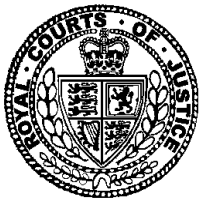

Neutral Citation Number: [2023] EWHC 2824 (Admin)

Case No: CO/1419/2023
AC-2023-LON-001228

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2023

Before :

LADY JUSTICE MACUR DBE
MR JUSTICE GARNHAM

- -

Between :

R. (on the application of LXP)	**Claimant**
- and -	
Central Criminal Court	**Defendant**
Commissioner of Police of the Metropolis	**Interested Party**

- -
- -

Mr Alex Bailin KC and Mr Ben Silverstone (instructed by **Bindmans LLP**) for the **Claimant**
Mr Neil Sheldon KC and Mr Alistair Richardson for the **Interested Party**

Hearing dates: Friday 13 October 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 10 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LADY JUSTICE MACUR DBE

Macur LJ :

Introduction

1. This case arises from the ruling made by HHJ Mark Lucraft KC, the Recorder of London, ("the judge") on 10 March 2023, by which the Commissioner of Police of the Metropolis ("MPS") obtained permission to download and search materials from the Claimant's devices seized in accordance with two warrants issued on 8 July 2022 pursuant to s 9(1) of the Official Secrets Act ("OSA") 1911. The issue it raises is one of due process in circumstances where the materials which the MPS (or any other body authorised by a search warrant) seek may be 'journalistic material'.

2. The Claimant's applications for permission to apply for judicial review and anonymity were adjourned to be listed in the Divisional Court as a rolled-up hearing on notice to the Defendant and MPS and, if granted, for the Court to proceed immediately to determine the substantive grounds. Subsequently, the Claimant has sought permission to rely upon fresh evidence, namely a statement from his solicitor, confirming that her firm would take possession of the said devices in accordance with the relief the Claimant seeks as indicated in [6] below.

3. The Defendant, the Central Criminal Court, has taken no part in the proceedings as is conventional.

4. At the outset of the rolled up hearing we granted permission 'on the papers' since it appeared to us that there was an arguable case that a ground for seeking judicial relief existed which merited a full investigation. We directed that the case proceeded under the auspices of the order previously made providing for the Claimant's anonymity pending further decision of this Court, consequential directions as to the way the Claimant is to be identified, and restriction of public access to documents in the case. The hearing took place in public.

5. Mr Bailin KC and Mr Silverstone appeared on behalf of the Claimant. Mr Sheldon KC and Mr Richardson appeared on behalf of the MPS.

Relief sought

6. The Claimant seeks a declaration, a quashing order and the return of the seized material to his solicitors who will provide an irrevocable undertaking to safeguard the material until the determination of an application for an inter partes production order pursuant to Schedule 1 paragraph 4 of the Police and Criminal Evidence Act 1984 ("PACE") , which will enable the proper resolution of the issue of whether the MPS are permitted to access journalistic material within the seized material.

7. The MPS defends the claim and seeks to uphold the judge's ruling but argues that, if the claim is successful, the matter should be remitted to the judge for determination of the second limb of the application pursuant to section 59 (5), (6) and (7) of Criminal Justice and Police Act 2001 ("CJPA"); see [18] below. In the interim, the MPS should retain the seized materials that may be "at the very centre of the offending" and involve "highly sensitive classified information".

8. The Claimant resists this suggested outcome on two bases: (i) it would be contrary to principle for the issue as to whether the MPS are permitted to access the seized material to be based on closed evidence (on which, it seems, the MPS would inevitably rely): *R (BSkyB) v Central Criminal Court* [2014] AC 885; and, (ii) there is no proper basis for concluding that, bearing in mind the Claimant's proposal in [6] above, it would immediately be appropriate to issue a warrant under Schedule 1, paragraphs 12 and 14 of PACE.

Background

9. On 8 July 2022 the MPS made an ex parte application to the judge for warrants pursuant to s 9(1) OSA 1911. The application form stated that there were reasonable grounds to suspect that offences had been committed by the Claimant under section 5 OSA 1989, by a second individual, referred to below as "X", under section 1 OSA 1989 and by a third individual, referred to below as "Y", under section 2 OSA 1989. That is, in broad terms, the application concerned disclosure of information relating to national security and intelligence, and information relating to defence.

10. The hearing was conducted in private, in open and closed session. There were no open details of the matters concerning the Claimant, X or Y. The application form stated that the application included "closed elements, the latter of which are not believed to be suitable for disclosure (see the Form of Words)".

