Chapter 40: Terrorism and the effect of counter-terrorism law

Chapter summary
The heightened threat of terrorism in recent years has led to more counter-terrorism laws in the UK, some controversial because of their actual or potential interference with journalists' work. These laws ban the gathering of certain information, and restrict what can be published. As this chapter shows, the wide scope of counter-terrorism law has the potential to deter journalistic investigation of the causes and control of terrorism.

Journalists investigating terrorism

The increased threat of terrorism in the UK has prompted Parliament to extend the range of offences which deter and punish such crime. As this chapter explains, some of these laws also have potential to deter or punish what many journalists would see as legitimate, journalistic inquiries into the circumstances which lead to people becoming terrorists or the effectiveness of counter-terrorism policy.

Such laws are problematic for journalists because the prohibitions in them are widely-drawn and they contain no specific defence for journalism which is in the public interest. Protection for such journalism, including legal protection for journalists' sources to remain secret from the authorities, is therefore highly dependent on how judges interpret this law, and on decisions by investigating officers and prosecuting agencies on what leeway should be given to journalists.

For example, a journalist who wants to investigate why some UK citizens joined jihadi, Islamist groups in Syria may, by communicating with those individuals, who may want to be confidential sources, gain information of interest to the police. If a journalist promises a source that his or her identity will be kept secret, ethically that promise must be kept – see *McNae's* chapter 34. But as explained below, police may seek a 'production order' to gain the journalist's notes to try to identify a confidential source. In some circumstances the journalist could – under counter-terrorism law - be at risk of prosecution for failing to report to the police what a terrorist said, and in law faces punishment for disobeying the 'production order'. But the journalism is likely to be in the public interest, to explore how jihadi groups recruit or why they seem attractive, or why the UK authorities were unable to stop that recruit travelling to Syria.

In 2015 barrister Gavin Millar QC, a specialist in media law, pointed out to a London conference that UK citizens who travel to Syria to join one of the groups fighting the Assad regime were 'in the view of the courts' deemed to be terrorists, because of how the law defined terrorism, and so those who returned to the UK and agreed to be interviewed by a journalist would wish to be anonymous in anything published about them. He said that if police sought a 'production order' to try to find out who that source was, a journalist or news organisation could refuse to supply information on the basis of the public interest value in their work, and their rights under Article 10 of the European Convention on Human Rights (to freedom of expression and to impart information, see *McNae's,* 1.3.2). But he added: 'There is not much case law on that. There have been lots of standoffs between media organisations and the Metropolitan Police about whether they really want to take that on. It is certainly a looming problem' (*Media Lawyer*, 29 September 2015).

Since then, more counter-terrorism legislation has been enacted, creating new offences and bringing greater potential threats to journalism.

Counter-terrorism law is complex. This chapter summarises those parts most relevant to journalists, but a journalist who fears he/she may be at risk of breaking this law should seek legal advice.

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Definition of terrorism
The definition of a terrorist is a value-loaded one. As has often been said, a terrorist group – for example, within a separatist movement – may be celebrated as freedom fighters by its supporters, though despised by the population being terrorised.

The UK's legal definition of terrorism, as expressed in section 1 of the Terrorism Act 2000, as amended by the Terrorism Act 2006 and the Counter-Terrorism Act 2008, can be summarised as:

- the use or threat of action where the use or threat is designed to influence the government [of any country], or an international government organisation, or to intimidate the public [in any country] or a section of the public, and the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.

To meet this definition the 'action' must involve serious violence against a person or serious damage to property, or endanger a person's life (other than the perpetrator's); or create a serious risk to the health and safety of the public; or be designed to seriously interfere with an electronic system.

Section 11 of the 2000 Act makes it illegal – punishable by a maximum jail term of 10 years – to be or profess to be a member of a 'proscribed group' – that is, one deemed to be 'concerned in terrorism'. Section 3 of the Act says a group is 'concerned' in terrorism if it prepares, participates in or commits acts of terrorism, or promotes or encourages terrorism. Schedule 2 of the Act proscribes groups, in a list which can be updated by **statutory instruments**. This list, as in force in October 2019, proscribes 89 groups from around the world, including Islamic State of Iraq and the Levant, Al Qaeda, and Basque group ETA. It also includes paramilitary groups with roots in Northern Ireland such as the IRA and UDA, which have been proscribed for decades, as well as the far-right neo-nazi UK-based group National Action. The legal definition of terrorism is not confined to proscribed groups' activities – it could apply, for example, to violence by 'animal liberation' groups. Terrorists can, of course, also be charged with other criminal offences, including murder and conspiracy to cause explosions.

