IN HIS MAJESTY'S COURT OF APPEAL **CA-2022-001019**

ON APPEAL FROM THE HIGH COURT
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N :

REX
on the application of the
LIBERTY

Appellant

-and-

(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT

(2) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Respondents

-and-

NATIONAL UNION OF JOURNALISTS

Intervener

SKELETON ARGUMENT OF THE NATIONAL UNION OF JOURNALISTS

A. Introduction and Summary

1. The National Union of Journalists ("NUJ") invites the Court to allow ground one of the appeal on the European Convention on Human Rights ("the Convention"). In particular, it respectfully submits that:

   a. The common law and international human rights law principles insist on a high threshold for any application to obtain journalistic material, whether it is confidential or not.

   b. The same applies under article 10. Two particular procedural safeguards apply where the state seeks to obtain journalistic material: (1) independent authorisation, and (2) an overriding requirement in the public interest.

   c. The judgment of the Grand Chamber in *Big Brother Watch v United Kingdom* (2022) 74 EHRR 17 **[Auth/56/2204-2376]** applies these principles to bulk interference powers and to the acquisition of communications data, as examples of secret surveillance regimes.

There is no good reason of principle why these safeguards do not apply also to the other regimes under the Investigatory Powers Act 2016 ("IPA 2016") **[C/32/1034-1579]**.

d. The Respondents' attempts to limit or narrow these safeguards should be rejected. In addition, the definitions of "*journalistic material"* and of "*confidential journalistic material"* do not reflect the approach of the European Court of Human Rights and of this Court.

2. It is recognised that there is a degree of overlap between these issues and those advanced by the Appellant in its skeleton argument. The NUJ will avoid any duplication of oral submissions at the hearing of this appeal.

B. The Intervener

3. The NUJ was founded in 1907 and has more than 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. It also campaigns for press freedom through lobbying and public interest litigation.

4. The NUJ has campaigned specifically in respect of the legislation under challenge in this appeal. 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.

5. The NUJ intervened below in support of the Appellant, where it argued the article 10 points, and in *Big Brother Watch*. It has provided support to journalists seeking to protect their journalistic material, including (most recently) Chris Mullin, who successfully challenged a production order relating to the Birmingham Six investigations,[2] and the journalists who produced the documentary "*No Stone Unturned"* about the Loughinisland terror attack.[3]

---

[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] https://www.nuj.org.uk/resource/chris-mullin-interview-with-nuj-journalists-protect-sources.html

[3] https://www.nuj.org.uk/resource/nuj-welcomes-final-settlement-for-no-stone-unturned-journalists.html

C. The importance of journalistic material

6. The starting point is a proposition that is so well established that its importance is sometimes in danger of being underplayed. A strong media is integral to a working democracy. The media (and the public at large) requires respect for journalistic material to enable it to function.

7. This is a point on which the common law and the Convention speak with one voice. Freedom of expression is essential to the healthy functioning of a democratic society. It is conducive to the discovery of truth in the "*marketplace of ideas*". It ensures that the public can effectively participate in a democracy on an informed basis. There can be no assurance that government is carried out for the people unless the facts are made known, and the issues publicly ventilated.[4] It is for this reason that the common law insists on a high threshold for any application to obtain "*the working papers"* of a journalist.[5]

8. Hence, Parliament has sought to provide particular protection to all journalistic material (not just source material) in criminal investigations. Under ss.11-14 and Schedule 1 of the Police and Criminal Evidence Act 1984 and Schedule 5 of the Terrorism Act 2000 **[Auth/62/2558-2561, 2574-2583; Auth/66/2625-2641],** journalistic material is classed as "*special procedure material*" or "*excluded material*" and is thereby afforded additional protections where a criminal litigant seeks access to it. Access can only be granted by a judge if it is "*likely to be of substantial value*" and its production must be in the "*public interest"*.