11. The material and devices sought included (without limitation) any "[c]omputers and peripheral equipment, portable storage devices, CD ROMS, floppy discs, electronic information storage devices, audio or video tapes, video or still cameras" at the Claimant's residential and work premises.

12. The application form indicated that "[t]he police are aware of their obligations in respect of journalistic source material" but that "[n]one of the material sought falls within that protection as [the Claimant], [X] and [Y] are not journalists. If the situation arises, any such material can be identified and separated, and police will not seize that material".

13. The transcript of the 'open' session of the hearing records that DI Holmes confirmed that appropriate procedures would be in place in respect of journalistic material that was seized "collaterally". This apparently referred to information given in closed session that some materials on the devices may belong to the Claimant's partner who was a journalist.

14. The judge granted the warrants. In his reasons he referred to the "safeguards that will be in place when the warrants are executed" and to "two detailed documents" containing the '"closed' confidential information", which were 'key to understanding"' his decision to grant the warrants.

15. The warrants were executed at the Claimant's residential address and his work premises on 12 July 2022. A large quantity of electronic devices and documents belonging to the Claimant were seized. The Claimant indicated that some of the material was journalistic, or privileged parliamentary materials. The warrants executed at the home addresses and 'workplaces' of X and Y have been executed without challenge.

16. By a letter dated 25 July 2022 addressed to the MPS Directorate of Legal Services, the Claimant's present solicitors referred to correspondence between the Claimant's former solicitors and the MPS on 12 July 2022 (which we do not have) but which ultimately concluded with the request that the MPS would not examine any of the seized items pending the Claimant's instructions to make an application to judicially review the grant of the warrant. Exchanges in subsequent correspondence from the Claimant's present solicitors to the MPS, provided details of the Claimant's work as a journalist and formally objected to the seizure/examination of the material pursuant to a section 9(1) OSA 1911 warrant which did not, and could not, authorise seizure of journalistic material.

17. On 4 August 2022, the MPS informed the Claimant's solicitors that, "[i]n light of the material you have provided" the MPS would make an application under section 59(5) CJPA and "invite the Court to determine the issue of whether [the Claimant] is a freelance journalist". The course would "provide an opportunity to ventilate the issues between us, and for the Court to adjudicate on the appropriate way forward". In these circumstances the MPS asked the Claimant to confirm that he would not bring a claim for judicial review on the basis that to do so "would be premature in light of what we propose providing an alternative remedy". The Claimant's solicitor agreed to this suggestion "subject to the scope of the s 59 hearing".

18. The MPS's application was served on 11 November 2022 seeking (i) "a direction that it may proceed to examine [the Claimant]'s devices, in accordance with the warrant issued …, on the basis that he is not a journalist, and subject to the safeguards previously identified (s 59(5)(b) CJPA)"; alternatively, (ii) "[i]f the court disagrees with the MPS' position as regards whether [the Claimant] is covered by the particular protection afforded to journalists", an order "that retention and examination of the devices may continue" on the basis that "were [the Claimant]'s devices returned to him, it would immediately become appropriate to issue a warrant pursuant to Schedule 1, paragraph 12 of PACE (s 59(6)-(7) CJPA 2001)".

19. The Claimant issued no separate application but made clear his position that he opposed the MPS application on the basis that he was a journalist and that the conditions of sections 59(6)-(7) CJPA were not satisfied. Consequently, the Court should order the return of the Claimant's property.

20. By the time of the hearing the MPS conceded, at least for the sake of argument, that the Claimant was a journalist but submitted that nevertheless, the MPS could be empowered by the Court to examine the seized materials in accordance with directions made under section 59(5)(b) CJPA without the need for the retention and examination of the materials to be authorised by way of an order under section 59(6)-(7) CJPA.

21. The MPS's position at that hearing, which took place in private on 9 February 2023, and in its further written submissions dated 11 February 2023, which were filed at the conclusion of the hearing at the direction of the judge, was that the only material which the MPS wished to examine were (i) documents protected by the OSA 1989, which X and/or Y had allegedly disseminated unlawfully and passed to the Claimant or (ii) documents evidencing such alleged acquisition and onward dissemination. This material was not journalistic material within the meaning of PACE and the CJPA for two reasons: (i) the material could not be "journalistic" if it was stolen; alternatively, (ii) the Claimant had not conceded that he had received material from X and/or Y or

adduced any evidence that if so, it was with the intention that it would be used for journalistic purposes. The MPS proposed a set of directions for examination of the seized materials to guard against genuine journalistic material being examined (as indicated below in [21]).