Information about recent convictions of those involved in terrorism can be found on the website of the UK's Security Service (colloquially known as MI5). See https://www.mi5.gov.uk/news-and-speeches

Glorification of terrorism
Section 1 of the Terrorism Act 2006 specifically prohibits encouragement of terrorism, including indirect encouragement through 'glorification'. A person commits an offence if he/she publishes, or causes to be published, a statement which:

- glorifies the commission or preparation (whether in the past, in the future or generally) of acts of terrorism; and which
- is a statement from which 'members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.'

For this offence to occur, the statement must be likely to be understood by at least some members of the public (anywhere in the world) as an encouragement to them to commit, prepare for or instigate acts of terrorism. The person accused of such glorification must have intended some people to be thus affected, or have been 'reckless' as to the statement's effect, though it is irrelevant whether anybody was in fact led to perpetrate terrorism. Encouragement of terrorism, including through glorification, can be punished by a prison sentence of up to seven years or by a fine or both.

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This law was created primarily as a response to extremist, Islamist 'preachers of hate'. But, according to some experts, the glorification offence could catch any praise of any group using political violence anywhere in the world. Case law is that support for terrorism directed against a repressive government, for example that which was headed by Colonel Gaddafi in Libya, is illegal, but has drawn some distinction between indiscriminate acts of violence and directed military action in a civil war (*R v F* [2007] EWCA Crim 253, *DD (Afghanistan) v Secretary of State for the Home Department* [2010] EWCA Civ 1407). Some journalists remain uneasy about the potentially wide scope of the 'glorification' offence.

It is a defence under section 1 of the 2006 Act – if it has not been proved that the defendant intended the statement to encourage, etc., acts of terrorism – for him/her to show that the statement published neither expressed his/her views, nor had his/her endorsement and that it was clear in all the circumstances of the publication that this was the case. This defence should protect journalists, and their publishers, when their journalism includes interviews with people glorifying terrorism, if the journalism reports such words in a neutral (or condemnatory) fashion and neither the journalists nor their publishers associate themselves with the glorification.

The section 1 defence would also protect the publisher of a website forum if a member of the public were to post such glorification on it. But section 3 of the Act says the defence will not apply if police give a website publisher notice that a statement encouraging terrorism is being published on the site and the publisher then failed to remove it, without reasonable excuse, within two working days.

Failure to disclose information to police

Section 38B of the Terrorism Act 2000 makes it a crime for a person to fail to disclose to police, as soon as reasonably practical, information that he/she knows or believes might be of material assistance in preventing the commission by another person of an act of terrorism anywhere in the world, or in securing the apprehension, prosecution, or conviction of another person, in the UK, for a terrorist offence. The maximum penalty is 10 years in prison, or an unlimited fine, or both. A person accused of such failure has a defence if he/she can prove he/she had a 'reasonable excuse'. But there is no specific exemption for journalists anywhere in the Act. A reporter who discovers information about terrorism by, for example, interviewing a terrorist leader, then fails to disclose it quickly to police is at risk of prosecution.

Section 19 of the 2000 Act imposes similar disclosure obligations relating to information gained which leads to a belief or suspicion that a financial transaction is linked to funding terrorism.

Section 39 of the Act makes it a crime to disclose anything likely to prejudice an investigation into terrorist activity. This provision would seem to cover, for example, publishing or verbally relaying information which 'tips off' someone that he/she is being or is about to be investigated. Section 39 also makes it a crime to interfere with material which is likely to be relevant to such an investigation. There is a defence in section 39 if the person making the disclosure or interfering did not know and had no reasonable cause to suspect that the disclosure or interference was likely to affect a terrorist investigation, and section 19 too contains the 'reasonable excuse' defence.

