APPLICATION FOR A PRODUCTION ORDER UNDER THE TERRORISM ACT 2000.

RULING

Introduction.

1. On Friday 25th February 2022 I heard an application by West Midlands Police [WMP] under paragraph 5 of Schedule 5 of the Terrorism Act 2000 [TACT] for a production order directed at Christopher John Mullin [CM] for excluded material. At the end of the hearing I reserved my decision and the reasons for the decision.

2. Before embarking on the substantive hearing an issue arose as to the nature of the hearing, whether the normal approach of production orders being sought in a private hearing should apply, or whether the hearing should take place in circumstances where the public and press might be present.

3. It was agreed by all that the hearing should, subject to the views of the Court, be held in public. I directed that it would and should be heard in public. Rule 47.5 of the Criminal Procedure Rules states that the hearing must be in private unless the court otherwise directs. In my judgment there are clear public interest reasons for this hearing to be in public.

4. On behalf of WMP concern was raised about the identities of the two individuals referred to throughout this ruling as AB and CD. It is said that whilst there might be speculation in the media and public, their identities have not been publicly confirmed. On behalf of WMP it was suggested that a reporting restriction under s.11 of the Contempt of Court Act 1981 be imposed. The suggested terms of the order are: *"there must be no reporting of anything that may lead to or tend to lead to the identification of the individuals referred to as AB or CD*." On behalf of CM a neutral stance was taken as to this approach and the use of ciphers.

5. On behalf of five media organisations (Associated Newspapers Limited, Guardian News and Media Limited, ITN, Telegraph Media Group and Times Newspapers Limited) it was submitted that it was not necessary to impose any reporting restriction under s.11. For the purposes of the hearing I decided that the wise precautionary course of action was to put in place an order under s.11 and then to review that order once I had heard all of the submissions and made my determination on the application.

6. In relation to AB it was submitted that he has been widely identified in the national media as a critical suspect and that he was also identified in the course of the inquest proceedings in 2019 and so there is no on-going need for any restrictive order. For CD it is submitted that there was no basis to withhold his identity either. Having reflected on the submissions made, subject to any further submissions made when this ruling is provided to the parties, I intend to lift the s.11 Contempt of Court Act restriction I imposed at the start of the hearing on 25th February 2022.

Summary of conclusions.

7. There are three issues that this Court has to determine. Firstly, does CM have material in his possession, custody or control which is caught by the wording of the production order sought, and if so what such material does he have in his possession, custody or power? On this issue, I find that CM does have material in his possession, custody or power that comes within the wording of the production order as refined in the course of the hearing.

8. The second issue is, in relation to the material the subject of the production order, are there reasonable grounds for believing that the material is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation? On this issue, I find that the condition is made out.

9. The third issue is whether there are reasonable grounds for believing that it is in the public interest that the material should be produced, or that access to it should be given having regard to the benefit likely to accrue to a terrorist investigation if it is obtained and to the circumstances under which CM has the material in his possession, custody or power? In effect, is there a clear and compelling case that there is an overriding public interest that might displace CM's strong Article 10 right to protect his confidential journalistic source along with the Court considering its discretion? On this issue I do not find an overriding public interest to displace the journalistic source protection right. I decline to grant the production order sought.

Background.

10. In the course of the hearing before me Detective Constable Darren Sutton of the WMP Counter Terrorism Unit [CTU] gave evidence under affirmation. He confirmed the truth of the contents of his 51 page Information dated 26th November 2021.

11. DC Sutton's Information sets out the background to Operation Castors, the WMP CTU investigation into two explosions caused by the detonation of high explosive devices in 'The Mulberry Bush' and the 'Tavern in the Town' public houses in Birmingham on 21st November 1974. The 'Birmingham Pub Bombings', as the explosions have become known, killed 21 people and injured more than 220.

12. DC Sutton states that from material gathered and analysed, particularly from CM, WMP is confident that 'AB' is one of the two individuals who planted the bombs. On the same night in November 1974, two more bombs, found at the rear entrance to the Barclays Bank building on Hagley Road, Birmingham, failed to detonate. A week earlier on 14th November 1974, a bomb had detonated at the General Post Office, Salt Lane Coventry, killing the planter of that bomb, James McDade, and causing significant damage to the property. No one else was harmed in that explosion. James McDade had two accomplices, one of who drove him to Coventry. DC Sutton also states that WMP are confident that McDade's driver was 'CD'. DC Sutton goes on to state that many years later the IRA claimed responsibility for the 'Birmingham Pub Bombings.' Patrick Hill, William Power, Hugh Callaghan, Noel McIlkenny, John Walker and Gerard Hunter, the 'Birmingham Six', were convicted of the 21 murders in 1975. Those convictions were overturned by the Court of Appeal in 1991 and the real perpetrators have never been charged. The Information sets out that the families of the 21 victims of the bombings continue to campaign for justice for their loved ones.

13. DC Sutton refers to the campaign of the IRA in the 1970s as well as the significant media and public interest in the 'Birmingham Pub Bombings'. A schedule of media publications is included with the papers [A/7]. It is well known that there have been numerous legal proceedings and inquiries into the circumstances of these atrocities. Most recent amongst these legal proceedings were coronial inquests that concluded in 2019. The sets of legal processes include various appeals to the Court of Appeal, two sets of coronial inquests and 6 police investigations.

