Neutral Citation Number: [2008] EWHC 1362 (Admin)

Case No: CO/3270/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/06/2008

Before :

LORD JUSTICE DYSON
MR JUSTICE PITCHFORD
MR JUSTICE OUSELEY

- -

Between :

Shiv Malik	**Claimant**
- and -	
(1) Manchester Crown Court - (2) Chief Constable of Greater Manchester Police	**Defendants**
(3) Constable and Robinson Ltd	**First Interested Party**
(4) Attorney General	**Second Interested Party**

- -
- -

James Eadie QC and Alex Bailin (instructed by Bindmans LLP) for the Claimant
Andrew Edis QC and Anne Whyte (instructed by Greater Manchester Police) for the Defendant
Andrew Nicol QC (instructed by the Treasury Solicitor) for the Attorney-General as an Interested Party
First Interested Party did not appear and was not represented

Hearing dates: 21 and 22 May 2008

- -

Judgment

Lord Justice Dyson: this is the judgment of the court.

Introduction

1. The claimant is a respected freelance journalist. He has a particular interest in terrorism. In collaboration with Hassan Butt, he is currently writing a book entitled "Leaving Al-Qaeda: Inside the Mind of a British Jihadist". The book is based on the experiences of Hassan Butt. It is due to be published in 2009 by Constable and Robinson Limited ("the publisher"), the interested party to these proceedings.

2. Hassan Butt is well known to the police. He has publicly admitted his past involvement with Al-Qaeda. He has admitted to the claimant having committed at least the following offences between 2002 and 2006: (i) murder (according to the book, he was in some way involved in the killing of 11 Pakistanis in an attack on the US consulate in Karachi on 14 June 2002); (ii) terrorist funding offences (he says he received £2800 in cash per month of which he retained £1000 for his own "expenses"); (iii) recruiting persons into a proscribed organisation; (iv) membership of a proscribed organisation (the book does not say that the "network" was Al-Qaeda, but Hassan Butt does name his "emir" who he says has Al-Qaeda contacts); and (v) possession of a contacts book, laptop and money for terrorist purposes.

3. On 19 March 2008, the Chief Constable of Manchester Police ("the Chief Constable") applied to Manchester Crown Court for a production order of certain specified journalistic material against the claimant and the interested party under schedule 5 of the Terrorism Act 2000 ("the 2000 Act"). Following a hearing which was partly in the presence of the claimant and his legal advisers ("the open hearing") and partly in their absence ("the closed hearing"), Judge Goldstone QC granted a production order on 31 March requiring the claimant to produce the material specified in the order by 9 April. Execution of the order was stayed pending these judicial review proceedings.

4. The production order was in these terms:

> "I am satisfied that you are the person who appears to be in possession of the material to which this application relates, namely:
>
> All material in his possession concerning:-
>
> (1) The terrorist activities of Hassan Butt and his membership of Al-Qaeda or Al-Muhajiroun or any other similar organisations;
>
> (2) [A];
>
> (3) The drafts and source material for the book "Leaving Al-Qaeda" by Hassan Butt and Shiv Malik including all material provided by Hassan Butt to Shiv Malik containing information about his activities in pursuit of the aims of Al-Qaeda or the Islamist jihad of which Al-Qaeda is part.

(4) All images associated with the publication, whether intended for use or otherwise; audio and video recordings, digital and analogue; notes made regardless of format and source material; any financial information relating to payments made by or on behalf of Mr. Malik to Mr. Butt or on his behalf inclusive of amount paid, dates and method of payment

and that this material consists of, or includes such material as is mentioned in sub-paragraph (2) of paragraph 5 of Schedule 5 and that access conditions specified in paragraph 6 of Schedule 5, are fulfilled in relation thereto.

Accordingly, YOUR ARE HEREBY ORDERED TO:

produce the said material to a Constable for him to take away ….

not later than

the end of the period of 9 days from the date of this order."

5. The person mentioned in paragraph (2) of the order (named above as "A") is an associate of Hassan Butt. He is to be tried on 1 September 2008 at Manchester Crown Court before Saunders J and a jury on charges of offences against the 2000 Act.

6. The production order against the publisher (which took a neutral stance at the hearing) required it to produce material by 7 April. The court adjourned for 3 months consideration of whether production of all the claimant's contact lists and other material was also required.

7. On 7 April, the claimant started these proceedings in which he seeks declarations that the production order (i) was substantively unlawful, and (ii) was made following an unfair procedure (and therefore unlawful on that ground too). He also seeks an order quashing the decision to grant the order and the order itself.