9. The importance of applying a high threshold to journalistic material has been emphasised by the Council of Europe,[6] the Inter-American Commission on Human Rights,[7] and the African Commission on Human and Peoples' Rights.[8] And reporter's privilege, as set out in the law of the United States, "*applies to nonconfidential, as well as to confidential [journalistic] information*".[9]

---

[4] *Simms* [2000] 2 AC 115, 126 and *Shayler* [2003] 1 AC 247, §21. Cited by Laws LJ in *R (Miranda) v Secretary of State for the Home Department* [2014] 1 WLR 3140, §43 **[Auth/3/105].**

[5] *R (Bright) v Central Criminal Court* [2001] 1 WLR 662, Judge LJ, §98 **[Auth/2/69].**

[6] Committee of Ministers of the Council of Europe, '*Recommendation (2000)7 on Protection of Sources*' **[Auth/83/4113-4116]**.

[7] Inter-American Commission on Human Rights ('IACHR'): "*Declaration of Principles on Freedom of Expression*" (October 2000), §8: "*[e]very social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential*"**[Auth/84/4118].**

[8] "*Declaration of Principles on Freedom of Expression in Africa*" (2002), §15: *"[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 special safeguards **[Auth/85/4124].**

[9] *Gonzales v. National Broadcasting Co., Inc*. 194 F. 3d 29 (2d Cir. 1999), Leval J at 35.

10. The need to protect confidential material is also a requirement of journalists' ethical codes. 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 **[Auth/86/4125]**. The Editors' 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*" **[Auth/87/4126]**.

D. Article 10

11. The approach of the European Court of Human Rights to the protection of journalistic materials is equally clear. Given the vital importance to press freedom of the protection of journalistic sources and of information that may lead to their identification, any interference with the right to protection of such material must be attended with legal procedural safeguards commensurate with the importance of the principle at stake. These are quality of law requirements, that is, the European Court requires that domestic systems themselves contain identified requirements in order to be "*prescribed by law*" for the purposes of article 10.

12. Two particular procedural safeguards must exist in domestic law where the state seeks to or is likely to obtain journalistic material or has done so unknowingly and wishes further to use the material: (1) independent authorisation and (2) an overriding requirement in the public interest, assessed by the independent authoriser. This has been clearly established for decades and it is confirmed by *Big Brother Watch v United Kingdom* (2022) 74 EHRR 17 **[Auth/56/2204-2376]**.

13. The chronology begins with a case funded by the NUJ, *Goodwin v United Kingdom* (1996) 22 EHRR 123 **[Auth/27/1026-1055]**. Hoffmann J, as he then was, ordered a trade journalist to identify a source who had provided him with information regarding the financial status of a company that had been marked "*Strictly Confidential*". The order did not survive scrutiny in Strasbourg. At §39 **[Auth/27/1046]**, the European Court explained the importance of confidential journalistic material. It held that an "*order of source disclosure … cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.*" As the initial order was made by a judge, it was not necessary to set out these safeguards as part of the "*prescribed by law"* analysis. However, the European Court's approach in *Goodwin* has become the established approach to protection of journalistic material under article 10.

14. The next case was *Ernst v Belgium* (2004) 39 EHRR 35 **[Auth/30/1114-1161]**. A judge granted authority for a search of journalists' homes and premises. At §§91-93 **[Auth/30/1146]**, the European Court repeated its emphasis on the importance of journalistic material from *Goodwin* and emphasised that it was for the national authorities to apply the "*overriding requirement in the public interest"* test. As the search warrant permitted access to "*all the documentation held by the journalist*", there was a "*far more significant impact on the protection of journalistic sources"* than the order in *Goodwin*: §103 **[Auth/30/1148-1149]**.

15. The European Court has subsequently applied the same test in cases involving judicial orders that *"might"* or are "*likely to"* lead to the identification of a source,[10] that would permit the search of a journalist's home or workplace[11] or electronic devices,[12] or that require the provision of a journalist's mobile telephone communications data.[13] In each of those contexts, the Court applied a test of an "*overriding requirement in the public interest"*. The Court also emphasised that "*the right of journalists not to disclose their sources cannot be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources"*.[14]

16. These tests are so well-established that the European Court has made it clear that they are not only part of the proportionality assessment, but they also form part of the "*in accordance with law"* test. Thus, where national authorities have taken steps to access journalistic material where domestic law did not require a judicial or other independent authorisation, the Court has found that domestic law did not provide adequate safeguards, and thus there was a breach of article 10, for this alone.[15] The European Court has also emphasised that judicial or other independent authorisation is a requirement of the "*prescribed by law"* test in multiple cases.[16]