14. The offences under investigation in Operation Castors are 21 counts of murder, contrary to common law.

15. CM is a journalist who has been extensively involved with the background to the investigations into the Birmingham Pub Bombings. He is the author of a book *'Error of Judgment: the Truth about the Birmingham Bombings'* which was first published on 17th July 1986. The book advanced a case for the innocence of the 'Birmingham Six'. Extracts of the book are included in the materials provided in this application. [Bundle B, B/1 & B/2]. In a later autobiography '*Hinterland*', CM provided additional information about those said to be responsible for the murders. [B/3]

16. In relation to this application, DC Sutton states that, having interviewed a number of former IRA volunteers who had been active in the Midlands, CM also identified new suspects as being involved in the bombings. CM referred to the suspects as X, Y, Z, 'Belfast Jimmy' and a male, AB. CM set out in his writings that two of those he spoke to admitted their involvement in the bombings to him. These two were X, who had made the bombs and the warning call and AB, who admitted planting the bombs in the two pubs. This production order application is directed to the fruits of interviews CM conducted with AB and CD whilst researching his books. It is said that WMP are confident that when CD was interviewed by CM, he confirmed the identity of AB as one of the men who planted the bombs in the pubs.

17. CM has provided some of his notes of interviews he conducted with former IRA members voluntarily to WMP. This has been done after a considerable amount of time has elapsed after the interviews took place. In his witness statement CM sets out the clear basis of his approach to the bombings and to those he interviewed in the lead up to the publication of the books and the television documentaries he was involved with. Some of the notes have been redacted and some pages have been omitted. CM says he has done this to protect the identity of those he has spoken to. As CM sets out in his witness statement in relation to AB [paragraph 13], he has retained typed copies of his notes of the interview and where he is able to *"…without risking the disclosure of sources to whom I owe a duty of confidentiality, I have provided them to the current police investigation."* It is a reasonable assumption to make that the redacted parts would identify AB.

18. In paragraphs 11 to 17 of the Information DC Sutton sets out the factual background to the pub bombings on 21st November 1974. He then deals with the 'Birmingham Six' at paragraphs 18 to 21. The facts of the various books written by CM and television documentary programmes CM was involved with are set out at paragraphs 22 to 35. The Information then turns to the details of the investigative background including the various police investigations including the current operation, Operation Castors. This is set out in paragraphs 37 to 49 of the Information. In paragraph 48 DC Sutton states that CM spoke to

WMP on several occasions between 1978 and 1993. He declined to make any statement or to provide any admissible evidence in support of his findings. CM stated that his reasons for taking the stance he did then, and continues to take, was based on assurances of confidentiality he had given to those he had spoken to. [See B/316 & 318].

19. At paragraphs 50 to 57 DC Sutton sets out details of the coronial Inquests. The Inquests were formally opened on 28th November 1974. The Inquests were adjourned pending the outcome of criminal proceedings then in place. On 1st June 2016, Louise Hunt, the Senior Coroner for Birmingham & Solihull, ordered the Inquests to be re-opened and the resumed Inquests were heard by His Honour Sir Peter Thornton QC and a jury.

20. On the eve of the start of the Inquests, an article was published in the London Review of Books. The article, '*The Birmingham Bombers'* from CM [Bundle B, B/282] includes the following text which is of some significance:

> *"I know the names of the bombers. Four men were involved: two bomb-makers and two planters. More than 30 years ago two of them described to me what they'd done in some detail. By a process of elimination, assisted by information from former members of the West Midlands IRA, I also identified at least one of the remaining perpetrators, perhaps both, though neither would admit to me their role in the bombings. But I have never named names. Journalists do not disclose their sources. I interviewed many of those who were active in the IRA's West Midlands campaign. To gain their cooperation I gave repeated assurances, not only to the guilty, but to innocent intermediaries, that I would not disclose their identities. I cannot go back on that now, just because it would be convenient. My purpose at the time was to help free the six innocent men who had been convicted of the bombing. I was never under the illusion that I could bring the perpetrators to justice. My researches, conducted between 1985 and 1987, formed the final chapters of my book about the case, Error of Judgment. In it two of the perpetrators are quoted at length, but not identified. I no longer have any compunction about identifying two of the men involved, who are now dead (I am about to do so), but the man described in my book as the 'young planter' is still alive, and I will not name him."*

Later on in the same article CM sets out the details of the 'confession' he was provided with by AB. At the end of the article he gives the names of those he had spoken to who had subsequently died, but does not identify AB. On behalf of WMP, Mr Lewis QC submits that this article is of some significance due to the way that CM describes the information provided to him by AB.

21. CM gave evidence in the course of the Inquest hearings. Copies of the transcripts of his evidence are included in the materials in support of this application and I have considered the full account he gave. [Bundle B B/416 – 485, 486 – 583]. In the course of his evidence to

the Inquests he spoke about the process he had undertaken with his research, the details provided, but again did not name AB.

