

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, but some recent law recognises the legitimacy of such journalism.

40.1 Journalists investigating terrorism

The increased threat of terrorism in the UK has prompted Parliament to extend the range of specific 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 research into why people become terrorists or how terrorists operate, or into the effectiveness of counter-terrorism policy.

Counter-terrorism laws are potentially problematic for journalists because the prohibitions in them are widely-drawn and some contain no specific defence for journalism. Protection for such journalism can therefore be highly dependent on how judges interpret such law, and on decisions by law enforcement and prosecuting agencies on what leeway should be given to journalists. The Director of Public Prosecutions has issued guidance to prosecutors on what factors should be taken into account when they decide whether to prosecute a journalist for any crime suspected to have occurred in journalism work – see 34.2 in *McNae's*. But in many circumstances a journalist investigating terrorism, who hopes to rely on the investigative work being deemed by police or the Crown Prosecution Service to be 'in the public interest', cannot be certain that the guidance will mean he or she will not be prosecuted for breach of counter-terrorism law.

A journalist investigating terrorism cannot be certain either that the police will accept that the identities of his or her confidential sources should remain a secret. For example, if a journalist wants to investigate why some UK citizens joined jihadi, Islamist groups in Syria, she or he 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 honoured and practical steps taken to protect the source's identity— see 33.1, 33.2.2, and 33.9 in *McNae's*.

As explained below, the 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 if the 'production order' is disobeyed. But the journalism is likely to be in the public interest, to explore how jihadi groups recruit or why they seem attractive, and 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 are 'in the view of the courts' deemed to be terrorists, because of how the UK law defines terrorism, and so those who return to the UK and agree to be interviewed by a journalist will want 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 1.3 and 33.2 in *McNae's*). 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). ”

It is possible – as outlined in ch. 33 of *McNae's* – that a journalist could be put under surveillance, his/her communications could be intercepted, or his/her communications data and devices accessed by police seeking to discover who the source is.

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.

Recent convictions of terrorists are listed online by the Crown Prosecution Service – see Useful Websites, below.

40.2 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, 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.

Section 2(2) says that to meet this definition, the use or threat of 'action' must involve serious violence against a person anywhere in the world, or serious damage to property anywhere in the world, 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 a section of the public; or be designed to seriously interfere with or seriously to disrupt an electronic system, but adds that the definition is met too if such use or threat of action involves the use of firearms or explosives even if there is no design to influence a government or international government organisation or to intimidate.

40.2.1 Proscribed groups

Section 3 of the Act makes it illegal – punishable by a maximum jail term of 10 years and/or a fine – to be a member or to profess to be a member of a 'proscribed group' – that is, one deemed to be 'concerned in terrorism'. This section 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 2000 Act is the latest law to proscribe groups, in a list which can be updated by **statutory instruments**. This list, as in force in May 2022, proscribes more than 80 groups from around the world, including ISIS (Islamic State of Iraq and the Levant), Al Qa'ida, Basque group ETA and paramilitary groups with roots in Northern Ireland – for example, the IRA and UDA – which have been proscribed for decades.

In 2016 the UK neo-Nazi group National Action, established in 2013 and which had branches across the country, became the first extreme right-wing group to be proscribed. The Government said that the group's online propaganda frequently featured extremely violent imagery and language, and that it had promoted and encouraged acts of terrorism after Thomas Mair murdered Labour MP Jo Cox (*Home Office press release*, 16 December 2016).

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.

40.2.2 'Support' offences

Under section 12 of the Terrorism Act 2000 there are various offences banning support for a proscribed organisation. For example, it is illegal 'to express an opinion or belief that is supportive of a proscribed organisation' while being reckless

as to whether the person to whom that expression is directed will be encouraged to support the organisation’.

Under section 13 it is an offence if a person publishes an image of an item of clothing, such as a uniform, or of any other item, such as a flag, in such a way or in such circumstances ‘as to arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation’.

Publication of such an image will not be an offence if done within coverage which neutrally reports or includes condemnation of the proscribed group’s aims or activity, because such material cannot ‘arouse reasonable suspicion’ that the publisher supports the proscribed group. The Government’s Explanatory Notes for this section (created by an amendment to the Act in 2019) say this offence would, for example, ‘cover a person uploading to social media a photograph of himself or herself, taken in his bedroom, which includes in the background an ISIS flag’.