22. The Claimant's position at the hearing and in his further submissions dated 2 March 2023 challenged the MPS contention that, as a matter of law stolen material could not be journalistic material. The evidence filed before the Court and the concession made by the MPS gave rise to an overwhelming inference that any material obtained by the Claimant was acquired for journalistic purposes. The MPS, upon whom the evidential and legal burden lay, failed to establish on the evidence that any material they had seized was not 'journalistic'. The Claimant had neither confirmed nor denied the factual premise of the OSA investigation; he was restricted in the details which he could provide of his journalistic work because of the need to protect the identity of his journalistic sources and, since he is under police investigation in respect of an alleged/prospective offence under section 5 OSA 1989, the need to avoid self-incrimination.

23. Further, the MPS was required to return the seized material unless it could satisfy the conditions under sections 59(6)-(7) CJPA since the MPS implicitly accepted that the seized material included journalistic material. Section 55(1) CJPA required a person in possession of material seized under a warrant issued other than pursuant to Schedule 1 PACE to return the material "as soon as practicable after the seizure" if the material "has any excluded material or any special procedure material comprised in it" unless the conditions in section 55(2)-(3) CJPA or s 56 CJPA are satisfied. They were not. There was no proper basis for concluding that if the materials were returned to the Claimant, it would immediately become appropriate to issue a warrant under Sch 1 PACE. The MPS proposals for the examination of the materials were unworkable and contrary to principle.

24. The judge's ruling was handed down in private on 10 March 2023.

The Ruling

25. The judge referred to the grant of the warrants on 8 July 2022 and their execution before turning to the MPS application pursuant to section 59(5) or sections 59(6) and (7) of CJPA. He identified his approach from the outset to be "firstly consider the competing submissions under s.59(5) and only move on to consider the issues under s.59(6) should I determine that s.59(5) is not applicable.". He noted the evidence of DCI Gosling, Senior Investigating Officer [SIO] in the investigation at the time of the application for the warrants and that it is "accepted now that there was [journalistic] material at the premises. The process is set out [in the application] as to how material such (sic) would be addressed and that was not followed due to what took place subsequently. In effect the correspondence with solicitors that meant that did not happen."

26. The judge encapsulated the submissions of the MPS and the Claimant, identified what he regarded to be the relevant statutory provisions in CJPA and PACE and addressed various of the authorities cited. His determination is found in [59] to [64] of the ruling:

> "59. As set out above, the factual situation and the issue the Court in Northern Ireland [*Fine Point Films* [2020] NIQB 55.]

was quite different to that here. The submissions then turn back to the decision in *Miranda* as set out above [see paragraph 36 above and paragraph 37 where paragraph 64 of the judgment of Laws LJ is set out. [*R. (Miranda) v. Secretary of State for the Home Department and another* [2014] 1 WLR 3140.] In my judgment what is said by Laws LJ at paragraphs 64 and 72 is particularly important to the issue here and to the applicability of the approach the MPS invite this Court to take in making directions under s.59(5). There is in my judgement a clear distinction made between true journalistic material and material that has been stolen.

60. The supplemental submissions then go on to deal with the issue that the MPS is not seeking access to journalistic material. It is submitted that the MPS has not established this on the evidence. These additional submissions then develop a theory based on speculation as to what the OSA material might comprise. I am conscious that these additional points have not been the subject of any response by the MPS. The purpose of setting a timetable for additional submissions was not to provide another opportunity to rehearse all the points afresh, but to address the issues that arose in the hearing. In my judgment many of these additional submissions go to issues that are outside the scope of the determination I must make. At this stage the material seized from [LXP] has yet to be reviewed. It may be that there is no material found that is, to use the phrase here, stolen, or indeed that there is limited journalistic material. In my judgment it would not be right to seek to read into the statement of DI Holmes or the evidence of DCI Gosling what is set out in the supplemental submissions.

61. The third set of submissions on s.59(5) in the supplemental document go to the issue of whether this Court can properly make directions under s.59(5) for the examination of the seized material without the need for the MPS to seek authorisation for the retention of the material under s.59(6). It is submitted that this proposition is incorrect.

62. Reliance is placed on the decision of the High Court in *R (El-Kurd) v. (1) Winchester Crown Court, (2) SOCA* [2011] EWHC 1853 (Admin) [Tab 10]. As Mr Sheldon submits, the facts of that case differ markedly from those here and raise issues around the initial granting of a warrant that was later noted to have defects after it had been issued and executed. Reference is made in particular to paragraphs 42, 59 and 65 of the judgment.