Collecting and eliciting information

Section 58 of the 2000 Act makes it an offence to collect or make a record of 'information of a kind likely to be useful to a person committing or preparing an act of terrorism' or to possess 'a document or record containing information of that kind'. The maximum jail term is 15 years. There is a defence if the person accused of breaching section 58 can prove that he/she has a reasonable excuse. The Act was amended by section 3 of the Counter-Terrorism and Border Security Act 2019 to include a specific defence that the

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viewing or recording of the material was for the purposes of carrying out work as a journalist – a change which followed lobbying by the News Media Association (NMA).

Case study
In 2008 the University and College Union condemned the arrest of Rizwaan Sabir, a Nottingham University post-graduate student whose research was into terrorism. He had downloaded a declassified open-source document called the Al-Qaeda Training Manual, available on a US government website. He was held for six days, and then released without charge. He accepted £20,000 in settlement from Nottinghamshire police after a claim for wrongful arrest (*The Guardian*, August 26, 2009, September 19, 2011; BBC News website, September 14, 2011).

Section 58A of the 2000 Act, inserted by the Counter-Terrorism Act 2008, makes it an offence to 'elicit or attempt to elicit' information about an individual who is or has been a member of Her Majesty's forces, of the UK intelligence services or a police officer, which 'is of a kind likely to be useful to a person committing or preparing an act of terrorism'. It is also an offence to publish or communicate such elicited information. Both offences have a maximum penalty of a 15-year jail term or an unlimited fine or both. Anyone prosecuted will have a defence if he/she can prove there is a 'reasonable excuse' for his/her actions.

Santha Rasaiah, head of the NMA's political and regulatory affairs department, has expressed concern that such an 'eliciting' offence is potentially wide enough to catch journalists in a huge number of everyday situations in news-gathering.

Police powers to seize journalists' material
Schedule 5 to the Terrorism Act 2000 provides the police with a battery of powers to investigate terrorism, including procedure to seize material held by journalists. These powers are re-enactments or successors of parts of the Prevention of Terrorism (Temporary Provisions) Act 1989. Further powers have also been added through the provisions of the Counter-Terrorism and Border Security Act 2019, and the Crime (Overseas Production Orders) Act 2019.

Case study
It was under the Prevention of Terrorism (Temporary Provisions) Act 1989 that in 1992 Channel 4 and the independent production company Box Productions were fined £75,000 for contempt of court after refusing to comply with a court order requiring them to disclose to police the identity of a source used in a television programme *The Committee*, part of the 'Dispatches' series, which investigated killings in Northern Ireland (*Director of Public Prosecutions v Channel Four Television Company Limited and another* [1993] 2 All ER 517).

Schedule 5 empowers a **circuit judge** (or in Northern Ireland a Crown court judge) to issue a 'production order' for journalistic material – that is, an order for material held by a journalist to be surrendered to the police. The 2000 Act permits such an order to compel disclosure of 'excluded' material as well as 'special procedure' material. The definitions for such material are as stated in the Police and Criminal Evidence Act 1984 (PACE). Therefore the 2000 Act, in the investigation of terrorism, gives police greater power to demand access to journalists' research and contacts material than exists in PACE. *McNae's* 34.6 explains the terms 'excluded' and 'special procedure'.

The order will be granted if the judge is satisfied there are reasonable grounds for believing the material will be of substantial value to that investigation and for believing it is in the public interest that police

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should have access to it. This threshold of justification for compelling disclosure is lower in several respects than in PACE for special procedure material, and – unlike in PACE – there is no requirement under the 2000 Act for a journalist to be given notice of police intention to apply for a production order. But it was held in *Ex p Salinger* ([1993] QB 564) that the police must provide a media organisation with a written application and evidence as early as possible, and that the police must explain their case on oath at the hearing.

Case study
In 1999 a judge made an order under the 1989 Act that Ed Moloney, northern editor of the *Sunday Tribune*, should hand over to police notes of an interview with a Loyalist later charged with murder. But the order was quashed by the Lord Chief Justice of Northern Ireland, Sir Robert Carswell, who said: 'Police have to show something more than a possibility that the material will be of some use. They must establish that there are reasonable grounds for believing that the material is likely to be of substantial value to the investigation' (*Re Moloney's Application* [2000] NIJB).