Other demonstrations of support for a proscribed group – for example, wearing its uniform in a public place or arranging a meeting to support it - were already illegal under this part of the Act.

The maximum penalty for any of the ‘support’ offences is 10 years jail and/or a fine.

40.3 Glorification of terrorism

Section 1 of the Terrorism Act 2006 prohibits encouragement of terrorism, including indirect encouragement through ‘glorification’.

For example, 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 a reasonable person (anywhere in the world) as an encouragement or other inducement for people 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 15 years or by a fine or both.

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 posts such glorification on it. But section 3 of the Act means that the defence would not apply if the police gave a website publisher notice that a statement encouraging terrorism was being published on the site and the publisher then failed to remove it, without reasonable excuse, after more than two working days.

40.4 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 up to 10 years in prison, or a 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 in this section. A reporter who discovers information about terrorism by, for example, interviewing a terrorist leader but who fails to disclose it quickly to police may be 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, with a ‘reasonable excuse’ defence for non-compliance.

Section 39 of the Act makes it a crime to disclose anything which is 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 due 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, or had a ‘reasonable excuse’ for the disclosure or interference.

40.5 Viewing and collecting information, including downloading it

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'.

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*, 26 August 2009, 19 September 2011; *BBC News online*, 14 September 2011).

Section 58 also says that a person commits an offence if they view, or otherwise access, by means of the internet a document or record containing such information. The section makes clear that downloading such material is to collect or make a record of it, and therefore an offence. The maximum jail term for any such offence is 15 years. There is a defence if the person accused of a section 58 offence can prove that he/she has 'a reasonable excuse' for what he/she did.

There was concern in the news media that a journalist in the UK researching terrorist manuals or other terrorist material available on the internet could conceivably be prosecuted under section 58 for viewing, downloading or having a download of such information. In response to lobbying by the News Media Association, in 2019 the Government amended section 58, so that it now specifically states that if the purpose of the 'collecting' or making a record of, or of the possessing or viewing of such material was for 'carrying out work as a journalist' or 'academic research', that is a 'reasonable excuse'.

Someone charged with such an offence who was not at the relevant time carrying out work as a journalist or academic research has to persuade a jury that nevertheless a 'reasonable excuse' exists.

Case study

In 2017 student Joshua Walker was cleared by a jury at Birmingham Crown court of illegally possessing terrorist information in the form of a partial copy of the 'Anarchist Cookbook' manual which contained instructions on how to make explosives, hand grenades, pipe bombs and detonators. Walker, 27, of

Conduit Road, Bristol went to Syria in 2016 where, he told the court, he helped a Kurdish militia group fight the Islamic State terrorist movement. He was detained by police at Gatwick Airport on his return to the UK later that year. The manual copy was discovered under his bed when his bedsit was searched during that questioning. Mr Walker said when studying at Aberystwyth University he had printed it off the internet for a strategy war-gaming session in a university club, and described it as a 'rulebook' used to 'add a little flavour' to that role-playing exercise which featured fictional conflict between terrorists and counter-terrorism forces. He said he had forgotten about the Cookbook, believing it had been burned at a beach party with other material used in the game. Prosecutors alleged Mr Walker had 'no reasonable excuse' for having the manual. The jury took under three hours to acquit him. His lawyer condemned the decision to prosecute him and said the Cookbook is 'freely available' online and that well-known internet retailers sold it (*BBC News online*, 24, 25 and 26 October 2017).

It should be noted that in other cases, involving other circumstances, people who had a copy of the Cookbook were convicted under section 58.

40.6 The eliciting offences

Section 58A of the 2000 Act 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, if the information '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 and/or a fine. Anyone prosecuted will have a defence if he/she can prove there is a 'reasonable excuse' for his/her actions.

Santha Rasaiah, when head of what was then the Newspaper Society's political and regulatory affairs department, expressed concern that such an 'eliciting' offence is wide enough to potentially catch journalists in a huge number of everyday situations in news-gathering. There is no specific defence in the section for journalism. However, when this book went to press, there was no known case of a journalist being prosecuted for the offence.