8. On 17 April, the Administrative Court (Keene LJ and Treacy J) granted permission to apply for judicial review on all grounds and gave permission to add the further ground that the Chief Constable did not comply with his duty of disclosure when applying for the production order. They also stayed execution of the production order pending final determination of the application for judicial review.

9. On 17 April, the publisher complied with the production order and delivered a draft manuscript of the book to the police.

The relevant legislation

10. Section 37 of the 2000 Act provides that schedule 5 shall have effect. By paragraph 5 of schedule 5, a constable may apply to a circuit judge for an order under the paragraph for the purposes of a terrorist investigation (subparagraph (1)). An application for an order shall relate to particular material or material of a particular description, which consists of or includes "excluded material or special procedure

material" (subparagraph (2)). Excluded material includes "journalistic material which a person holds in confidence and which consists (i) of documents …" (paragraph 4 of schedule 5 and section 11 of the Police and Criminal Evidence Act 1984 ("PACE")). An order may require a specified person to produce to a constable within a specified period for seizure or retention any material which he has in his possession, custody or power and to which the application relates (subparagraph (3)(a)).

11. Paragraph 6 provides:

> "6. (1) A Circuit judge may grant an application under paragraph 5 if satisfied-
>
> (a) that the material to which the application relates consists of or includes excluded material or special procedure material,
>
> (b) that it does not include items subject to legal privilege, and
>
> (c) that the conditions in sub-paragraphs (2) and (3) are satisfied in respect of that material.
>
> (2) The first condition is that-
>
> (a) the order is sought for the purposes of a terrorist investigation, and
>
> (b) 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.
>
> (3) 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-
>
> (a) to the benefit likely to accrue to a terrorist investigation if the material is obtained, and
>
> (b) to the circumstances under which the person concerned has any of the material in his possession, custody or power."
>
> Like the judge and counsel, we shall refer to the conditions in subparagraphs (2) and (3) as "the access conditions".

12. Paragraph 8 of schedule 5 provides:

> "(1) An order under paragraph 5-
>
> (a) shall not confer any right to production of, or access to, items subject to legal privilege, and

> (b) shall have effect notwithstanding any restriction on the disclosure of information imposed by statute or otherwise."

13. By section 32, a "terrorist investigation" is defined as an investigation of :

> "(a) the commission, preparation or instigation of acts of terrorism,
>
> (b) an act which appears to have been done for the purposes of terrorism,
>
> (c) the resources of a proscribed organisation,
>
> (d) the possibility of making an order under section 3(3), or
>
> (e) the commission, preparation or instigation of an offence under this Act."

14. As will become apparent, sections 18 and 38B of the 2000 Act are relevant to an issue relating to the privilege against self-incrimination which we deal with at [64] to [86] below. We shall set these provisions out when we come to deal with that issue.

The events leading to the judgment

15. As we have said, on 19 March 2008, the Chief Constable applied for a production order. The terms of the order sought were somewhat wider than those of the order granted by the judge. In particular, he sought an order which included the production of "contact lists of all persons featured in the book, contractual agreements/arrangements/negotiations in respect of Hassan Butt including off the record or unofficial agreements and any financial information [inclusive of amount paid, dates and methods of payment]". It was said in the application (and remains the Chief Constable's case) that the order was sought for the purposes of two terrorist investigations, namely (i) an investigation into the activities of Hassan Butt and (ii) an investigation into the person who has been referred to in these proceedings as "A".

16. The relevance of the material sought to these two investigations was explained in a letter dated 19 March to the claimant in which the Chief Constable sought the material from him. The letter quoted the synopsis which the book was currently advertised as "bearing":

> "Leaving Al-Qaeda charts Hassan Butt's early life and Jihadi career as it leads up to the dark secret at the heart of this compelling book – a full account of terrorist activities that are undertaken in Pakistan. Along with this account of Butt's life, his motivations, evolving beliefs, regrets, guilt, and his later re-establishment of moral purpose, this modern story of repentance re-examines the nature of identity in Western society, the state of multiculturism in Britain and the inner-workings of the international terror network. Hassan Butt writes: Taking the life of an innocent civilian can be done in an instant, but building your worldview around the justification of

> murder takes years. In my case it took six. From the violence, deprivation and racism of my youth, I slipped easily into the radical Islamic movements that welcomed the tension between the foreign blood in my veins and the native soil beneath my feet. They promised to use my religion, Islam, to change the world for the better. And in those early years, I was filled with the confidence and sense belonging of those who defy the world in the name of truth. That was until I found myself planning and funding terrorism for one of Al-Qaeda's associates. Leaving Al-Qaeda took another four years. It also meant asking myself questions that I had long ignored and coming to terms with the fact that I had spent a decade killing for killing's sake. Now, having left, I live under constant threat that my own life will be taken. Nevertheless, if the world wants to stop terrorism from growing within its long forgotten ghettos and dark backwaters, then this story must be told."