> However, it seems to me that the issues being considered there and the issues here are very different. Here I am dealing with a lawful warrant and material lawfully seized and how it should be examined whereas in *El-Kurd* the High Court was considering the situation where, as is clear form (*sic*) paragraphs 31 and 32, there had been an unlawful warrant and the issue was one of the retention of material obtained in such circumstances.
>
> 63. The supplemental submissions also make points as to the proposed directions. It is submitted that they are unworkable. These points are set out at paragraph 25 to 28. I have considered each of the points raised about the draft directions with care. It seems to me on reading the proposed directions they do provide the appropriate safeguards to cater for items that are not within the scope of this investigation and that they also cater for any true journalistic material that may be found.
>
> Conclusion.
>
> 64. For the reasons set out above, I accede to the application for directions under s.59(5). In those circumstances I do not need to consider the question of s.59(6) or the competing submissions on that provision."

27. The judge thereafter directed that:

(a) All material on the seized devices will be downloaded.

(b) The Claimant will be given the opportunity to identify within 14 days, if he wishes:

(i) the nature and location of any material subject to legal professional privilege;

(ii) the nature and location of any special procedure material or excluded material, outside the scope of this application;

(iii) search terms or keywords to facilitate the identification of that material.

(c) The MPS will identify a set of search parameters (including keywords and selectors) to examine the devices for material belonging to His Majesty's Government which has been unlawfully disclosed, including evidence of any onward disclosure, and any communication which provides evidence of that disclosure, by either X or Y. Those search terms will be applied, and other material, not amenable to search terms, such as PDFs and photographs will be identified.

(d) After 14 days from the date of the order have elapsed, the MPS may begin its examination of the Claimant's devices by the application of the search parameters it has identified.

(e) The MPS will retain independent counsel to review the product of its searches, and separate out any material, outside the scope of this application, that falls within legal professional privilege, special procedure material or excluded material. The instructions to independent counsel will incorporate any information provided by the Claimant pursuant to (b) above, along with his witness statement in these proceedings which contains a detailed account of his journalistic activity.

(f) Any material separated out by independent counsel pursuant to (e) above will be segregated and not accessed by the MPS. The MPS will return any such downloaded material to the Claimant or (at his election) ensure it is confidentially destroyed.

(g) Any other material relevant (sic) that does not fall to be returned/destroyed will be passed to the investigation team.

(h) Save to the extent set out above, the downloaded material, and the devices themselves will not be examined, or otherwise accessed by the MPS. Downloaded material which is identified by the search parameters (per (c) above), and the devices themselves, will not be accessed or otherwise examined, and will be held securely to ensure that no such access occurs.

28. The commencement of the directions was stayed for a period of 28 days to enable the Claimant to consider whether to mount a challenge to the ruling. The judge confirmed, upon the Claimant's inquiry, that "in coming to my conclusions I had not taken into account any of the 'closed' material."

29. The MPS have not examined the seized materials, pending the Court's decision in these judicial review proceedings.

The Application for Judicial Review

30. The Claim Form and accompanying Statement of Facts and Grounds is dated 19 April 2023. It advances five separate grounds of claim, namely:

GROUND 1: The judge misdirected himself in law and adopted an erroneous statutory interpretation as to the meaning of "journalistic material" in PACE and the CJPA in that he ruled that 'stolen' material could not be 'journalistic' material.

GROUND 2: The judge misdirected himself in law and adopted an erroneous statutory interpretation by his failure to determine whether the material sought by the MPS was journalistic.

GROUND 3: The judge misdirected himself in law and adopted an erroneous statutory interpretation in concluding that even if the material was not journalistic, directions for its examination could properly be made without the need for the conditions in s 59(6)-(7) CJPA to be satisfied.

GROUND 4: The judge's ruling violated the Claimant's rights under Article 10 ECHR and did not comply with s 10 Contempt of Court Act 1981.

GROUND 5 : The directions made by the judge were ultra vires s 59 CJPA, contrary to the statutory purpose and/or irrational.

Response of the Interested Party in summary

31. The MPS submit that the original warrants pursuant to which the devices were seized were lawful. It was always anticipated that there may be journalistic material on the devices, because of the Claimant's partner's employment as a journalist, and a mechanism was identified for protecting such material. The Claimant subsequently provided evidence that he engaged in some degree of journalistic activity himself. However, the material sought by the MPS was material stolen by two Crown servants, and evidence of its theft. That material was not "journalistic material", for the reasons correctly identified by the judge. Those reasons cannot be characterised as irrational. The directions the judge gave as to how analysis of the devices be approached, and any journalistic material identified and separated, were reasonable and appropriate.

Analysis

32. A distillation of the written skeleton arguments and the oral submissions made to us, reveals a considerable expanse of common ground. That is:

    (a) There is no challenge to the legitimacy of the warrant granted pursuant to section 9(1) OSA or the manner of its execution.