22. DC Sutton's Information then sets out details of previous production orders. In this section [paragraphs 58 and 59] it is stated that in 1993 consideration was given to seeking a production order. At that time it is said that the CPS advised WMP that it would not be appropriate to make an application, but this application for a production order is supported by the CPS. DC Sutton states:

> *"More recently, the law has been developed and Mr Mullin has provided some material in the form of typed and copy manuscript notes, some of which have been redacted. Additionally, the authorities, particularly Malik and Stichting Ostade Blade, substantially post-date the CPS' consideration of the issue, and provide some assistance to the test to be applied."*

I will turn to *Malik* and *Stichting Ostade Blade* in due course.

23. Paragraphs 60 to 69 of the Information deal with production orders sought following television broadcasts and the results produced through investigation as a result.

24. Paragraphs 70 to 134 deal with the description of 'suspects' including an analysis of AB and CD in the context of the material from CM as published by him, and as shown in various TV documentaries.

25. At paragraph 104 DC Sutton sets out details of the materials provided by CM. The material includes a copy of 3 pages of typed redacted notes from an interview with AB on 15th April 1986 [B/34 p.584-587], a copy of 9 pages of redacted manuscript notes from an interview with AB on 15th April 1986 [B/35 p.588-597] (WMP CTU also provided me with a typed version of the 9 page handwritten notes B/36 p.598-613) and a 1 page typed note of a conversation with AB on 7th July 1990 [B/37 p.614-615]. The interview of AB on 15th April 1986 lasted some 4 hours.

26. Between paragraphs 113 and 134 DC Sutton sets out the position with regard to CD and what he says is the interaction that must have taken place between CM and CD. As paragraph 134 makes clear, CM has not disclosed any notes in respect of any interviews with CD. I have considered in detail the contents of paragraphs 113 to 128 where DC Sutton seeks to demonstrate that it is a reasonable inference that CM has interviewed CD. It seems to me that the inference he invites the Court to make is a good one and that CM did interview CD.

27. In paragraphs 135 to 147 of the Information DC Sutton sets out the nature of the material that is sought by this production order. He deals with the detailed requests made by WMP for

him to provide the material on a voluntary basis. Between paragraphs 148 and 175 there is further material about the existence of the underlying materials.

28. The contents of paragraphs 148 to 175 need to be considered in the light of the details set out in the witness statement of CM. In the course of giving evidence on this application DC Sutton accepted what is set out in CM's statement about the existence or lack thereof of his original notebooks. In his statement at paragraphs 14 to 16 CM set out the current position and I have no doubt he is relieved to hear the concessions made by DC Sutton in his evidence.

29. Having read through all of the material that CM sets out in his published books and that he has provided to WMP, it is clearly an admission by AB to being involved in the planting of the bombs that subsequently killed 21 people and injured many more.

30. In paragraphs 57 to 69 of his written submissions Mr Lewis sets out the basis on which WMP is confident that AB is one of those who planted the bombs. At paragraphs 77 to 79 he undertakes the same process in relation to the identity of CD and his connection to AB.

31. As well as the evidence of DC Sutton and CM for this application, I have been provided with a number of statements from those supporting CM's resistance to it. The statements are from Michelle Stanistreet, the General Secretary of the National Union of Journalists; Alan Rusbridger, a journalist and editor who is now the editor of Prospect Magazine and who was editor and then editor-in-chief of The Guardian between 1995 and 2005; Dr Paul Lashmar, a former head of the department of Journalism at City University, London and a Reader in Journalism, an investigative journalist since 1978; and Lord Falconer, a former law officer, Minister in the Cabinet Office and Lord Chancellor who has held other government and shadow governmental roles. Each of these statements sets out the statement holders views and opinions about CM, where they have a close connection, as well as their thoughts as to journalistic confidentiality. Whilst these views are of assistance in considering some of the arguments before me, the issue for me is one of the application of the law to the facts of this particular application.

The law.

32. It is common ground that under schedule 5, paragraph 5 of TACT, application can be made before a Circuit Judge for production of excluded material or special procedure material. In dealing with such applications regard must be had to the provisions of the Police & Criminal Evidence Act 1984 [PACE], the Criminal Procedure Rules at part 47 and Rule 47.11-12. [Bundle C, C/1 to C/3].

33. It is also common ground that such an application for special procedure or excluded material may be granted if various conditions in paragraph 6 of schedule 5 of TACT are satisfied. Here, the material sought is accepted to come within the definition of excluded material and special procedure material as defined by PACE.

34. Turing to the two access conditions in schedule 5 paragraph 6, the first condition is that the order is sought for the purposes of a terrorist investigation, and that there are reasonable grounds for believing that the material is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation. Here, it is accepted that the order is sought for the purposes of a terrorist investigation. There is an issue as to whether there are reasonable grounds for believing that the material is likely to be of substantial value to the investigation.

35. The second condition is that there are reasonable grounds for believing that it is in the public interest that the material should be produced or that access to it should be given having regard to the benefit likely to accrue to a terrorist investigation if the material is obtained and to the circumstances under which the person concerned has any of the material in his possession, custody or power. There is a clear issue raised as to public interest.