Case study: In 2015 the BBC did not oppose a 'production order' granted by a Crown court judge at the request of Thames Valley police which meant that Secunder Kermani, a journalist in the Newsnight team, was required to hand over his laptop to officers. It was later returned. A BBC report said that police were responding to communications between Mr Kermani and a man in Syria who was publicly identified as an Islamic State extremist. The man was not a confidential source, the BBC said. Newsnight editor Ian Katz said: 'While we would not seek to obstruct any police investigation, we are concerned that the use of the Terrorism Act to obtain communication between journalists and sources will make it very difficult for reporters to cover this issue of critical public interest.' A BBC spokesman said: 'The BBC does everything it can to protect its reporters' communication and materials and sought independent expert legal advice in the case of Secunder Kermani. It did not resist Thames Valley's application for an order under the Terrorism Act in court because the Act does not afford grounds under which it could be opposed. It is troubling that this legislation does not provide the opportunity for the media to mount a freedom of speech defence'. A police spokesperson said: 'It would be inappropriate to talk about any ongoing live investigation; however the South East Counter Terrorism Unit (SECTU) regularly conducts investigations where items may need to be examined. SECTU will always seek cooperation of the public and others who can voluntarily disclose material which may assist an ongoing investigation. Where cooperation is not agreed officers can seek a court order under the Terrorism Act. These are used proportionately and on a case by case basis' (BBC news website and *Press Gazette*, 29 October 2015).

Under the 2000 Act, someone made subject to a production order would normally be given seven days in which to disclose the material to the police. It is contempt of court, punishable by up to two years in jail, to disobey the order. If it is disobeyed, a judge can issue a search warrant for the material's seizure by police. A police superintendent can issue such a warrant if he/she has reasonable grounds for believing the case is one of great emergency and that immediate seizure is necessary. The police can also apply to a judge for an order requiring any person to provide an explanation of any material seized, produced or made available.

Case study
In 2008 freelance journalist Shiv Malik was required, by a production order granted under the Terrorism Act 2000 by a Crown court judge, to hand over to Greater Manchester police all drafts of and source material for a book he had researched and which was due to be published. It had the title *Leaving Al-Qaeda: Inside the Mind of a British Jihadist*. It was about Hassan Butt, who – when cooperating with Malik for the book – had claimed to have been in some way involved, before renouncing terrorism, with an attack in Pakistan which killed 11 people and with recruiting people to a 'proscribed' group. The

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production order required all Malik's notes, audio and video recordings associated with the book. The High Court was asked by Malik to consider in **judicial review** if the order was lawful. He argued that it required him to disclose confidential sources, in breach of his rights under Article 10 of the European Convention on Human Rights, and that this would affect how sources trusted him, and possibly put him in danger. The High Court judges ruled that the granting of the production order was valid. However, they limited its scope to include only material disclosed to Malik by Butt, not material from other sources, and ruled that Malik did not have to surrender his contact lists (*Malik v Manchester Crown Court and the Chief Constable of Greater Manchester Police* [2008] EWHC 1362). They ordered Malik, who complied with the amended order, to pay the police costs for the High Court case, as well as his own. *The Guardian* reported that in total these costs were more than £100,000, but that they were to be funded jointly by the National Union of Journalists and Times Newspapers Ltd, in support of Malik. See http://www.theguardian.com/media/2008/jun/27/pressandpublishing.medialaw and http://www.theguardian.com/media/2008/may/19/medialaw.pressandpublishing

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Privilege against self-incrimination

In *Malik*, it was argued for the journalist - as one of the grounds against the production order being upheld - that the legal privilege against self-incrimination should apply, in that requiring Shiv Malik to disclose material he had obtained in journalistic research into terrorism would tend to expose him to a real risk of prosecution under sections 19 and 38B of the Terrorism Act 2000, which are explained above.

The privilege against self-incrimination is a general and fundamental one in c**ommon law,** reflecting the principle that as a protection of civil liberties a person is not required to co-operate with official investigators if this would implicate himself/herself as having committed a crime. But there are exceptions to this general rule. Also, this privilege is not the same as the privilege expressly referred to in the 2000 Act when it refers to items which are confidential communications between a lawyer and his/her client. These, in almost all circumstances, are protected in law from being seized by police.