17. The Grand Chamber then codified the quality of law requirements of source protection in *Sanoma Uitgevers BV v Netherlands* [2011] EMLR 4 **[Auth/40/1429-1461]**. The factual context was a judge issuing a criminal summons directed to a magazine publisher, requiring the provision of photographs taken of an illegal street race. The purpose of the order was

---

[10] *Financial Times v United Kingdom* (2010) 50 EHRR 46, §§59, 68, and 70 **[Auth/38/1360-1361,1363-1364];** *Telegraaf Media Nederland Landelijke Media BV v Netherlands* (App. no. 39315/06), §86 and §127 **[Auth/43/1562-1563,1568];** *Becker v Norway* (App. no 21272/12), §§65-72 **[Auth/51/1898-1900].**

[11] *Tillack v Belgium* (2012) 55 EHRR 25, at §53 and §63 **[Auth/35/1268, 1270]**; *Nagla v Latvia* (App. No. 73469/10), §§79, 100-101 **[Auth/46/1649,1655].**

[12] *Sorokin v Russia* (App. no. 52808/09), §§39-40 **[Auth/60/2540].**

[13] *Sedletska v Ukraine* (App. no. 42634/18), §§62-3 **[Auth/58/2428].** The decision of the Investigatory Powers Tribunal in *News Group Newspapers Ltd v Commissioner of Police of the Metropolis* [2015] UKIPTrib 14176-H, at §§93–111 and 129, is domestic law authority to the same effect **[Auth/4/148-153,156].**

[14] *Tillack*, §65 **[Auth/35/1270];** *Sedletska*, §62 **[Auth/58/2428**]. See, to similar effect, *Financial Times*, §63 and §66 **[Auth/38/1361,1362];** *Telegraaf Media*, §128 **[Auth/43/1569]**; *Becker*, §74 **[Auth/51/1900].**

[15] *Telegraaf Media,* §§98-102 **[Auth/43/1564-1565].**

[16] *Nagla,* §§87-98 **[Auth/46/1651-1654]**; *Sorokin*, §§46-48 **[Auth/60/2541-2542].**

not the identification of the source, but rather obtaining journalistic material to assist the investigation of criminality (§§14, 24, and 27–29) **[Auth/40/1436,1437,1438-1439]**. The fact that the purpose was not the identification of the source was irrelevant (§66) **[Auth/40/1451]**, because the chilling effect was the same (§71) **[Auth/40/1452]**. The authorities did not subjectively intend to identify a source, but rather to obtain journalistic material which, objectively judged, was "*capable of"* or "*could"* identify a source.

18. The Grand Chamber found that, to comply with the quality of law requirement of article 10, domestic law had to require *"[f]irst and foremost"* as a "*safeguard*" the *"guarantee of review by a judge or other independent and impartial decision-making body*" (§90) **[Auth/40/1455]**. The Court also held that domestic law must require that the independent review entailed assessment of whether there was an overriding requirement in the public interest justifying the search. At §90, it emphasised that, "*The requisite review should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public 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.*"

19. The Grand Chamber held that independent authorisation had to take place prior to the search or, in urgent cases, "*at the very least prior to the access and use of obtained materials*": §91 **[Auth/40/1455]**. Review after the material has been handed over would undermine the very essence of the right to confidentiality: §91 **[ibid.]**. The Court further explained the importance of rigorous procedural safeguards, and the need for these to be laid down in domestic law, holding, for example at §92 **[ibid.]**, that: "*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. It should be open to the judge or other authority 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 they are specifically named in the withheld material, on the grounds that the communication of such material creates a serious risk of compromising the identity of journalist's sources … In situations of urgency, a procedure should exist to identify and isolate, prior to the exploitation of the material by the authorities, information that could lead to the identification of sources from information that carries no such risk ...*".