40.7 'Designated areas'

Reporters working abroad should know that it is illegal for a UK national or UK resident to enter or remain 'in a designated area'. This offence is in section 58B of the 2000 Act. The Government's aims in creating this offence included deterring UK citizens from travelling to foreign war zones to join terrorist groups, and being able to punish them if they do and are caught. The Home Secretary has the power to 'designate' such overseas areas.

There is a defence in section 58B for anyone who has a ‘reasonable excuse’ to enter or remain in such an area. The section specifies some such excuses as being ‘reasonable’, including that the person was providing humanitarian aid, working for the United Nations or attending a family funeral. It was only after concerted lobbying by the News Media Association, which represents media companies, that the Government specified in this law that one of the ‘reasonable excuses’ is that the person was ‘entering or remaining in’ such an area ‘to carry out work as a journalist’. This should protect foreign correspondents being prosecuted for the offence when they return to the UK from such areas. The maximum penalty for anyone convicted of the offence is 10 years in jail and/or a fine.

40.8 Police powers to seize or require surrender of 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 or to require them to ‘produce’ it (that is, surrender it) to police. These powers are re-enactments or successors of parts of the Prevention of Terrorism (Temporary Provisions) Act 1989.

In a range of cases over recent decades, media organisations or individual journalists have in court hearings resisted police use of such powers, doing so to protect the identity of confidential sources. For context about this ethical position, see 33.1 in *McNae’s*.

Case study

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, made under the 1989 Act, which required 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 in the 2000 Act empowers a **circuit judge** (or in Northern Ireland a district 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). The 2000 Act, in the investigation of terrorism, gives police greater power to gain access to journalists’ research and contacts material than exists in PACE. See 33.6 in *McNae’s* for explanation of PACE, including of the terms ‘excluded’ and ‘special procedure’.

Under the terms of Schedule 5, 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 should have access to it. These two 'access conditions' create a threshold of justification for compelling disclosure which is lower in several respects than that in PACE as regards 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 ruled in *Ex p Salinger* ([1993] QB 564) that the police must give evidence on oath to the judge when applying for the order, and if it is granted must quickly give the journalist written information about the grounds.

Case study

In March 2022 the Recorder of London, Judge Mark Lucraft QC ruled that journalist and former MP Chris Mullin did not have to surrender to West Midlands police the unredacted versions of his research notes about the Birmingham pub bombings which in 1974 murdered 21 people and injured more than 220. Police say that years later the IRA claimed responsibility for the bombings. Police have recently again re-opened investigations into those murders. Mr Mullin's research, much of it published in a book in 1986, helped overturn the wrongful convictions of the 'Birmingham Six' for the murders. Those men were innocent but spent 16 years in jail after being found guilty in 1975 of the bombings. During his research, Mr Mullin spoke to former IRA activists. Two men told him of their role in the bombings, after he promised not to reveal their identities. He provided redacted versions of his notes to the police, but argued he should not be required to identify his confidential sources, who he said included 'innocent intermediaries'. Applying under schedule 5 of the Terrorism Act 2000 for a production order to require Mr Mullin to surrender the unredacted notes, Detective Constable Darren Sutton told Judge Lucraft what police believed the notes could reveal. Barrister Gavin Millar QC, for Mr Mullin, referred to cases in which judges accepted it was in the public interest for a journalist not to be required to reveal a confidential source. Mr Millar argued that to require Mr Mullin to surrender the notes would infringe his rights in Article 10 of the European Convention on Human Rights, and that those rights were in Mr Mullin's case particularly strong, because his journalism had been of the highest public interest value exposing serious failings on the part of the criminal justice system which resulted in the wrongful conviction and imprisonment of six innocent men. Judge Lucraft ruled that there were reasonable grounds for believing that Mr Mullin had material in his possession which would be of substantial value to the police investigation into the bombings, but said there was not 'an over-riding public interest' to displace 'the journalistic source protection right' which Mr Mullin had. For context drawing on case law about Article 10 rights and source protection, see 33.2 in *McNae's*.

In 2009 journalist Suzanne Breen successfully opposed a production order in Northern Ireland, on the ground that if it was granted her life would be at risk from a terrorist group. For more detail, see 33.7 in *McNae's*.

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 a contempt of court, punishable by up to two years in jail and/or a fine unlimited by statute, 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 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).”