A person commits an offence under section 19 of the Terrorism Act 2000 if without reasonable excuse he/she fails to disclose to police information gained which leads to a belief or suspicion that a financial transaction is linked to the funding of terrorism. A person commits an offence under section 38B if, without reasonable excuse, he/she fails to disclose to police, as soon as reasonably practical, information that he/she knows or believes might be of material assistance in preventing the commission by another person of an act of terrorism anywhere in the world, or in securing the apprehension, prosecution, or conviction of another person in the United Kingdom for a terrorist offence.

Delivering judgment in *Malik,* Lord Justice Dyson, who sat with two other High Court judges, said that if any person wishes to rely on the privilege against self-incrimination it must be raised as an issue in the relevant proceedings. He added that, in the original hearing before the Crown court judge who granted a production order against Malik, the issue had been raised but in an 'unspecific manner', with neither section 19 or section 38B being mentioned to the judge.

Referring to paragraph 6 of schedule 5 of the Terrorism Act – the part which defines when production orders can be granted - Lord Justice Dyson said that while its wording did not show that Parliament had intended it to abrogate the privilege against self-incrimination, 'the automatic and absolute application of the privilege against self-incrimination in all cases where an application is made for a production order under schedule 5 would substantially weaken the schedule in relation to journalist material and that cannot have been what Parliament intended when enacting the provision'.

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He said that the High Court could offer the following general guidance on 'non-exhaustive factors' which could be taken into account in judicial decisions on whether a person should be required, under paragraph 6, to disclose material to police investigating alleged terrorism, where to disclose would risk infringing his/her privilege against self-incrimination as regards non-disclosure offences under the Terrorism Act: [*Material in square brackets has been added by McNae's authors to aid explanation, and to root the context, as it was in the Malik case, in a production order being challenged by a journalist]*

> 'First, it is necessary to assess the true benefit to the [police] investigation of the material [held by the journalist] which is sought to be obtained in breach of the privilege. The smaller the benefit [to that police investigation], the less justification there is for the infringement [of the privilege against self-incrimination]; and the greater the benefit, the greater the justification. Part of this evaluation involves a consideration of the extent to which the material [held by the journalist] can be (i) obtained by other means; (ii) ordered to be disclosed in stages, (so that a part which does not involve the infringement of the privilege against self-incrimination is disclosed first, leaving the value of the rest to be weighed differently against the infringement); and (iii) redacted to exclude those parts which create the risk.
>
> 'Secondly, it is always necessary to keep in mind the importance of the privilege itself. To compel a person to forgo the protection afforded by the privilege requires convincing justification.
>
> 'Thirdly, it is relevant to consider the gravity of the offence with which the person [journalist] who is required to surrender the privilege might be charged. The more serious the charge, the greater the justification required for the disclosure. In the context of sections 19 and 38B [that is, offences that information gained about terrorism was not disclosed earlier to police] it is material that these are serious offences which can lead on conviction on indictment to imprisonment for a term not exceeding five years.
>
> 'Fourthly, it is relevant to consider the risk of prosecution. In some cases, the Crown may offer the person [journalist] immunity from prosecution [should the material he/she is being required to disclose put him/her at risk of being prosecuted under sections 19 or 38B for failing to have alerted police to it earlier]. …It is open to the Crown to put the matter beyond doubt by making an unequivocal offer of immunity.
>
> 'Fifthly, it should always be borne in mind that if a person is prosecuted for an offence under section 19 or section 38B, the trial judge has the power to exclude evidence under section 78 of the Police and Criminal Evidence Act if that is required in the interests of fairness."

Lord Justice Dyson's comments can be seen as indicating that, in some such circumstances, a journalist may wish to seek such immunity from prosecution as regards any material disclosed because of a production order. But there may well remain the issue of the journalist's ethical obligation to protect the identity of a confidential source - for example, the person who gave him/her the material. See *McNae's,* chapter 34 on protection of sources.

In the case of Shiv Malik, protecting the identity of Hassan Butt, whose alleged terrorist activities led to the police decision to seek a production order against the journalist, was not an issue because Butt's identity as his source was not a secret. Butt had agreed that he was to feature openly in the journalistic project for the book Malik was producing. But a major reason why Malik opposed the production order was to protect other sources in the project which *were* confidential.