20. Another case applying these principles is *Nagla v Latvia* (App. no. 73469/10) **[Auth/46/1625-1658]**, in which the police carried out four urgent searches at the journalist's home. The source had already been identified. It was only the following day that a judge was informed of and approved the searches (§§14, 16 and 24) **[Auth/46/1629,1631]**. The purpose of the

search was not identifying a source; what mattered was the impact of searching a journalist's material (§§78, 79, and 82) **[Auth/46/1649-1650]**. The reason why the measure was prescribed by law was that the search had to be authorised by a judge, who considered the case file, and there was specific provision in relation to searches of journalists; moreover, the judge had the power to revoke the warrant (§§87-90) **[Auth/46/1651-1652]**.[17] However, in that case, the judge had not properly examined the conflicting interests and failed to apply the overriding requirement of the public interest test. Hence, there was a breach of article 10 (§§100-101) **[Auth/46/1655]**.

21. These requirements of article 10 in the context of journalistic material were not only clearly established by the Grand Chamber in *Sanoma Uitgevers*, they are also clear from the judgment of this Court in *R (Miranda) v Secretary of State for the Home Department* [2016] 1 WLR 1505 **[Auth/6/219-254].** *Miranda* was not a case about source protection: it was about obtaining journalistic material through a stop under Schedule 7 Terrorism Act 2000. As Lord Dyson MR explained, at §102, the source was known **[Auth/6/250].** The purpose of the stop was also lawful: it was aimed at preventing the disclosure of the material, which the officers believed fell within the definition of terrorism (§§17 and 58) **[Auth/6/227-228,237-238]**. The issue was whether it was lawful to obtain access to "*journalistic material simpliciter*" without prior judicial authorisation. At §101, Lord Dyson MR held that "*it is clear enough that the Strasbourg jurisprudence requires prior, or (in an urgent case) immediate post factum, judicial oversight of interferences with article 10 rights where journalists are required to reveal their sources*" **[Auth/6/249-250]**. At §107, he explained that it would be wrong in principle to draw a distinction between disclosure of journalistic material *simpliciter* and disclosure of material which may identify a confidential source **[Auth/6/251]**. At §114, he held that prior judicial oversight was needed even for journalistic material *simpliciter* **[Auth/6/253]**.

22. *Miranda* is binding on this Court. Its holding, that prior judicial authorisation is required where the practical effect of state action is that the authorities obtain journalistic material, applies with equal effect here, with appropriate adaptation to bulk secret surveillance powers. The practical effect of the powers in the IPA 2016 includes that the state obtains communications data (which can reveal confidential and identifying detail) or indeed communications content (which can have an even greater chilling effect) in bulk. Why should independent authorisation not be required at the point of search of and access to that information? There is no principled distinction from *Miranda* and the European Court authorities it applied.

---

17 The relevant provisions are summarised at §§35-36.

D. *Big Brother Watch* in the Grand Chamber

23. All of this was established at the time of the Divisional Court judgment in this case **[C/30/890-998]**. The Divisional Court's failure to find a lack of the safeguards required by articles 8 and 10 was therefore an error of law. The Divisional Court accepted that there was force in the submission that these safeguards were required, but concluded that "*it would not be appropriate to anticipate what the Grand Chamber may say about this in Big Brother Watch*" (§337) **[C/30/959-960]**. With respect, the Divisional Court's approach was to distinguish the European Court authorities effectively on the ground that they were not concerned with bulk secret surveillance powers: see, for example, §§314 and 322 **[C/30/954,956]**. That was not a principled basis for distinguishing this clear line of authority in cases about targeting journalists and journalistic material.

24. The application of these principles to the secret surveillance regimes in issue in this case has now been put beyond doubt by the judgment of the Grand Chamber in *Big Brother Watch*. The Grand Chamber held that, in order to be "*prescribed by law*" under article 10 (and "*in accordance with the law*" under article 8), a secret surveillance regime must itself contain requirements that:

    a. There is prior independent authorisation of a search directed to journalistic materials, that is, where search terms are used that are known to be connected to a journalist or which would otherwise make the selection of confidential journalistic material likely (or alternatively highly probable), whether or not the intention is to identify a journalistic source (§448 and §456, and §§525–528) **[Auth/56/2323-2324, 2326, 2340]**.

    b. Such a search is justified by an overriding requirement in the public interest, which the independent judge or body must itself consider to exist (§448 and §456) **[Auth/56/2323-2324, 2326]**.

    c. Even if the search terms were not intended or thought likely to yield confidential journalistic material, where it becomes apparent that confidential journalistic material has been (or is likely to have been or to be) selected for examination, continued use and retention of the material must, at that stage, be made subject to substantively the same safeguards (§450 and §457) **[Auth/56/2324-2325, 2326]**.