    (b) The importance and necessity to observe the protection afforded to 'journalistic material' is acknowledged.

    (c) The MPS accept that the Claimant has worked/does work as a journalist for the purpose of the application.

    (d) The application to the appropriate judicial authority for further directions pursuant to Part 2 of CJPA was necessary to determine the respective claims of the Claimant and the MPS for return or retention/inspection respectively. (Contrary to the thrust of the MPS submissions, I do not see that the identity of the applicant qualifies the parameters of the hearing; the arguments made for and against the return of the devices were two sides of the same coin.)

    (e) The MPS concede that material which has been unlawfully disseminated in contravention of the OSA 1989, or which provides evidence of its disclosure, may nevertheless be "journalistic material".

    (f) The Claimant concedes that "journalistic material" is not immune from compulsory order for seizure / disclosure in favour of the police subject to due process and consideration of all relevant Article 10 rights and freedoms.

33. Therefore, the actual issues seem to me to be:

    (a) Do the provisions of the statutory scheme in Part 2 of CJPA, more particularly sections 56 and 59(5), obviate the need for the appropriate judicial authority to conduct any balancing exercise of ECHR Article 10 considerations and section 10 Contempt of Court Act 1981 in order to give directions for the seizure, retention and inspection of seized materials that may contain journalistic

materials provided there are reasonable grounds to believe that they are or contain materials obtained as a result of the commission of an indictable offence, or are evidence of the commission of the same?

(b) If so, and in any event, are the directions made ultra vires as contrary to the statutory purpose of s 59 CJPA and/or irrational?

The definition of journalistic material, the statutory scheme of Part 2 of the CJPA and the definition of 'excluded material' are relevant to the application.

34. Section 13 PACE defines journalistic material as material acquired or created for the purposes of journalism in the possession of a person who acquired or created it for the purposes of journalism. By section 11, journalistic material is "excluded material" if it is held in subject to such an undertaking, restriction or obligation of confidence; and it has been continuously held (by one or more persons) subject to such an undertaking, restriction or obligation since it was first acquired or created for the purposes of journalism.

35. Section 51 of CJPA provides for "[a]dditional powers of seizure from the person" of anything if there are reasonable grounds to believe that it may contain something for which there is authorisation to search in circumstances where it is not practicable to separate or determine relevance of the article on the premises at that time. This includes property which is "comprised in something else that the authorised person has (apart from this subsection) no power to seize"; see s 51(2)(a).

36. In the event of materials being seized under a power conferred by section 50 or 51 of CJPA, section 53 requires an initial examination of the property to be carried out as soon as reasonably practicable to determine how much of the property falls within the auspices of the search warrant or, for the purposes of this application, is otherwise authorised by section 56.

37. Section 55 imposes an obligation to return excluded material unless its retention is authorised by section 56 or is comprised within and inseparable from other relevant non excluded material.

38. Section 56 authorises the retention of property seized in an authorised search if there are reasonable grounds for believing that it is property obtained in consequence of the commission of an offence or evidence in relation to any offence; and that it is necessary for it to be retained to prevent its being concealed, lost, damaged, altered or destroyed.

39. Section 59(2) makes provision for any person with a relevant interest in the seized property to make an application to the appropriate judicial authority (the Crown Court) for the return of the whole or a part of the seized property, on the basis that there was no power to make the seizure or that it contains any excluded material which is not comprised in property the retention of which is authorised by section 56.

40. However, section 59(6) and (7) makes provision for an application to be made to authorise retention of property on the grounds that if it were returned it would immediately become appropriate to issue, on the application of the person who is in possession of the property a warrant in pursuance of which, or of the exercise of which,

it would be lawful to seize the property; or to make an order under paragraph 4 of Schedule 1 of PACE. (Emphasis added)

41. Section 9 and Schedule 1, paragraph 3 PACE provide for a constable to obtain access to 'excluded material' for the purpose of a criminal investigation if there are reasonable grounds for believing that there is material which consists of or includes excluded material and but for section 9(2) (which repeals previous statutory provisions in relation inter alia to authorisation of searches for excluded material) a search for that material could have been authorised by the issue of a warrant under other enactments; and the issue of such a warrant would have been appropriate.

42. Schedule 1, paragraph 4 PACE relates to a production order and is directed to the person in possession of the material directing them to produce it to a constable for him to take away or give constable access to it, not later than the end of the period of seven days from the date of the order or the end of such longer period as the order may specify. Paragraph 7 requires an application for an order under paragraph 4 to be made inter partes.