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In giving the High Court's judgment that the production order against Malik should be upheld, albeit modified to cover only the information supplied to him by Butt, Lord Justice Dyson referred to the extent to which Article 10 of the European Convention on Human Rights could be held to protect a journalist from such an order. Article 10, which safeguards the right to freedom of expression and to impart information, has been cited in other cases in which journalists sought to protect confidential sources, as explained in *McNae's,* chapter 34.

Lord Justice Dyson said: 'Where, as in the present case, such material is in the possession of a journalist, there is a potential clash between the interests of the State in ensuring that the police are able to conduct terrorist investigations as effectively as possible and the rights of a journalist to protect his or her confidential sources. Important though these rights of a journalist unquestionably are, they are not absolute. Parliament has decided that the public interest in the security of the State must be taken into account. A balance has to be struck between the protection of the confidential material of journalists and the interest of us all in facilitating effective terrorist investigations. It is for the court to strike that balance applying the carefully calibrated mechanism enacted by Parliament in schedule 5 of the 2000 Act. In addition, in a case where the confidential material, if disclosed, might prevent a miscarriage of justice, that is a further factor to be taken into account in the balancing exercise.'

In referring to a potential miscarriage of justice, the judge was alluding to the fact that police sought the production order against Malik after a defendant in a pending trial of terrorism charges had claimed in a defence statement that Butt was 'the instigator of certain actions'.

Lord Justice Dyson said of this fact: 'Important though the right of a journalist to protect his sources undoubtedly is, it should surely yield to a duty to disclose if the material emanating from those sources might well avoid a miscarriage of justice.'

Lawyers for Malik had argued that police had other ways in which to investigate that defendant's claims, and that therefore a production order against Malik was not necessary.

David Miranda's detention

In August 2013 police detained David Miranda at Heathrow airport for nine hours, using powers in schedule 7 of the Terrorism Act 2000 allowing a person to be stopped and questioned at a port or border area for the purpose of determining whether he/she is concerned in terrorism. Miranda's detention and the fact that police took items from him, including encrypted storage devices, proved controversial – he is the spouse of Glenn Greenwald, a journalist who has produced news stories in co-operation with Edward Snowden, see *McNae's,* 33.2

Snowden gave journalists material he copied when he was a contractor with the USA's National Security Agency. It concerned the huge scale of surveillance by the NSA and the UK's intelligence services of the internet, including personal emails. The resultant articles published by *The Guardian, The New York Times* and other media outlets about the global extent and potential intrusiveness of this secret surveillance proved embarrassing for the USA and UK governments. Within these nations, the disclosures provoked debate about whether democratic and legal scrutiny of these intelligence operations was sufficient to protect the privacy of innocent US and UK citizens. The disclosures also led to a cooling of the USA's and UK's diplomatic relations with countries whose politicians and citizens, according to Snowden's disclosures, were also subject to the surveillance. The USA and UK governments said that Snowden's leaks of some of this intelligence information had damaged their national security and therefore the safety of citizens.

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When detained at Heathrow, Miranda was in transit in the process of transporting some of the Snowden material from Berlin to Brazil for Greenwald. *The Guardian* had made Miranda's travel arrangements and paid for the trip. Miranda, who is a Brazilian citizen, later applied to the High Court in London for judicial review, claiming his detention and the seizure of material was unlawful. His claim was backed by several organisations, including Liberty and Article 19, which felt the police action threatened the media's freedom to investigate official agencies, including intelligence services. His lawyers argued that the dominant purpose of the police was not to investigate terrorism but to obtain information, on behalf the UK's Security Service, about the material from Snowden, and that this was a disproportionate interference with Miranda's right to 'the protection of journalistic expression'.

The court heard that encrypted data in an external hard drive seized from Miranda contained approximately 58,000 highly classified UK intelligence documents, obtained by Snowden. The UK government argued that the material had to be examined to see if it contained the identities of government employees and details of security operations, because public release or compromise of such data would be likely to cause very great damage to security interests and possible loss of life, and consideration of the material was needed to ascertain how best to negate or minimise such damage.