36. As is clear from the wording of paragraph 6 of schedule 5, the Court has a discretion as to whether to grant the application sought. It is accepted by all parties that the exercise of the discretion by the Court involves a consideration of the public interest and the application of Article 10 of the European Convention on Human Rights [ECHR].

37. I am grateful to those representing WMP and CM for the very helpful detailed skeleton arguments and bundles of authorities. As Mr Lewis QC and Mr Millar QC both made clear, whilst there are some voluminous materials to consider, the issues have narrowed.

38. As is clear from all submissions there are the three issues for determination. The first turns on whether CM has material in his possession, custody or power which is caught by the wording of the production order, and if so what such material he has.

The first issue: Does CM have material in his possession, custody or power?

39. The material sought through this production order relates to interviews CM conducted with both AB and CD. In his Information DC Sutton states that WMP are confident that they know the real identity of AB and secondly, that CD confirmed the identity of AB as one of those who planted the bombs when he was interviewed by CM. As a result of the evidence given in the course of the hearing the scope narrowed. The application as now focussed is for:

> (i) the unredacted and full versions of the material provided by CM to WMP; specifically: the 3 pages of redacted typed notes of interview with AB on 15th April 1986, the 9 pages of redacted manuscript notes of interview with AB on 15th April 1986; and the 1 page of typed notes of conversation with AB on 7th July 1990; and
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> (ii) the original, unredacted manuscript and typed notes of interview, including any document provided to CM, arising from an interview with CD on or around 27th March 1986 identifying AB.

40. The detail of engagement as between WMP and CM is set out in Bundle B, B/7 to B/26. CM has provided a copy of 3 pages of typed, redacted notes from an interview with AB on 15th April 1986, a copy of 9 pages of redacted manuscript notes with AB on 15th April 1986 and a 1 page document headed 'Note of conversation with [AB]' on 7th July 1990. No material has been provided in relation to CD. CM has always refused to name all of those people he interviewed. He accepts interviewing some 16 or 17 people.

41. In giving evidence DC Sutton accepted that since he signed his Information in November 2021, he had seen the witness statement provided by CM in which CM set out the detail of records he had made, those he had disposed of and what he still retained. In paragraphs 14, 15 and 16 of his statement CM sets out what he had retained and why. When DC Sutton was asked questions in the hearing he made clear that he now accepted what CM had set out in

relation to AB and the wording of the draft production order was amended to follow the material that exists and is in the possession, custody or power of CM.

42. In relation to CD, WMP sought CM's notes of any interviews with him on 4th April 2019 [B/16 p.321-323]. The letter from WMP mentions CD by name. In CM's letter in response to WMP [B/17 p. 325-326] he does not mention CD by name. However, his letter states:

> *"As you know, during the course of my investigation I tracked down and interviewed 16 or 17 of those who had been planting bombs in and around Birmingham in 1973-4. In order to obtain their co-operation I was obliged to provide undertakings guaranteeing their anonymity. These undertakings were unconditional and life-long and were provided to innocent intermediaries, as well as to those involved in the bombings."*

Having dealt with some specific requests he then states:

> *"As regards interviews with other former members of the Birmingham IRA, I regret that I cannot disclose them without their consent because of assurances that I gave at the time."*

This was followed by another specific request for any material relating to any interview with CD on December 10th 2020. CM responded on 5th January 2021 to say that he was not able to provide any further notes of any interviews. [B/24 p.363 & B/25 p.364-375]. In my judgment it is important to view these exchanges of correspondence alongside the material set out in paragraph 77of the written submissions of WMP and to the items at B/56 p.721-725, B/44 p.642, B/5 p.289 and B/44 p.642. When one does so it shows that CD is someone CM has interviewed.

43. On the first issue, I am entirely satisfied that CM does have in his possession, custody or power the material to which this application relates. The material he has is the unredacted version of the interviews he clearly held with AB. In relation to CD, whilst I accept that CM has not positively stated whether he interviewed CD or not, I am satisfied that it is a reasonable inference from what he has written and published that CM did interview CD and that CM, as was his practice, would have made a note of that interview or interviews. In paragraphs 77 and 78 of the written submissions Mr Lewis sets out the route by which WMP are confident that CD is the man who identified AB, or who confirmed the identity of AB, to CM. The links include the document at B/5 p.289. In my judgement those points are made good.

The second issue – in relation to the material the subject of the production order, has the substantial value condition in paragraph 6(2)(b) been made out?

44. The second issue is whether there are reasonable grounds for believing that the material is likely to be of substantial value to the investigation. On this issue, Mr Lewis QC relies on the various documents in Bundle B. As well as the documents I have already referred to, this includes extracts from the book written by CM where he submits it is clear that AB makes a confession as to his role in the Birmingham Pub Bombings. I was taken to B/1 at pages 160 to 161 (pages 261 to 263 of the 1990 edition of "*Error of Judgement"*) and to B/2 at pages 211-212 (pages 297 to 299) of the final (1997) edition of "*Error of Judgement*".