25. The Grand Chamber made these findings as regards the "*section 8(4)"* bulk interception regime, equivalent to Part 6 Chapter 1 of the IPA 2016 **[C/32/1183-1204]**. It then approved

the Chamber's earlier findings applying these principles to the acquisition of communication data relating to journalists (the regime equivalent to Parts 3 and 4 of the IPA 2016 **[C/32/1096-1142]**). These safeguards applied "*in every case where there was a request for the communications data of a journalist, or where such collateral intrusion was likely*" (§§525 and 528) **[Auth/56/2340]**.

26. The Respondents wrongly seek to portray the article 10 finding about the acquisition of communication data as a finding that turned on a concession about EU law. This is wrong:

a. The Grand Chamber's reasoning on the acquisition of communication data made no reference to EU law. The UK government did not contest the First Section's reasoning on article 10.

b. The First Section's reasoning cannot be read in this narrow way either.[18] The First Section noted that prior independent authorisation was only required under the domestic scheme where access to communications data was sought for the purpose of determining a journalist's sources: §497 **[Auth/56/2334-2335]**. It noted with approval the fact that those applications had to be made under the Police and Criminal Evidence Act 1984 under the then "*Acquisition of Communications Data*" code of practice, a requirement that is not replicated in any of the codes in this case.[19]

c. The First Section set out its reasons for the breach of article 10 at §499 **[Auth/52/2096]**.

i. Firstly, there were no adequate safeguards "*in every case where there is a request for the communications data of a journalist, or where such collateral intrusion is likely*". This is an article 10 requirement.

ii. Secondly, and "*furthermore*", there were no special provisions restricting access to the purpose of combatting "*serious crime*". This second finding referred back to domestic law (including for this purpose EU law) as summarised in §467 **[Auth/52/2088]**.

The Respondents suggest that <u>both</u> these findings reflected the requirements of domestic law (including EU law). However, at the time of the First Chamber's decision, there was no EU law authority to the effect of the <u>first</u> of these propositions (and the NUJ is not aware of any other EU law authority expressly to this effect).

[18] App. nos. 58170/13, 62322/14 and 24960/15, 13th September 2018 **[Auth/52/1911-2122].**
[19] The relevant provision of the "*Acquisition of Communications Data*" code of Practice, §3.78, is set out in the First Section's decision at §117 **[Auth/52/1978].**

d. The Respondents' suggestion that the First Section's conclusion turned entirely on a finding based on EU law is therefore overblown. Only the second aspect of the Court's reasoning can be said to be linked to EU case law. At §499, the First Section treated other requirements (both the requirement for an overriding requirement in the public interest and the independent approval of authorisation mentioned in §498) as article 10 quality of law standards **[Auth/52/2096]**.

e. It is also wrong for the Respondents to suggest that the First Section ruled out independent authorisation as a requirement. Instead, the first sentence of §499 suggests that the absence of independent authorisation where there was likely collateral intrusion with the communications data of a journalist was a reason for the breach of article 10 **[ibid.]**.

f. It was the First Section's findings above that the Grand Chamber adopted, including its reasoning as to where article 10 required the journalistic safeguards to be applied.

