out above, the basis of the finding that the s.8(4) regime considered in *Big Brother Watch* breached article 10 was the absence of any "*above the waterline"* arrangements limiting the intelligence services' ability to search and examine journalistic material other than where "*it is justified by an overriding requirement in the public interest"* (**[AB/2/20]**, §495).

33. Again, this must be required in all circumstances where it is intended or possible that a journalistic source or journalistic information will be identified and examined and also where this occurs during examination.

34. This is what *Big Brother Watch* requires, when it deprecated the lack of arrangements "*limiting the intelligence services' ability to search and examine*" (with emphasis added) journalistic material (**[AB/2/20]**, §495). This followed on from the Court's concern, at §493, that there were no "*above the waterline"* requirements, "*either circumscribing the intelligence services' power to search for confidential journalistic or other material (for example, by using a journalist's email address as a selector), or requiring analysts, in selecting material for examination, to give any particular consideration to whether such material is or may be involved. Consequently, it would appear that analysts could search and examine without restriction both the content and the related communications data of these intercepted communications*" (with emphasis added).

35. Importantly, the United Kingdom's written observations in the *Big Brother Watch* Grand Chamber reference accept this: see §§9(7)(a)[47] and 203.[48] It thus ought to be common ground in this claim.

36. Despite this, the Defendants dispute that there is any requirement for the "*overriding public interest"* test to be embodied in law, because a Judicial Commissioner may apply such a test.[49] Yet *Big Brother Watch* finds precisely that such a requirement must be laid down. If the Convention jurisprudence on proportionality offered sufficient regulation of the s.8(4) regime, there would have been no violation, because both RIPA s.5(3) and the Human Rights Act 1998 imposed requirements to act proportionately in that case. The "*overriding public interest"* test not only regulates how proportionality should be assessed, but it is a requirement of the quality of law that is in place. The question is what the legislation and codes of practice say and whether they will ensure that Convention rights are respected, not simply what is done in practice.

37. As set out in the Claimant's re-amended grounds, the "*overriding requirement in the public interest"* test is not generally required by the bulk surveillance regime of the Investigatory Powers Act 2016. It is only expressly required in codes of practice (not the Investigatory Powers Act 2016 itself), and even then only where information is obtained or examined "*to determine the source of journalistic information*".[50] Yet, as set out above, the "*overriding requirement in the public interest"* test also applies (a) where a search, processing, or selection "*could*" identify journalistic material; and (b) during examination of material, journalistic material is discovered.

38. In addition, because they fail to require an overriding requirement in the public interest to justify interference, they further fail to require that, where journalistic material is discovered unexpectedly, this material is not further processed,

---

[47] **[TB/2/538]**. Accepting there must be protection for "*communications capable of identifying journalists' sources*".
[48] **[TB/2/589]**. Accepting in relation to article 10 that the RIPA s.8(4) regime "*was insufficiently foreseeable in the premises and for the reasons set out in the First Section's judgment*".
[49] Detailed grounds of resistance, footnote 89, sub-paragraph (2) **[TB/2/401]**.
[50] Interception of Communications Code of Practice **[AB/3/24]**, §9.74; Communications Data Code of Practice **[AB/3/28]**, §§6.24-6.25; Bulk Personal Datasets Code of Practice **[AB/3/23]**, §7.45; Equipment Interference Code of Practice **[AB/3/22]**, §9.76; Bulk Acquisition Code of Practice **[AB/3/25]**, §6.25. See also IPA **[AB/1/1]**, ss.28(1), 29(1) and 113(1) and 114(1), which merely require that where selection for examination occurs to authorise selection for examination of "*journalistic material*" (as defined) or to identify or confirm a "*source of journalistic information*" (as defined) the application for the warrant must state this.

examined or otherwise used until an assessment of whether an overriding public interest to justify this exists.

(3) The definition of "*journalistic material*"

39. Journalistic material is narrowly defined in s.264(2) Investigatory Powers Act 2016 **[AB/1/1]** (and in the associated codes of practice) as "*material created or acquired for the purposes of journalism*". "*Confidential journalistic material*" is defined in s.264(6) as journalistic material that the sender "*holds in confidence*", that the sender "*intends the recipient, or intended recipient, of the communication to hold in confidence*" or, in any other case, "*which a person holds in confidence*". A person "*holds material in confidence*" for the purposes of s.264 if "*the person holds it subject to an express or implied undertaking to hold it in confidence*" or "*the person holds it subject to a restriction on disclosure or an obligation of secrecy contained in an enactment*": s.264(7).