43. Schedule 1, paragraphs 12 – 14 relate to the issue of a search warrant if the judge is satisfied that service of notice of an application for an order under paragraph 4 above may seriously prejudice the investigation. Such an application may include 'closed material'; see *R (Haralambous) v Crown Ct at St Albans* [2018] AC 236.

44. Section 59(5) enables the appropriate judicial authority on (inter alia) a section 59 application under subsection (2) and an application made by the person for the time being having possession of anything in consequence of its seizure under a relevant power of seizure to give such directions as the authority thinks fit as to the examination, retention, separation or return of the whole or any part of the seized property.

Discussion

45. The judge's finding in [59] of the ruling, which distinguished "between true journalistic material and material that has been stolen", is seemingly generic and made absent any consideration of the arguments advanced by the Claimant regarding journalistic material and consequent protections, as is evident in [64] therein. With respect to the learned judge, it is a bold finding which is dependent upon a qualification of the definition of journalistic material provided by section 13 PACE, by insertion of the adjective 'true'. What is more, stating there to be a "clear distinction" flies in the face of a line of binding authorities in which it has been said variously that: "There cannot be …any "unequivocal, bright line test""; *BBC v Sugar (No 2)* [2012] 1WLR 439 @ [84], and "the point is not straightforward, given the proposition (which I have accepted) that there are cases where the law should protect stolen journalistic material"; see *R (Miranda) v Home Secretary (DC)* [2014] 1 WLR 3140 @ [49] and [64]. However, I note, he was invited to this position by the MPS submissions.

46. This was a significant finding because it led the judge to conclude that he had no need to address the Claimant's submissions that he should adjudicate upon whether the material, or any of it, held on the seized devices did comprise journalistic material, and if so to determine where the balance of competing rights and interests under Article 10 lay in terms of retention or return. Equally he did not consider it necessary to embark upon determination of the second limb of the MPS application.

47. The MPS now submit that the finding was irrelevant to the exercise of the judge's discretion pursuant to sections 56 and 59(5) CJPA; alternatively, whilst acknowledging the Claimant's privilege against self- incrimination and his need to protect his journalistic sources, that in the absence of any evidence from the Claimant, the judge was entitled to draw an adverse inference that any unlawfully acquired material which may be found on the devices is not 'journalistic'. To countenance the alternative would be to encourage spurious and easily made claims of 'journalistic material' to conceal evidence of the 'plainest turpitude'. Consequently, the MPS aver that the provisions of section 59(5) are free standing and not interrelated with sections 59(6) and (7).

48. The judge evidently did consider that his finding in [59] of the ruling absolved him of the need for further inquiry pursuant to s59(6) and (7) or for a balance to be struck "between two aspects of the public interest". Reading [59] to [64] of the ruling together, I am satisfied that the judge would not have reached that conclusion but for the finding he made effectively that 'stolen' material could not be regarded as "true" journalistic material. It follows that I do not accept the MPS submission that the fact and nature of the finding was superfluous.

49. Of course, the protection of journalistic sources and freedom of the press is not paramount. "The journalist enjoys no heightened protection for his own sake, but only for the sake of his readers or his audience. If there is a balance to be struck, it is between two aspects of the public interest"; see [46] in *Miranda*. The fact that materials may have been unlawfully acquired may weigh heavily in the balance of Article 10 rights.

50. The Claimant cites several domestic and European authorities in this regard. I refer only to three: *Tillack v Belgium* (2012) 55 EHRR 25 and *Financial Times v UK* [2010] EMLR 21; and *Re Fine Point Films* [2021] NI 387.

51. In *Tillack* the Court stressed 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, but is part and parcel of the right to information, to be treated with the utmost caution". In *Financial Times v UK* [2010] EMLR 21, the ECtHR recognised, at [63], that "[whilst] it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage where it was overridden in circumstances where a source was clearly acting in bad faith with a harmful purpose and disclosed intentionally falsified information, courts should be slow to assume, in the absence of compelling evidence, that these factors are present in any particular case. In any event, given the multiple interests in play, the Court emphasises that the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise required under art.10(2)."

52. It is unnecessary to attempt a different formulation of the principle which is well understood. There is an inevitable tension in these situations between the Claimant, or any other journalist, exercising his or her right not to incriminate him or herself, and yet seeking to avail themselves of the protection of Art 10 ECHR. The court considering the issue must, consistent with its obligations under Art 10 and at common law, weigh each of those important entitlements in the balance in the context of the other equally important public interests in Art 10 (2); see *Fine Point Films* @ [43].