In its judgment in February 2014 the High Court rejected the argument made by Miranda's lawyers, supported by a witness statement from Greenwald, that experienced editors and journalists were able to distinguish between material which should not be published, because to do so would endanger life, and material which did not carry that risk but was appropriate to be published, even against the government's wishes. The court ruled that the police action fell properly within the scope of schedule 7 of the 2000 Act, accepting the police argument that the definition of terrorism in the Act's section 1, see above, was capable covering the publication or threatened publication of stolen classified information which, if published, would reveal personal details of members of the armed forces or security and intelligence agencies, thereby endangering their lives, 'where that publication or threatened publication is designed to influence government policy on the activities of the security and intelligence agencies'. The court also rejected the argument that police, if their concern was about terrorism, should have used powers under the 2000 Act's schedule 5, which are explained above. Schedule 5 offers more protection for journalistic material than schedule 7. In the judgment Lord Justice Laws said press freedom had to be balanced against national security, adding: 'On the facts of this case, the balance is plainly in favour of the latter' (*Miranda v the Secretary of State for the Home Department and the Commissioner of the Police of the Metropolis* [2014] EWHC 255 (Admin)).

In July 2014 David Anderson QC, who was then the UK's independent reviewer of counter-terrorism law, with a duty to make annual reports to the Government on its use, said he understood why police needed to seize stolen intelligence files but expressed doubt about whether they should have used counter-terrorism law in the Miranda case. Mr Anderson voiced concern that the legal definition of terrorism was too widely drawn (BBC online news, July 22, 2014, http://www.bbc.co.uk/news/uk-28415712). Mr Anderson's report for 2013, which refers to the Miranda case, can be seen at https://terrorismlegislationreviewer.independent.gov.uk/the-terrorism-acts-in-2013-july-2014/

Miranda appealed against the High Court ruling. In 2016 the Court of Appeal ruled that his detention at Heathrow was 'lawful' under schedule 7, because police were considering if the material he carried might be released for the purpose of terrorism. But it ruled that the 'stop power' conferred by schedule 7 was incompatible with Article 10 rights, which give some protection to the confidentiality of journalists' source material. The 'stop power' was incompatible because it was 'not subject to adequate safeguards against its arbitrary exercise', the Court said, adding that the most obvious safeguard would be 'some

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form of judicial or other independent and impartial scrutiny conducted in such a way as to protect the confidentiality in the material' (*Miranda v the Secretary of State for the Home Department and the Commissioner of the Police of the Metropolis* [2016] EWCA Civ 6)

Rights organisation Liberty, which 'intervened' in the case to make submissions criticising schedule 7, welcomed the Court's ruling on this 'incompatibility'. The Court of Appeal based its judgment on the wording of schedule 7 as it was when Miranda was held in 2013. The Government amended the wording in 2014, but Liberty has said these amendments were inadequate.

New offences and further stop and search powers
The Counter-Terrorism and Border Security Act 2019 introduced new offences connected to terrorism, inserting them into the Terrorism Act 2000, and increased the maximum sentences for existing offences.

Section 1 of the 2019 Act makes it an offence to express support for a proscribed organisation while being reckless as to whether the person to whom that expression is directed will be encouraged to support the organization, and section 2 makes it an offence to publish an image of an item of clothing, such as a uniform, or of any other item, such as a flag, in a manner or circumstances which 'arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation'. The maximum sentence for both offences is 15 years in prison and/or an unlimited fine.

Section 3 of the 2019 Act creates the offence of using the internet to view or obtain information of a kind likely to be useful to a person committing or preparing an act of terrorism, while section 4 creates the offence of entering or remaining in a designated area. Again, the maximum sentences for these offences if 15 years in prison or an unlimited fine. Both of these offences would place journalists at serious risk of prosecution – any reporter trying to find out about a terrorist organisation's philosophy by researching websites, or any correspondent covering war zones which the Home Secretary decided were designated areas would be committing offences. It was only after concerted lobbying by the NMA that the Government agreed to introduce defences if the person viewing the material, or entering the designated area, was doing so for the purposes of journalism or academic research.