E. The Application of These Principles

27. These principles apply to each of the powers created by the IPA 2016. The Respondents are wrong to seek to limit the application of these principles to bulk interception and, even in that context, the Respondents' concession does not go far enough.

i. Bulk interception

28. The Respondents now accept that Part 6 Chapter 1 IPA 2016 (the bulk interception power) is not compatible with article 10 as it "*does not currently provide for independent authorisation where the [Security and Intelligence Agencies] either intend to select confidential journalistic material … for examination from bulk intercept; or such selection is 'highly probable'; or they intend to retain [confidential journalistic material] which has inadvertently been selected for examination"* (Respondent's skeleton, §4) **[C/4/82-83]**. On 20th March 2023, the Government published a policy paper setting out its proposed amendments to the IPA 2016.[20] This paper will lie before both Houses of Parliament for 60 days during which time representations may be made, in accordance with Schedule 2 of the Human Rights Act 1998. As a result, it remains unclear what changes will be made to the IPA 2016 and the Codes of Practice to reflect the Respondents' concession. It follows that

[20] https://www.gov.uk/government/publications/amending-the-journalistic-safeguard-of-the-investigatory-powers-act-2016/incompatibility-under-the-human-rights-act-1998-a-proposal-for-a-remedial-order-to-amend-the-journalistic-safeguard-at-section-154-of-the-investigato

the statutory scheme remains incompatible with articles 8 and 10, at least to this extent. But the incompatibility goes further, as set out below.

29. The Respondent's concession is too narrow:

a. It does not follow from *Big Brother Watch* that the safeguards set out above only apply where there is a subjective intention to select "*confidential journalistic material"* or where a search is "*highly likely"* to lead to the obtaining of "*confidential journalistic material"*. The comments of the Grand Chamber, §448, related to examples in which the *Sanoma* safeguards apply, but the Grand Chamber also specifically approved and applied *Sanoma* in the context of bulk surveillance **[Auth/56/2323-2324]**. The Grand Chamber did not suggest that these were the only examples to which the safeguards applied.

b. As Lord Dyson MR put it in *Miranda*, there is no principled reason for treating a search that results in obtaining journalistic material *simpliciter* differently to a search that "*may identify a confidential source"*.

c. It is therefore clear that, where a search is likely to lead to the obtaining of journalistic material, the *Sanoma* safeguards apply. The Respondent's submissions to the contrary (skeleton, §§24-27) **[C/4/90-91]** are wrong. The Grand Chamber applied a "*likely"* test to the acquisition of communications data (§525) **[Auth/56/2340]** and this followed the clear line of authorities set out above.

30. The Respondent is also incorrect to suggest that there is no requirement for these safeguards to be set out in the statutory scheme (skeleton, §§29-31) **[C/4/91-92]**:

a. This contention does not reflect what the Grand Chamber actually held, when applying these principles and concluding that the section 8(4) regime violated article 10 in relation to journalistic materials (at §§456–458) **[Auth/56/2326]**. The Grand Chamber's finding was that the applicable Code of Practice did not contain, as express safeguards, the requirements of independent authorisation and the "*overriding requirement in the public interest"* test (§456) **[ibid.]**. It was this lack of express safeguards in the statutory scheme that led to the finding of breach of articles 8/10. The principle articulated by the Grand Chamber is therefore that the domestic regime must, itself, require these safeguards.

b. These safeguards can, of course, be expressed in different ways and by using various forms of words and could (for Convention purposes) be laid down in statute or in codes of practice. But there must be something <u>in the regime itself</u> that ensures this result.

c. Here, the IPA 2016 does not contain the full safeguards required. The NUJ respectfully endorses the annex to the Appellant's skeleton argument explaining the deficiencies in the statutory scheme as regards journalistic material.

d. The Respondents have introduced policy guidance regulating this statutory scheme, in the various Codes of Practice **[see Auth/76-82/3414-4112]**. Those Codes do not contain the required safeguards either. Indeed, as explained above, in certain respects they provide less protection than those considered by the Grand Chamber under the "*section 8(4)"* regime. Moreover, the Respondents' policy guidance in the codes purports to provide a full account of the legal position, but fails to achieve it. By reason of material omissions of requirements or safeguards, the codes present a misleading picture of the true legal position.

e. There is therefore a lack of clarity as regards the application of these safeguards in this context. And even if there is no need for the statutory scheme to set out that these safeguards apply (*quad non*), there is at the very least a need for a clear judicial finding to the effect that the regime as it exists requires an overriding requirement in the public interest to exist and to be assessed by the independent authoriser, not least in circumstances where the Divisional Court held otherwise.[21]

ii. Specific deficiencies in the IPA 2016

31. The Respondents also wrongly seek to limit the safeguards that they concede apply. There are two particular problems with the definitions set out in the IPA 2016.