45. Mr Lewis submits that the notes of the interview CM had with AB amount to a confession and that a voluntary and reliable confession of murder by the murderer in its unredacted form where the identity of the person providing that confession is set out is something of great evidential value. With regard to CD, he relies on the submissions made in paragraphs 77 to 79 to support his submission that the material exists and that it too is of substantial value to this terrorism investigation. In paragraphs 109 to 115 Mr Lewis makes additional points that support his submissions as to substantial value.

46. In his skeleton at paragraph 20 Mr Millar sets out the relevant legal principles. He submits that there must be cogent evidence as to what the material is likely to reveal and how important such evidence would be to carrying out the investigation. In paragraphs 21 to 27 he makes various observations about the evidence and submits that the evidence does not show reasonable grounds for a belief that the redacted passages would probably be of significant value to the investigation.

47. I was referred to the decision in *Malik v. Manchester Crown Court* [2008] EMLR 19. I note in particular what is set out in paragraphs 36 and 37 of the judgment in that case as to reasonable grounds for believing that the material is likely to be of substantial value.

48. It seems to me here on the basis of what is set out by CM in his various publications as to what AB said, that I can be satisfied that there are reasonable grounds for believing that it (the material CM has that identifies AB which has been redacted, and the notes of his speaking to CD) is material likely to be of substantial value. DC Sutton has set out the basis for his belief in respect of AB and CM does not dispute the material exists nor that he has made redactions to it. So far as any material as to CD is concerned, DC Sutton has also set out the basis of his belief as to the existence of such material which I accept as being cogent and it seems to me

for that material too, there are reasonable grounds for believing it to be of substantial value to the investigation. The material from AB is a confession to having participated in the attacks by planting the bombs that when they were detonated caused the deaths of 21 people and injuries to many others, and confirmation as to the identity of the person making that confession and connecting that confession to AB is material likely to be of substantial value. In relation to material from CD given to CM when interviewed confirming the identity of AB, that too in my judgment is material likely to be of substantial value to the investigation. I agree with the observations made by Mr Lewis in the course of his submissions that it is difficult to see how a reliable note of a voluntary confessions is not something of substantial value. The points made by Mr Lewis in paragraphs 110 to 115 of the written submissions are all good ones and show the clear import of this material and its value to the investigation. It is difficult to see how it would not be admissible as against the maker, AB, if all of the safeguards in ss.114 and 117 of the Criminal Justice Act 2003 were addressed and make a *prima facie* case of murder. I also agree with his observation that in many ways this is a paradigm of substantial value to the investigation.

The third issue – are there reasonable grounds for believing that it is in the public interest that the material should be produced, or that access to it should be given? In effect, is there a clear and compelling case that there is an overriding public interest that might displace CM's strong Article 10 right to protect his confidential journalistic source?

49. In my judgement this is the crux of this application: a consideration of the competing public interest in the making of a production order in favour of the WMP who are conducting an investigation into a significant terror event dating back to 1974, alongside the significant need to protect confidential journalistic sources.

50. I referred above to the decision of the High Court in *Malik*. In that case an application had been made for journalistic material against the journalist Shiv Malik. As the head note sets out, Malik was a respected freelance journalist with a particular interest in terrorism. In collaboration with B, someone who had admitted an involvement with Al-Qaeda, he was in the process of writing a book. B had admitted to Malik having committed a number of serious terrorist offences between 2002 and 2006 including, among other things, involvement in the murder of civilians in Pakistan, receipt of funding for terrorist purposes and possession of a contacts book, laptop and money for terrorist purposes. The judge granted an order in

relation to much of the material sought. The High Court in dealing with this third issue and the exercise of the discretion helpfully stated:

> ***The exercise of discretion and the Convention***
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> *46. The principal criticism of the judge is that he failed to exercise his discretion compatibly with the Convention and in particular with article 10 which provides:*
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> > ***"Article 10 – Freedom of expression***
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> > *1 – Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
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> > *2 – The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*
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> *47. There is no disagreement between the parties as to the relevant legal principles. Courts are public authorities under section 6(3) of the Human Rights Act 1998 ("the HRA"). Accordingly, a production order cannot be made if and to the extent that it would violate a person's Convention rights. The discretion conferred by paragraph 6 must be exercised compatibly with an affected person's Convention rights even if the two access conditions are satisfied.*
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> *48. The correct approach to the article 10 issues as articulated in both the Strasbourg jurisprudence and our domestic law emphasises that (i) the court should attach considerable weight to the nature of the right interfered with when an application is made against a journalist; (ii) the proportionality of any proposed order should be measured and justified against that weight and (iii) a person who applies for an order should provide a clear and compelling case in justification of it.*
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> *49. The significance of article 10 in the scheme of the Convention has been underlined many times by the ECtHR. It is acknowledged domestically in section 12 of the HRA. The importance of the protection of sources is also acknowledged in section 10 of the Contempt of Court Act 1981. Any curtailment of article 10*
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> > *"….must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved….one of the contemporary functions of the media is investigative journalism. This activity, as much as the traditional activities of reporting and commenting, is part of the vital role of the press and the media generally": Reynolds v Times Newspapers Ltd [2001] 2 AC 127 at 200F, per Lord Nicholls.*
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> *50. The importance of the right and the weight of the justification required for an interference that compels a journalist to reveal confidential material about or*

provided by a source has been frequently stated both in Strasbourg and in our courts. It is sufficient to refer to Goodwin v United Kingdom (1996) 22 EHRR 123 at [39] and [40] "protection of journalistic sources is one of the basic conditions for press freedom" and "limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the court"; Tillack v Belgium (Application no 20477/05, 27 November 2007) at [53]; John v Express Newspapers [2000] 1 WLR 1931 at [27] where the court of appeal said:

> *"Before the courts require journalists to break what a journalist regards as a most important professional obligation to protect a source, the minimum requirement is that other avenues should be explored";*

and Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29, [2002] 1 WLR 2033 at [61] where Lord Woolf CJ said that disclosure of a journalist's sources has a chilling effect on the freedom of the press and that the court will "normally protect journalists' sources".

51. *None of this is in any doubt. The issue is whether the judge's application of these principles in the present case was wrong. We shall deal later with the question whether the terms of the order were wider than was necessary and proportionate to the aim of furthering the two terrorist investigations and whether in any event their width was inconsistent with the judge's avowed intention to do what he reasonably and properly could do to preserve the anonymity of the claimant's contacts other than Hassan Butt. Having weighed the competing interests and, in particular, the article 10 considerations, the judge decided that it was right in principle to make production orders against both the claimant and the publisher. Mr Eadie submits that this decision was wrong. That is to say, he submits that the judge would have been wrong even to make an order limited to material provided by Hassan Butt (and excluding material which might reveal the identity of a confidential source or the content of confidential material from any source other than Hassan Butt).*

52. *Mr Eadie submits that the judge failed to analyse the necessity for the interference with the claimant's article 10 rights and failed to explain how the interference was proportionate to the end sought to be achieved. The claimant is a responsible journalist with a good reputation. Terrorism is a pressing subject. Mr Eadie argues that the judge must have failed to take into account or given sufficient weight to the fact that the claimant's book explores what draws people into terrorism and what causes them to disown it and that it seeks to dissuade would-be terrorists from becoming terrorists.*

53. *Mr Eadie relies on two statements made by the claimant for the purposes of the present proceedings. They are dated 7 April and 16 May 2008. They contain a good deal of information about his sources, his fears as to the effect of compliance with the production order that was made on his sources, his reputation as a journalist and his fears for his safety and that of his wife. In this context, the protection of sources is particularly important: it is very difficult to persuade people who have information to divulge it.*

54. *For the reasons already given, we do not see how evidence that was not before the judge can be taken into account in determining the lawfulness of his decision. But we do not need evidence to underscore the general importance of the need to protect sources in order to sustain a journalist's article 10 rights.*

> *55. On the other hand, it is obvious that there is a powerful public interest in protecting society from terrorism and, to that end, enabling the police to conduct effective investigations into terrorism. That interest is promoted by the provisions of the 2000 Act. Article 10(2) of the Convention itself asserts that the right to receive information without interference by public authority may be subject to such restrictions as are prescribed by law and are necessary in a democratic society inter alia "in the interests of security". Paragraph 6 of schedule 5 contains carefully drafted provisions which strike a balance between the object of enabling the police to conduct terrorist investigations effectively and respect for a journalist's article 10 rights. To the extent that there is a conflict between that object and respect for a journalist's rights, the court is required to weigh the competing considerations and make a judgment. That process is familiar to any court that is required to balance competing considerations.*
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> *56. In our view, it is relevant to the balancing exercise to have in mind the gravity of the activities that are the subject of the investigation, the benefit likely to accrue to the investigation and the weight to be accorded to the need to protect the sources. In the present case, the investigations into the activities of Hassan Butt include allegations that he was an active member of Al Qaeda and that he participated in some way in the murder of 11 people in Pakistan. They also include allegations which are relevant to the impending trial of A. The investigations are, therefore, into activities of the utmost seriousness. As we have said, the judge was entitled to conclude on the material before him that there were reasonable grounds for believing that material in the possession of the claimant emanating from Hassan Butt was likely to be of substantial value to the investigations. For the same reasons, he concluded that significant benefit was likely to accrue to the investigations from that material. He was entitled so to conclude.*
>
> *57. In carrying out the balancing exercise, he acknowledged that there was a strong public interest in preserving the sanctity of the claimant's sources and the importance of the claimant's article 10(1) rights. He said in terms that the qualifications in article 10(2) should not be "restrictively interpreted" and that any interference with the claimant's article 10(1) rights should be "convincingly justified".*
>
> *58. In our judgment, the judge's approach to article 10 cannot be criticised. He directed himself correctly and reached a conclusion which was reasonably open to him on the material before him. Mr Eadie submits that he did not explain how he struck the balance between the core issues in play. We accept that the judge could have articulated the weight that he gave to the competing considerations more clearly than he did. But in our judgment, he must have concluded that the activities being investigated were so serious that, taken in conjunction with the benefit that was likely to accrue from the material from Hassan Butt that was in the claimant's possession, they justified interfering with the claimant's article 10 rights. That was a conclusion which the judge was entitled to reach. The benefit that was likely to accrue from the material from Hassan Butt was described in the passage in the Chief Constable's letter dated 19 March which we have quoted at [18] above. So far as the trial of A is concerned, the judge was not only entitled, but obliged, to take into account as an important relevant factor the need to ensure that A had a fair trial. 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.*