17. The letter went on to refer to an article which the claimant had written in the Sunday Times on 6 May 2007 which had the headline: "The jihadi house parties of hate". The letter continued:

> The report contains an account by Hassan Butt. There is reference to a fund-raising BBQ where £3500 was raised for jihadi training camps. Among the guests present were Mohammed Quayyum Khan (who is alleged to have sent Mohammed Siddique Khan to the Malakand training camp for Al-Qaeda) and Kazi Rahman east London crew leader now serving a nine-year custodial prison sentence for attempting to purchase firearms. Hassan Butt is attributed the following quotes:-
>
> *"People also came up to me during the evening and asked if I knew how to get training"*.
>
> Mohammed Junaid Barbar is also present and after the BBQ he and Hassan Butt drove to Mohammed Siddique Khan's home in Leeds. "

18. A copy of the article was attached to the letter which went on to say:

> "Consequently, you will hold material which is likely to be of substantial value, whether by itself or together with other material, to this terrorism investigation since there are reasonable grounds for believing that it will:
>
> > Provide evidence of Hassan Butt's ability to facilitate training for Al-Qaeda sympathizers;
> >
> > Demonstrate Hassan Butt's association with convicted terrorists/criminals/suspects and his influence amongst this group;

> Demonstrate Hassan Butt's role and activities in facilitating support for individuals fighting coalition forces in Afghanistan; and
>
> there are reasonable grounds for believing that it is in the public interest that the GMP CTU has access to that material.
>
> Furthermore, there is an ongoing prosecution of a close associate of Hassan Butt, namely [A], who is charged with offences under the Terrorism Act 2000 (two counts of collection of information for terrorist purposes, possession of article for terrorist purposes and attendance at a place used for terrorist training). This case is scheduled to come to trial later this year. Within this matter a defence statement has been served which contends that Hassan Butt is the instigator of certain actions and that the Defendant's contacts and actions have been in order to facilitate media reports/productions. Since you have material to this effect, accordingly, this same material that you hold is or may be relevant to the forthcoming criminal trial and is required by the prosecution in order to prepare for this impending trial. At the very least, it will become unused material, which may be relevant to the Defence, and GMP therefore has statutory obligations in relation to its preservation."

19. The claimant did not provide the material to the Chief Constable and the application proceeded before the judge on 25 March. The claimant was present and was represented by Mr Bailin of counsel. No special advocate was appointed to represent him at the closed hearing. The judge had a witness statement dated 20 March 2008 by the claimant. In this statement, he said that for nearly two years he had been working on a book entitled "Leaving Al-Qaeda" with Hassan Butt. He said that Hassan Butt was a "self-identified ex-member of Al-Qaeda" who had frequently commented on aspects of terrorism and counter-terrorism on television and had been quoted in newspapers. Hassan Butt had met the Home Office Minister responsible for security and counter-terrorism, Tom McNulty. The claimant said that, by demystifying terrorism, he had been able to do an immense amount of public good. He and Hassan Butt met Mr McNulty in August 2007 and Hassan Butt made it clear that he would be available for further briefings. He referred to a number of meetings and communications between Hassan Butt and the police.

20. At paragraph 13 of his statement, the claimant described the effect that a production order in the terms sought would have on him in these terms:

> "Should the order be granted the effect on my work would be dramatic. I will not be able to complete the book which will put me in breach of my contractual obligations which will have the knock on effect of causing me to fall into serious debt. Furthermore, once it becomes known that I have handed over confidential material in my possession to the state and compromised a source who has trusted me for many years, my ability to function as an investigative journalist in this

> extremely sensitive and important area will be brought to an abrupt end. Revealing entire contact lists, confidential notes etc as contemplated by the proposed Order will have a devastating effect upon my hard earned reputation as a trusted and respected journalist. Most importantly, should it become known that I have been made to reveal my entire contacts list and other confidential information, my personal safety and that of my wife and my family will be put in extreme danger. Any protection afforded me previously as an independent journalist would be lost."

21. As we have said, the claimant was present in court on 25 March. The only oral evidence he gave related to his willingness to give certain undertakings of non-disclosure pending the final determination of the production order proceedings. No evidence was given on behalf of the Chief Constable in the open hearing. Detective Inspector Richardson did, however, give evidence at the closed hearing.