Schedule 3 of the Counter-Terrorism and Border Security Bill 2019 introduced new powers for police and border officials to stop and search anyone in a port, airport or border area who is entering or leaving the UK. These powers are extremely wide-ranging – officers may exercise them without having to have any 'grounds for suspecting that a person is or has been engaged in hostile activity'. The News Media Association (NMA) has criticised these powers, and similar new powers introduced into Schedule 7 of the Terrorism Act 2000 as apparently expressly legitimising state access to confidential journalist material. In effect, police and Border officers may retain and copy all sorts of material, including journalistic material without having to pay any regard to the journalists' rights to protect their sources under Article 10 of the European Convention on Human Rights, or any other statutory protections for journalistic material. Officers have to notify the Investigatory Powers Commissioner that they have taken the material – but only after they have done so. They also have powers to copy and retain it, although these are subject to approval by the Commissioner.

Draft Codes of Practice intended for police and Border officers who will exercise the powers have also been heavily criticized as stripping away the protections for journalistic material under PACE – see McNae's 34.6. The NMA said in response to a Government consultation in early 2019 that the Draft Code to Schedule 3 of the 2019 Act effectively encouraged police and Border officers to disbelieve claims that detained individuals were journalists, and to examine and/or copy or retain some material without first

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verifying statements that they were journalistic material. The NMA has called for radical changes to the draft Codes to introduced proper protections for journalists and their materials and sources.

In a further threat, the Crime (Overseas Production Orders) Act 2019 creates a framework under which the Government can reach agreements with foreign states that the courts in those countries will execute production orders issued by British judges. But section 12 of the Act does require that when a production order is sought in relation to any journalistic material – not just confidential journalistic material – the journalist or media organisation concerned must be notified.

Anonymity for terrorism suspects

In 2011 the Government, as part of a review of counter-terrorism law, announced it would abolish the system of 'control orders' whereby, under the Prevention of Terrorism Act 2005, people suspected of involvement in terrorism but who have not been prosecuted could be restricted from – for example – travelling abroad or using phones or the internet. The Terrorism Prevention and Investigation Measures Act 2011 introduced a new system in which such suspects can be made subject to similar controls. These are imposed the Home Secretary by means of a TPIM 'notice', but are reviewed by the High Court. Part 80 of the Civil Procedure Rules (CPR) enables the court to conduct all or part of such hearings in private 'in order to secure that information is not disclosed contrary to the public interest' or for 'any other good reason.' The rules also enable the court, at the request of the Home Secretary or the suspect, to make an anonymity order preventing media reports from identifying the suspect as having been made subject to a TPIM notice. See *McNae's,* 15.10.3 for general information about the CPR and the Additional Material for chapter 14 on www.mcnaes.com about 'special advocate' and 'closed material' procedure, which can be used in TPIM hearings.

These anonymity orders usually remain in force even after the TPIM notice has been revoked or lapsed. But the anonymity has been lifted by the High Court in respect of suspects who have breached a TPIM notice by absconding, because publicity may help them to be traced. These included a suspect who in 2013 escaped surveillance by disguising himself as a woman by wearing a burka.

In 2016 Parliament was told that at the end of May only one TPIM notice was in force, and therefore only one terrorist suspect was being 'controlled' by this measure at that time.

See also *McNae's*, 36.2.4 about 'stop and search' powers under the Terrorism Act 2000 which have been used against journalists involved in routine photography and filming.

Recap of major points

- Terrorism is given a wide definition in UK law.
- It is an offence to publish a statement which 'glorifies' the commission or preparation of acts of terrorism.
- It is an offence to fail to disclose to police information gained about suspected terrorist offences.
- It is an offence to collect or make a record of information 'of a kind likely to be useful to a person committing or preparing an act of terrorism'.
- It is an offence to 'elicit' or publish information about someone who is or has been a member of Her Majesty's forces, of the UK intelligence services or a police officer, if the information 'is of a kind likely to be useful to a person committing or preparing an act of terrorism'.
- There are some limited defences to the offences listed above.
- Police powers to compel a journalist to surrender research material are stronger under counter-terrorism law than under law covering other police inquiries.

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Useful Websites

http://www.cps.gov.uk/publications/prosecution/ctd.html
Crown Prosecution Service Counter-Terrorism Division webpages

https://www.liberty-human-rights.org.uk/human-rights/countering-terrorism/overview-terrorism-legislation
Criticism by civil rights campaign group Liberty of some counter-terrorism laws

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