51. At paragraph 100 of the judgment, the High Court stated:

> *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: see [58] above.*

52. Mr Lewis also took me to the relevant parts of the decision in *Goodwin v. UK* (1996) 22 EHRR 123. In particular he referred me to paragraph 64 where the Commission stated:

> *"The Commission considers that protection of the sources from which journalists derive information is an essential means of enabling the press to perform its important function of "public watchdog" in a democratic society. If journalists could be compelled to reveal their sources, this would make it much more difficult for them to obtain information and, as a consequence, to inform the public about matters of public interest. The right to freedom of expression, as protected by Article 10 of the Convention which includes the right to receive and impart information, therefore requires that any such compulsion must be limited to exceptional circumstances where vital public or individual interests are at stake. The question is therefore whether such exceptional circumstances existed in the present case".*

53. He also makes reference to the decision of the Court of Appeal in *R. v. Norman* [2017] 4 WLR 16 where the then Lord Chief Justice made reference to the decision in *R (Miranda) v. Secretary of State for the Home Department (Liberty Intervening)* [2016] EWCA Civ 6; [2016] 1 WLR 1505 and the disclosure of journalistic material and paragraph 39 of the judgment in Goodwin where it was stated:

> *"Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."*

54. Mr Lewis submits that there is a clear distinction to be drawn between genuine whistle-blowers acting in the public interest with those situations where someone is seeking to hide

their own criminality or that will be the effect of the decision. He submits that circumstances here with material of this nature with a confession to the murder of 21 people is such that there is an overriding public interest that outweighs any protection of journalistic sources.

55. Mr Lewis also relies on the decision in *Stichting Ostade Blade v. Netherlands* (2014) 59 EHRR SE9. The decision was concerned with the granting of a warrant to the police to search an office address of a magazine called 'Ravage'. The editors of the magazine had issued a press release announcing that, in an edition of the magazine to be issued the following day, they were to include a letter from an organisation called the 'Earth Liberation Front' claiming responsibility for a bombing at a chemical factory in the Netherlands on 16th April 1996. The magazine challenged the decision claiming that the police action amounted to a breach of its rights under Article 10 of the ECHR. Before the Regional Court it was held that there had been an overriding requirement in the public interest to search for the letter and for other indications on the premises regarding links between the magazine and perpetrators of the attacks. At paragraph 32 of the authority there is reference to other developments that include the details of an armed bank robbery on 22nd March 2006 by someone referred to as 'T'. 'T' subsequently confessed to committing bombing attacks including that in April 1996 and to having sent the letter claiming responsibility to Ravage. At paragraphs 58 onwards the decision of the Court is set out. Having reviewed various decisions including *Goodwin*, the Court stated:

> *"It is undeniable that, even though the protection of a journalistic "source" properly so-called is not in issue, an order directed to hand over original materials may have a chilling effect on the exercise of journalistic freedom of expression. That said, the degree of protection under art.10 of the Convention to be applied in a situation like the present one does not necessarily reach the same level as that afforded to journalists when it comes to their right to keep their "sources" confidential. The distinction lies in that the latter protection is twofold, relating not only to the journalist, but also and in particular to the "source" who volunteers to assist the press in informing the public about matters of public interest (see Nordisk Film, cited above).*
> *In the present case the magazine's informant was not motivated by the desire to provide information which the public were entitled to know. On the contrary, the informant, identified in 2006 as T ……was claiming responsibility for crimes which he had himself committed; his purpose in seeking publicity through the magazine Ravage was to don the anonymity with a view to evading his own criminal accountability. For this reason, the Court takes the view that he was not in principle, entitled to the same protection as the "sources" in cases like Goodwin, Roeman, Ernst, Voskuil, Tillack, Financial Times, Sanoma, and Telegraaf."*

56. Taking these matters together, and in particular what is set out above at paragraphs 55 and 56 of *Malik* Mr Lewis submits that the clear balance is in favour of granting the production order in this case. He submits that there is a clear public interest in permitting the police to

gain access to this material so as to conduct an effective investigation into terrorism particularly where the crimes are as grave as they are here.

57. Finally, he refers to the decision of the High Court in *R. (On the Application of British Sky Broadcasting Ltd) v. Chelmsford Crown Court* [2012] EMLR 30 and what he submits are the general principles that can be derived from the judgment. The principles he identifies in paragraph 104 are as follows:

    (i) In considering the balancing exercise between the undoubted public interest in detection and prevention of crime (an in particular serious crime) and the Article 10 rights engaged in such production order applications, the court will have regard to the scope of the application and whether this is necessary, proportionate and justified;

    (ii) The court must have regard to the independence of the press and the risk to press freedom and individual journalists if they are too readily compelled to hand over their material; and

    (iii) There must be cogent evidence as to (i) what the footage sought is likely to reveal, (ii) how important such evidence would be to carrying out the investigation and (iii) why it is necessary and proportionate to order the intrusion by reference to other potential sources of information.