32. The first problem is the definition of "*confidential journalistic material"* at s.264(6) IPA 2016 **[C/32/1317]**, which requires journalistic material to be "*subject to an express or implied undertaking to hold it in confidence*" or held "*subject to a restriction on disclosure or an obligation of secrecy contained in an enactment*." This definition is considerably narrower than the approach suggested in the European Court case law and in *Miranda*, which apply the safeguards to journalistic material "*simpliciter"* and which treat all journalistic material (that is, material held by a journalist) as protected.[22] The safeguards therefore ought to apply where the authorities search for a term connected with a journalist, not just where such material is held pursuant to an undertaking. In any event, ethical requirements to

[21] The Divisional Court accepted the Respondents' submission did not require these safeguards, contrary to the submissions of the NUJ (summarised by the Divisional Court, at §302(3)) **[C/30/951].**

[22] This definition seems to have been drawn from the definition of "*excluded"* material in s.11 Police and Criminal Evidence Act 1984 **[Auth/62/2558-2559],** but does not reflect the fact that that Act also requires judicial authorisation and a strict proportionality test for access to all journalistic material.

protect journalistic material ought be treated as imposing the same requirements as a formal undertaking to that effect.

33. The second problem is that the definition of "*journalistic material"* in s.264(5)(a) IPA 2016 excludes material that is "*created or acquired with the intention of furthering a criminal purpose*" **[C/32/1317]**. However, the European Court has stressed that source material does not lose its status as such "*depending on the lawfulness or unlawfulness of their sources"*.[23] The extent to which a source was acting in bad faith or with a harmful might be relevant to whether an "*overriding requirement in the public interest"* justifies obtaining it, but it does not mean that the material is not journalistic at all and searches for it should not be subject to exactly the same safeguards. In any event, the body carrying out the independent authorisation should be "*slow to assume"* that a source was clearly acting in bad faith with a harmful purpose.[24]

iii. Application to other powers

34. While the findings of the Grand Chamber in *Big Brother Watch* arose in the context of the "*section 8(4)*" bulk interference regime and the applicable communications data regime, there is no reason in principle to limit their application to that context. Indeed:

    a. The Respondents accept that the requirements above apply only in the context of bulk interception. Yet the Grand Chamber found that the same standards applied to the acquisition of communication data relating to journalists, when approving the Chamber's earlier conclusion to this effect: *Big Brother Watch* §§525–528 **[Auth/56/2340]**. The Respondents' attempt to suggest that this finding only arose because of a concession of breach of EU law does not work, particularly given the clearly established approach of the European Court to the protection of journalistic material (as set out at §26 above).

    b. In any event, there is clear authority, both in Strasbourg and domestically, that these safeguards apply to searches for a journalist's communications data.[25] For example, the European Court held in *Ekimdzhiev v Bulgaria* (App. no. 70078/12) at §395 that the same requirements apply to "*the general retention of communications data by communications service providers and its access by the authorities in individual cases*" **[Auth/59/2520].** There was no suggestion in those cases that the safeguards clearly

[23] *Tillack*, §65 **[Auth/35/1270];** *Sedletska*, §62 **[Auth/58/2428].** This passage in *Tillack* was approved in *News Group Newspapers Ltd v Commissioner of Police of the Metropolis* [2015] UKIPTrib 14176-H §105 **[Auth/4/151-152].**

[24] *Financial Times*, §63 and §66 **[Auth/38/1361, 1362];** *Telegraaf Media*, §128 **[Auth/43/1569];** *Becker*, §74 **[Auth/51/1900].**

[25] See footnote 12, above. The findings of the Investigatory Powers Tribunal in *News Group*, §106 **[Auth/4/152]**, also make it clear that the Respondents are wrong to deny that the law must provide for the independent authoriser to determine the existence or otherwise of an overriding requirement in the public interest.