53. I do not agree that the provisions of Part 2 of CJPA supersede this jurisprudence, or that this is a consequence of the Claimant "not challenging the warrant". Further, I agree with the Claimant, that sections 56 and 59(5)(b) are not to be divorced from the provisions of sections 59(6) and (7), which refer to the provisions of PACE Schedule 1; see *R. (on the application of El-Kurd) v Winchester Crown Court* [2011] EWHC 1853 (Admin) at [42], [46] and [59]. The judge below was mistaken to reject the principle as being dependent upon the facts.

54. Paragraph [65] of *El-Kurd* determined that the:

> "judicial discretion built into the new scheme provided for by Section 59(6) of the 2001 Act provides a safeguard against abuse on the part of the police or other agencies or the watering down of the high importance attached in the …the need for scrupulous care and attention in the drawing and execution of search warrants. The Claimant is in my view right to point to the undesirability of the police or other agencies regarding the new power to apply for the retention of unlawfully seized property as enabling them to adopt a more lax approach to complying with the strict requirements imposed in relation to the drawing up and execution of search warrants…"

55. The Claimant does not suggest that the MPS acted in bad faith in applying for a warrant under section 9 OSA 1911 rather than section 9 and Schedule 1 of PACE, but the principle to be derived from *El-Kurd* is equally applicable, and readily extends to judicial monitoring of applications to lift the veil of journalistic protections.

56. See also *R (BSkyB Ltd) v Central Criminal Court* at [29] in which Lord Toulson said:

> "Compulsory disclosure of journalistic material is a highly sensitive and potentially difficult area. It is likely to involve questions of the journalist's substantive rights. Parliament has recognised this by establishing the special, indeed unique procedure under section 9 and Schedule 1 for resolving such questions."

57. The judge recognised that the first question to be resolved is whether the devices contain any relevant material sought by the MPS. However, he failed to acknowledge that the second step must be to determine whether it is 'journalistic material', and if so, whether it should be immune from inspection.

58. The first issue may be easily resolved by the application of search terms as suggested by the directions the judge made. However, if the stable door is opened by the police conducting the search, the horse named 'journalistic protection' has already bolted, before the judge has considered where the balance of public interest lies. I do not agree with the MPS that subsequent judicial review proceedings, or an abuse of process application, or an application to exclude evidence from trial proceedings pursuant to s 78 PACE afford adequate relief to a claimant journalist in these circumstances.

59. Whilst I do not agree that the instruction of an independent counsel is ultra vires or unreasonable per se, ultimately, I agree with the Claimant that the directions made by

the judge below failed to correctly identify his/her role. They were formulated upon the judge's erroneous finding that stolen material was distinct from journalistic material and therefore is not 'excluded' material. The directions made permit MPS to interrogate the devices for 'unlawfully' obtained materials from X or Y before 'independent counsel' is engaged. I agree with the Claimant that the directions as framed do not achieve the purpose for which they were made; see [60] of the ruling above.

60. Consequently, I would find for the Claimant on all grounds and would quash the order made.

Relief

61. For the reasons above I do not accept the MPS submission that it is right for us to refuse to grant the relief sought since it is "highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred": section 31(2A) Senior Courts Act 1981 ("SCA").

62. Section 31(5)(a), (b) and (5A) of SCA provides for this court to remit the matter to the court which made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court, or to substitute its own decision for the decision in question if, but for the error of law, there would have been only one decision which the court could have reached.

63. Unlike the situation in *Miranda*, and other authorities to which we have been referred, neither the judge below, nor we, are aware of the subject matter of the material that is on the devices the MPS seek to examine.

64. The Claimant maintains that he is unable to admit or deny the existence of certain information relating to the contents of his devices, for to do otherwise undermines his privilege against self-incrimination of a criminal offence and/or, undermines the protection of journalistic sources, consistently and unequivocally recognised by high legal authority. Nevertheless, he submits that the evidence adduced in his witness statement dated 23 December 2022, relating to his work as a journalist gives rise to a "compelling inference that any relevant material obtained by him was acquired for a journalistic purpose" specifically in the context of the oral evidence of DCI Gosling, which suggested that the subject of the MPS investigation involved disclosures which ended up in a "newspaper article" and, the evidence of DI Holmes who referred in a witness statement to "another journalistic story on a national security topic" which was the product of interactions between the Claimant and Y, and another national security related story implied to be the result of a disclosure by X.

65. I do not agree with the description of DCI Gosling's evidence in this regard. The transcript of evidence shows him to be exceedingly guarded in his response to cross examination. When asked whether the disclosures he was concerned with were "disclosures that ultimately appeared in newspaper articles?" He said: "I think I need to be careful about where I get drawn on this. I think I'd remain[?] as per our warrant application that we have reasonable grounds to suspect an offence contrary to section 5, and clearly that offence requires and/or a disclosure (sic)." Whilst immediately thereafter, he agreed that "the onward disclosures that are under investigation in this case, are onward disclosures that end up in some form of newspaper article", I do not see that this undermines the evidence he gave previously. That evidence was given in

response to the supposed 'repetition' of a follow-on question, which question was not identical to that which had gone before.