22. On 31 March, the judge delivered an open judgment and a closed judgment.

The open judgment

23. The judge first considered whether the first access condition was satisfied. He considered this question in the light of material disclosed by Detective Inspector Richardson in his sworn information and in his oral evidence at the closed hearing. He rejected the submission advanced on behalf of the claimant that, in order to establish that the material would be of substantial value to the investigations, the Chief Constable had to show that the production order was "necessary". He said: "necessity, human rights considerations and the balancing exercise which the court has to carry out between the public interest in ordering production and that in not stifling public debate, are matters which I must consider in determining whether or not the second condition is satisfied and, if so, whether I should then exercise my discretion to grant the order". He said that he was satisfied, for the reasons submitted on behalf of the Chief Constable, that there were reasonable grounds for believing that the material was likely to be of substantial value whether by itself or together with other material, to both of the terrorist investigations relied on.

24. On behalf of the claimant it was submitted that the application was premature, if only because Hassan Butt was willing and able to talk to the police. They should speak to him first. Only if he was uncooperative might an application become necessary. On behalf of the Chief Constable, it was submitted that it was not necessarily accepted that Hassan Butt would be a witness of truth whose remorse was genuine and complete; and the public interest was in what information he had provided to the claimant rather than what he could now provide to the police. The judge accepted the submissions made on behalf of the Chief Constable and said that he was satisfied that "the approach of the Police in making this application, without testing or exhausting the possibility of interviewing Mr Butt, is wholly responsible, sensible, bona fide and appropriate and I will elaborate on those conclusions in my closed judgment".

25. The judge said that this was not the end of the matter. He had to conduct a quantitative assessment of the benefit which was likely to accrue to the investigation of the material was obtained. For the reasons given in relation to the first access

condition, he was of the opinion that the benefit to the investigations would be "significant". He then referred to the claimant's statement and in particular paragraph 13. He noted the submission that these assertions showed "a strong public interest in preserving the sanctity of [the claimant's] sources and in holding that right to freedom of expression enshrined in Article 10.1 [of the European Convention on Human Rights ("the Convention")] should not be balanced with its qualifications in Article 10.2 and that the qualifications should be restrictively interpreted". He also noted the submission on behalf of the claimant that an order in the terms sought would be "wholly disproportionate and an unwarranted application of the qualification contained in Article 10.2".

26. The judge then asked whether the "intrusion" in the claimant's article 10 rights could be "convincingly justified". At this point in his judgment, he referred to an issue which had arisen as to the number of the claimant's sources that would be affected by a production order in the terms sought by the Chief Constable. Miss Whyte, who was appearing for the Chief Constable, emphasised that paragraph 13 of the claimant's statement had referred to "source" in the singular. Mr Bailin had submitted that "despite what is contained in the statement and the importance of accuracy which was known both to him and to those who drafted it, there is in fact more than one source who might be envisaged by the use of the phrase "a source who has trusted me for many years"". The judge said that he could not accept this assertion. "It is not something in the context of this case about which an error of such importance could have been made. I am satisfied accordingly, on the basis of paragraph 13, that Mr Malik is seeking to protect Mr Butt and the material which he has received from him. The fact that it emanates from a self publicist is a matter which I am entitled to take into account in determining whether the second access condition is satisfied."

27. The judge then said that he had regard to the nature of the material, its relevance to terrorism and terrorism-related offences and the identity of the source (Hassan Butt) and his relationship with the claimant. Notwithstanding (i) the "quasi-sanctity" of the journalist-source relationship and the right to freedom of expression in article 10.1, and (ii) the option the police had of approaching Hassan Butt directly, he had reasonable grounds to believe that it was in the public interest that the material should be produced or that access to it be given.

28. Finally, the judge turned to deal with the exercise of his discretion. He said that he was conscious of the "heavy burden" on him "not only in my assessment of the evidence *ex parte* as well as *inter partes*, but also in the exercise of my discretion in a matter such as this". It did not follow that, because the access conditions had been satisfied, an order would necessarily ensue, far less an order in the terms sought. He said that he had considered the question of proportionality and disproportionality. He concluded: "save as to the scope of the order, I am satisfied that orders in principle should be made". He continued:

> "…As against the publishers, I make the order in the terms sought. As against Mr. Malik, I am of the opinion that in certain respects the order sought is or may prove to have been too widely drawn. I do not wish to compromise the investigation of the Police or the public interest in discouraging serious crime and in detecting and bringing to justice those who are responsible for it any more than the rights of Mr. Malik and