established by the European Court did not apply simply because the secret surveillance power in issue was different. Nor can there be any suggestion that bulk acquisition of communications data is relevantly different. Indeed, the main differences are that (i) the exercise of the power results in communications data being held by the state (rather than third party communications services providers) and (ii) this occurs on a vast scale. Those differences do not suggest some lesser standard should apply.

c. The finding that the same safeguards apply to bulk interception and communications data is unsurprising. The European Court has applied the principle that domestic law must require independent authorisation and determination of whether there is an overriding requirement in public interest by the independent authoriser to orders that might identity a source but also to the search of a journalist's home, office, and electronic devices. The reason this safeguard applies in each of those contexts is because the European Court recognises that permitting the search of journalistic material in each of those contexts would have a chilling effect on press freedom.

d. This logic applies with equal (if not greater) force to the bulk acquisition of communications data under Part 6 Chapter 2 IPA 2016 (as explained above) **[C/32/1204-1219]**. It applies also to equipment interference under Part 5 or Part 6 Chapter 3 IPA 2016 **[C/32/1220-1242]**, which covers all electronic interference with devices other than interception (for example, instructing devices to send certain data to the intelligence services), and to the bulk personal dataset powers in Part 7 of the IPA 2016 **[C/32/1242-1268]**. The fact that the Respondents may use different techniques to carry out searches of journalistic material does not make those powers any less intrusive powers for secret surveillance, to which the principles developed by the European Court apply.[26] Any such argument is belied not least by the very similar format of each of the authorisation regimes under the IPA 2016, including in particular the authorisation of generalised retention and, in the context of all the bulk regimes (Part 6 Chapters 1 to 3 and Part 7) and Parts 3 and 4, an additional mechanism for the authorisation of searches (for example, selection for examination).

e. Nor in the context of journalists do the differences between the practical application of the powers lessen the chilling effect of any such technique.

[26] See, for example, *Big Brother Watch*, §§332–334 **[Auth/56/2295-2296].** The NUJ notes the heading above §332: "*General principles relating to secret measures of surveillance, including the interception of communications*" (emphasis added). §333 puts this beyond doubt, including by the extensive citation of earlier European Court authority.

35. None of this represents a breach of the "*mirror principle"*, as suggested by the Respondents (Respondent's skeleton, §35) **[C/4/93-94]**. The NUJ does not suggest that this Court should establish any new principle of Convention law. Rather, it invites the Court to apply the principles established in the Convention case law to each of these directly analogous contexts, in circumstances where the European Court's jurisprudence is clear that the principles apply to "*secret measures of surveillance*".[27] This is not only permissible, but it is a task that the Court "*can and should"* carry out.[28]

36. Further, insofar as the Respondents suggest in their skeleton, §37 **[C/4/94-95]**, that there is evidence they would wish to rely on that would establish that some safeguards should not apply or somehow be attenuated:

a. It is for the Respondents to place such evidence before the Court. They have not sought to do so. There is therefore no evidence to make good this claim. It fails at the threshold.

b. Such evidence is in any event irrelevant: the Court can see the nature of the powers from the face of the statute, and it is apparent that they are all secret surveillance powers or powers for secret state databases, capable of significant intrusion into article 10 (and article 8) rights, and which are necessarily operated in secret.

F. Conclusion

37. For these reasons, the NUJ respectfully agrees with the annex to the Appellant's skeleton argument, identifying specific breaches of articles 8 and 10 in each of the statutory regimes created by the IPA 2016 in respect of journalists. In particular, the NUJ respectfully invites this Court to find that the safeguards identified above (of prior independent authorisation of whether a search of journalistic material is justified by an overriding requirement of the public interest) apply to each of the statutory powers in issue in this appeal. This would avoid further illegality, which the Respondents' incomplete Codes of Practice continue to permit.

38. The Court is therefore respectfully invited to allow ground one of the Convention appeal. The NUJ also supports the Appellant's appeal on ground 3 of the EU law appeal.

JUDE BUNTING KC
Doughty Street Chambers

24th March 2023

[27] See footnote 26 above.
[28] *R (AB) v Secretary of State for Justice* [2022] AC 487, §59 **[Auth/10/387-388]**.