40.8.1 Freelances are vulnerable financially

A journalist working for a large media organisation can expect to get help from it to resist in court an attempt by a police to get a production order, although – as *McNae's* 33.9 says - a staff journalist should in general get approval from her or his editor before promising confidentiality to a source in any circumstance when such a legal battle may follow.

A freelance is more vulnerable in such legal disputes, because he or she may not have enough money to pay the costs.

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 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>

40.8.2 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 common 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 a section 19 offence under 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 a section 38B offence 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 in the case 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'.

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 want to ask for such immunity from prosecution as regards any material disclosed because of a production order. But there may well remain the issue of the journalist needing, because of journalism's ethics, to protect the identity of a confidential source - for example, the person who gave the material to the journalist.

As regards Hassan Butt, whose alleged terrorist activities led to the police decision to seek a production order against Malik, the protection of Butt's identity was not an issue for Malik because Butt's identity as his source was not a secret – the

journalistic project was for Butt to feature openly, and with his consent, in a book being produced by Malik. But a major reason why Malik opposed the production order was to protect other sources in the project who *were* confidential sources.

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. For more about Article 10 in this context, see 33.2 in *McNae's*.

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.

In 2019 a book by Malik, called *The Messenger*, which explains how he came across Butt and relates the ordeal of the court case, was published by Guardian Faber Publishing.

40.8.3 Safeguarding neutrality

The reason why a production order is opposed may not be to protect a confidential source. It may be that the source's identity is already well known, but the media organisation or journalist is seeking to safeguard a position of neutrality, to help ensure that sources in sensitive situations – for example, connected with

terrorism – will trust that journalist and other journalists in the future, and feel free to talk to them about matters which have a high ‘public interest’ value if published, and not see them as collectors of incriminating information on behalf of the police. The adoption of this neutrality ground to resist a production order is therefore seen by journalists as ethical in a broad way, and taking this position is also a protection for all journalists, because they may well be at greater risk in many situations if they are perceived as ‘spies’ for the police (for a case in which this safety argument was articulated, see *Channel 4 Television Corporation v the Metropolitan Commissioner for the police*, BAILII Citation Number: [2019] EW Misc B2 (CCrimC)).

The Additional Material for ch. 33 has a case study illustrating this stance of neutrality, about how in 2019 media organisations argued in court against an attempt by the Metropolitan police to get a production order under the Terrorism Act 2000 which would have required journalists to produce notes of interviews conducted with Shamima Begum. She left London as a schoolgirl to become a ‘jihadi bride’ and was later discovered by a correspondent of *The Times* to be in a prison camp in Syria after ISIS strongholds fell, and was interviewed there by him and other journalists.

40.9 Border checks give police and officials extra powers

Schedule 3 of the Counter-Terrorism and Border Security Act 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 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 the material, although these are subject to approval by the Commissioner. Officers must also notify the journalist if they intend to copy any of his or her material. See Useful Websites, below, for more details of the Commissioner’s role.

40.10 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 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 15.11 in *McNae’s* for general information about the CPR and see the Additional Material for chapter 15 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.

During the course of 2020 the number of TPIM notices in force fluctuated between three and six, all imposed on British nationals, all but one of whom were members of the proscribed group Al-Muhajiroun. Persons made subject to a ‘terrorism exclusion order’ (TEO) are also protected by anonymity orders. TEOs are designed to help ‘manage’ an individual’s return to the UK after suspected involvement with terrorism abroad. Once in the UK, they can be legally required to report to the UK police regularly, notify them of any change of address, and keep appointments with a ‘mentor’.



Cross reference

See also 35.2.4 in *McNae’s* 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.

Useful Websites

<https://commonslibrary.parliament.uk/research-briefings/cbp-7613/>

House of Commons Library briefing paper: Terrorism in Great Britain: The statistics

<https://www.cps.gov.uk/terrorism>

Crown Prosecution Service Counter-Terrorism Division webpages

<https://www.ipco.org.uk/>

Investigatory Powers Commissioner’s Office

<https://terrorismlegislationreviewer.independent.gov.uk/>

Independent Reviewer of Terrorism Legislation’s website

<https://www.libertyhumanrights.org.uk/human-rights/countering-terrorism/overview-terrorism-legislation>

Criticism by civil rights campaign group Liberty of some counter-terrorism laws