40. These definitions (which are reflected in the GCHQ Compliance Guide, at pp.140-1 **[TB/5/190-1]**) are overly narrow and do not offer adequate protection to freedom of expression:

    a. As Ian Cobain explains in his witness statement **[TB/2/509]**, at §47(1), material that is provided to a journalist may not automatically become part of source material for a story. It is unclear when, if at all, the material will therefore be treated by the intelligence services as "*journalistic material*". This concern is all the greater given that the codes suggest that "*An assessment of whether someone is a journalist (for the purposes of the Act) should be made on all the facts and circumstances available at the time*".[51] If it is not immediately apparent to a journalist when material becomes "*journalistic material*" it is likely to be still less apparent to a member of the intelligence services;

    b. The European Court defines a source as "*any person who provides information to a journalist*"[52] and provides protection in respect of any

[51] See, for example, the Interception of Communications Code of Practice **[AB/3/24]**, at §9.81, and the GCHQ Compliance Guide, p.140 **[TB/5/190]**.
[52] *Telegraaf Media* **[AB/2/10]**, at §86.

"*documentation held by [a] journalist".*[53] As set out above, at §15, *Miranda* **[AB/2/15]** confirms this domestically. The additional requirement in s.264(2) that material also be provided to a journalist "*for the purposes of journalism"* is therefore overly narrow and does not reflect the full extent of protection required by article 10;

c. The definitions also wrongly require an express or implied "*undertaking*" to hold material in confidence. This, too, is overly narrow against the European Court's understanding of a source. It is also unclear how, in practice, it is possible for someone examining data obtained under an Investigatory Powers Act 2016 warrant from a journalist whether the material is held in confidence: see the witness statement of Ian Cobain, at §§47(2) and (3) **[TB/2/509]**. As he explains, journalistic material is often not held on the basis of an express or implied undertaking to hold it in confidence and, in addition, information may be provided without such an undertaking being present which later, in light of other information, becomes journalistic source material;[54]

d. It is unclear to what extent these definitions will be applied to the new generation of journalists who may publish material online, on "*blogs"*, or on social media (sometimes without remuneration, irregularly, or on non-traditional media platforms). As Ian Cobain explains in his witness statement, at §§55-60 **[TB/2/512-514]**, the matters said to be relevant to determining who is a journalist in the GCHQ Compliance Guide and in the related codes of practice pose particular problems in the modern era of journalism. Those definitions list as relevant factors: "*whether they receive remuneration for their work"*, the "*frequency of the individual's relevant activities"*, "*the means by which they disseminate that information",* "*the level of personal rigour they seek to apply to their work".*[55] This of particular

[53] See also *Sanoma Uitgevers* **[AB/2/9]**, §§67 and 72.
[54] See, for example, the videos at issue in *Sanoma Uitgevers* **[AB/2/9]***,* at §64.
[55] Compare with the simple definition of a "*journalist"* adopted in the Interception of Communications Commissioner's Office report: "*IOCCO Inquiry into the Use of Chapter 2 Part 1 of the Regulation of Investigatory Powers Act (RIPA) to Identify Journalistic Sources"* (4th February 2015, at §6.31: "*any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication"* **[TB/3/158]**.

concern given the European Court's recognition of the importance of the internet as a means of dissemination of information under article 10;[56]

e. These definitions also seem to improperly exclude those who work for or provide information to "*social watchdog*" organisations such as the Claimant. This is of concern given that the European Court jurisprudence has applied the protections of article 10 to such watchdog organisations.[57] Indeed, no reference at all is made to such organisations in any of the codes of practice of the Investigatory Powers Act 2016 itself, which means they wrongly fail to provide the full protection which article 10 requires;

f. Equally, the exclusion of certain material from "*journalistic material*" because it was "*created … with the intention of furthering a criminal purpose*"[58] goes too far for the reasons set out by Ian Cobain in his witness statement, at §§48-54. The way these provisions are drafted would mean, for example, that where a government official creates a document to authorise torture, and another government official provides that document to a journalist, the document would not be classed as "*journalistic material*" and would have no protection at all.

41. For these reasons, the definitions of "*journalistic material*" and "*confidential journalistic material*" are overly narrow and do not comply with article 10.

E. Conclusion

42. For the reasons set out above, and in the Claimant's submissions, the Court is respectfully invited to allow the claim and to grant relief specifically directed to the non-compliance with the powers challenged with the requirements of article 10 in relation to journalists and watchdog organisations.

---

[56] See, for example, *Magyar Helsinki Bizottsag v Hungary* (App. no. 18030/11) **[AB/5/68]**, §168: "*given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information … the function of bloggers and popular users of the social media may be also assimilated to that of 'public watchdogs' in so far as the protection afforded by Article 10 is concerned*."

[57] See, for example, *Társaság a Szabadságjogokért v Hungary* (App. no. 37374/05) **[AB/5/59]** and *Magyar Helsinki* **[AB/5/68]**.

[58] Investigatory Powers Act 2016, s.264(5) **[AB/1/1]**, as interpreted in, for example, the Equipment Interference Code of Practice, at §9.79 **[AB/3/22]**, and in the GCHQ Compliance Guide, at p.141 **[TB/5/191]**.

JUDE BUNTING
Doughty Street Chambers

10th May 2019
[Replacement version finalised on 12th June 2019]