58. Mr Lewis submits that what is sought here is material making admissible a confession where the police are already confident they know the source. He goes on to submit that CM has, in effect, already disclosed the identity of his source and what he is doing by not disclosing the redacted parts of the material from AB and not disclosing anything from CD is in effect protecting the confession made. The underlying material has been disclosed and so it cannot really be said that this is a journalist protecting his source. He submits that taking into account the gravity of the offences under investigation where the families of the deceased are yet to get justice for what is one of the most significant and unresolved terror crimes in the United Kingdom that this narrow, targeted and proportionate application for a production should be granted.

59. Mr Millar submits that even if the application makes it through stages one and two, this application should fall at this stage. In his written submissions he sets out many of the authorities and passages within them that I have already referred to above. In paragraphs 32 and 33 of his written submissions he invites a careful consideration of the decision in *Stichting Ostade Blade* and the impact of the decision in *Goodwin*. He submits that the

reasoning that Mr Lewis seeks to apply from the decision cannot be applied on the facts of this case. He submits that to the contrary, when the details as set out by CM in his statement are considered, he approached his sources some 12 years after the miscarriage of justice. I agree with him that the time gap is significant in the context of this case and this application. As he goes on to submit those sources only agreed, reluctantly, to provide information to him to assist him in informing the public that those accused of the atrocity, the 'Birmingham Six' were not the actual perpetrators of the bombings and only did so on the basis of clear and express assurances as to confidentiality. He submits that, on the reasoning of *Stichting* they were classically journalistic sources, and the fact that the information was sought and provided on this basis including admissions as to involvement in the crimes does not mean that CM can be denied the benefit of the source protection right. As he submits, it was the very information he needed to achieve his public interest journalistic objective. It seems to me that the time period between CM carrying out the interviews he did, and the date of this application for a production order is also of significance in the context of the undertakings CM gave to those he interviewed.

60. Mr Millar also relies on the decision in *Ashworth Hospital Authority v. MGN Ltd* [2002] 1 WLR 2033. The facts and details of the case are well known. He relies in particular on an extract from the speech of Woolf LCJ in the House of Lords at paragraph 38 where he stated:

> *"However, whatever was the objective of those promoting section 10, there can be no doubt now that both section 10 article 10 have a common purpose in seeking to enhance the freedom of the press by protecting journalistic sources. The approach of the European Court of Human Rights as to the role of article 10 in achieving this was clearly set out in Goodwin v. United Kingdom (1996) 22 EHRR 123, 143, para 39 in these terms* [the relevant paragraph is then set out] *....The same approach can be applied equally to section 10 now that article 10 is part of our domestic law."*

He also refers to a paragraph (paragraph 101) of the judgment of Laws LJ from the Court of Appeal in the same case at [2001] 1 WLR 515, where in relation to the application of the Goodwin principle it is stated:

> "*The public interest in the non-disclosure of press sources is constant, whatever the merits of the particular publication, and the particular source. The suggestion (which at one stage was canvassed in the course of argument) that it may be no bad thing to impose a "chilling effect" in some circumstances is in my view a misreading of the principles which are engaged in cases of this kind. In my judgment, the true position is that it is always prima facie (I can do no better than the Latin) contrary to the public interest that press sources should be disclosed; and in any given case the debate which follows will be conducted upon the question whether there is an overriding public interest, amounting to a pressing social need, to which the need to keep sources confidential should give way."*

61. As Mr Millar accepts, the offences under investigation here are grave offences. He invites a very careful consideration of all of the circumstances of this case and not just a focus on the gravity of the offences in issue. He submits that when that exercise is undertaken the public interest in upholding the journalist's asserted rights is particularly strong. The journalism in issue was 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. In my judgment on all the facts of this case, I agree with the submission of Mr Millar that there is not an overriding public interest in denying the art.10 rights that are in play.

62. I have considered with care the various competing submissions as to the access condition in paragraph 6(2)(b). Having done so, in my judgement whilst I can see the benefit likely to accrue to a terrorist investigation if the material is obtained, having regard to the circumstances under which CM has the material in his possession, custody or power I do not find that the material should be produced or that access to it should be given. Following the decision in *R. (On the Application of British Sky Broadcasting Ltd) v. Chelmsford Crown Court* (above), even if I found this second access condition fully satisfied, I would not exercise my discretion so as to grant this order. As Moses LJ stated:

> *"The judge must then exercise his discretion; the fact that the appellant has satisfied the access conditions is not enough. He must exercise that discretion compatibly with art.10, even if the access conditions are satisfied. First, the objective must be sufficiently important to justify the inhibition such orders inflict on the exercise of the fundamental right to disseminate information. Secondly, the means chosen to limit the right must be rational, fair and not arbitrary and third, the means used must impair the right as little as is reasonably possible."*

63. For all the reasons set out above, this application for a production order is refused.

His Honour Judge Mark Lucraft QC
Recorder of London
Central Criminal Court
London EC4M 7EH
March 22nd 2022