66. Equally, I reject the Claimant's attempted categorisation of the contents of DI Holmes' witness statement to be to the similar stated effect. The reported comments of Y at the time of execution of the warrant, and X in his diary entries, do not establish what material is (or is not) contained on the Claimant's devices, nor do they establish the status of that material as being journalistic or not.

67. Whether material is "journalistic" is not determined by his own self-assessment. However, as I indicate in [52] above, the court considering the extant issue must, consistent with its obligations under Article 10 and at common law, strain to find a means of eliminating or, where that is not possible, reducing the pressure on each of a journalist's important entitlements of the right not to incriminate him or herself, and their right to avail themselves of the protection of Article 10 ECHR. That may necessitate finding novel solutions to meet the demands of the case. I frame the directions I propose this Court shall make pursuant to section 55(5) CJPA accordingly.

68. In my view, but for the error of law described above, the only decision that the Court could have reached was to give directions for the inspection of the materials by independent counsel, prior to considering the MPS application. Subject to agreement by my Lord, Garnham J, I would substitute a decision that gave directions to that effect, as indicated in [73] below. These directions do not limit the MPS from making appropriate representations in the balancing exercise to be conducted as to why, in the circumstances of this case as may be evidenced in closed session, unlawfully disclosed materials belonging to His Majesty's Government that may be identified in accordance with [73] (ii) below should not be privileged from inspection.

69. I summarise the provisions of section 59(5), (6) and (7) above. The judge did not consider it necessary to address sections 59(6) and (7). It is unsurprising, in those circumstances, that he made no finding as to the need to preserve the integrity of the material prior to the making of a production order under Schedule 1, paragraph 4, alternatively the issue of a warrant under Schedule 1, paragraphs (12) and (14) of PACE.

70. The Claimant submits that he is now aware of the issue of the warrant and there can be no question that the investigation would be prejudiced by an application for a Schedule 1, paragraph 4 PACE production order. Further, the position set out in the fresh evidence on which he seeks to rely (see [2] and [6] above), ensures the integrity of the material.

71. The MPS submit that the judge's grant of the section 9 OSA 1911 warrant on an ex parte application, and specifically on the basis of "closed confidential information contained in two detailed documents … of fundamental importance in supporting the application that is made …", means that there is good reason/evidence to suspect that any other measure would prejudice the investigation, and otherwise to stress the security risk involved in releasing the devices to the Claimant's solicitor.

72. We have not been provided with any of the 'closed' material that was before the judge but know that it relates to highly sensitive information protected by OSA. In the circumstances, and in view of the directions I propose, I am satisfied that it is not

unreasonable to give directions pursuant to Section 59(5) for the retention of the devices by the MPS to the order of the Court as indicated below.

73. The directions are that:

(i) All material on the seized devices shall be downloaded. The downloaded and seized hard copy material will not be accessed or otherwise examined by the MPS and will be held securely to ensure that no such access occurs.

(ii) MPS to identify within 14 days a set of search parameters (including keywords and selectors) in order to examine the devices for material belonging to His Majesty's Government which has been 'unlawfully' disclosed, including evidence of any onward disclosure, and any communication which provides evidence of that disclosure, by either X or Y and identify other material, not amenable to search terms, such as PDFs and photographs that may be relevant to their investigation.

(iii) MPS to instruct independent counsel ("IC") to examine the Claimant's devices by the application of the search parameters so identified.

(iv) IC shall prepare a schedule, identifying relevant material by description and shall serve the schedule upon the Claimant.

(v) The Claimant, if he so chooses, is to identify those 'materials' which he claims to be 'journalistic' or should otherwise be excluded from disclosure to the MPS and why, within 7 days thereafter.

(vi) Thereafter the schedule and materials identified in the examination by IC and the Claimant's representations, if any, be served on the Court only.

(vii) The application for inspection by MPS be re-listed before the judge to determine (a) the 'gist' of any relevant closed materials upon which the MPS will rely which is to be provided to the Claimant; (b) whether there is 'stolen' material which falls within the definition of journalistic material; and (c) to conduct the Art 10 balancing exercise on whether to permit inspection by the MPS of journalistic materials.

Anonymity

74. I would continue the order providing for the Claimant's anonymity pro tem the final order.

Garnham J:

75. I agree.