> I will do what can reasonably and properly be done without prejudice to those competing rights to preserve the anonymity of his contacts as opposed to that of Mr. Butt.
>
> For the moment therefore, I am minded to grant the order in the terms of paragraphs 1 to 3 of the draft order, and I am minded to grant the order insofar as it is set out in paragraph 4, in the following terms: all images associated with the publication, whether intended for use or otherwise; audio and video recordings, digital and analogue; notes made regardless of format and source material; any financial information relating to payments made by or on behalf of Mr. Malik to Mr. Butt or on his behalf inclusive of amount paid, dates and method of payment.
>
> It follows that for the moment, at any rate, I do not think it appropriate, having regard to the balancing exercise which I have to perform, to require the Respondent to give up contact lists of all persons featured in the book or contractual agreements, arrangements and negotiations in respect of Mr. Butt, including off-the record or unofficial agreements.
>
> What I propose to do is to adjourn for a period of three months the application in relation to the remainder of the material sought, presupposing that any appeal, should there be one, will have been resolved before then."

Events since the judgment

29. As we have said, the publisher delivered a draft manuscript of the book to the police on 17 April. On 9 May, Hassan Butt was arrested at Manchester airport as he was about to board a plane for Pakistan. He was extensively interviewed by the police. He told them that his earlier public statements that he had been involved in terrorism with Al-Qaeda were untrue. He had never been an Al-Qaeda activist. He had lied to the media in order to make money and achieve fame. He has now been released without charge, but the police investigations are continuing.

The grounds of challenge

30. Mr James Eadie QC submits that the judge erred in that (i) he should not have been satisfied that the first or the second access condition was met in this case; (ii) he failed to exercise the discretion conferred by paragraph 6(1) of schedule 5 in a manner which was compatible with the Convention (in particular article 10); (iii) the production order does not comply with article 6 of the Convention in that it violates the right of a person not to incriminate himself; (iv) even if it was right in principle to make a production order, its terms were too wide; (v) the production order was unlawful in that the closed hearing rendered the proceedings unfair: a special advocate should have been appointed to represent the interests of the claimant at the closed hearing. Finally, Mr Eadie submits that there was a breach of the duty of disclosure on the part of the Chief Constable when he applied for the production order such as should lead this court to quash the order.

Two preliminary points

31. Before we come to the grounds of challenge, we need to emphasise two preliminary points. The first is that these are judicial review proceedings. This is not an appeal. The decision of the judge cannot be quashed unless he erred in law in one or more of the respects in which a decision can be impugned on public law grounds. We recognise, however, that this court is a public authority which must itself comply with the Convention. We bear this in mind when we consider the Convention issues that arise in this case.

32. The second preliminary point arises from the fact that, as we have said, a number of important developments have taken place since the date of the judgment. These include most significantly that Hassan Butt has been arrested and interviewed by the police and now says that he has never been an Al-Qaeda member and never taken part in its terrorist activities. The evidence of what has occurred since the date of the judgment cannot be used to attack (or support) the judgment. In our view, it is irrelevant to this challenge. We accept that it might be relevant if we were to conclude that the order was unlawful and we had to decide, as a matter of discretion, whether to quash it. If post-judgment events showed that, if we were to remit the case to this or another judge for reconsideration, that judge would be bound to reach the same conclusion as Judge Goldstone (so that remission would be futile), then we could take these events into account for the purpose of deciding whether to quash and remit. But we do not see how they can be taken into account for the purpose of deciding whether or not the judge's decision was lawful.

33. That is not to say that, once a production order is lawfully made, it is necessarily set in stone even if subsequent events show that it should not stand, or not stand in the form in which it was made. Since a production order can be made without notice being given to the affected party at all, it would be most unfortunate if that were the case. Paragraph 10(3) of schedule 5 of the 2000 Act provides that the Criminal Procedure Rules may make provision about the variation or discharge of an order. It is common ground that the rules have not made such provision. But section 45(4) of the Supreme Court Act 1981 provides that subject to immaterial exceptions, the Crown Court shall "in relation to…..all other matters incidental to its jurisdiction, have the like powers, rights, privileges and authority as the High Court". There is no doubt that the High Court has inherent jurisdiction to entertain an application by a party affected by an order to vary or discharge the order. In our view, it is clear that it is open to parties affected by a production order to apply to the court which made the order to vary or discharge it on the basis of fresh material that was not before the court when it made the order.

The first access condition

34. The Circuit Judge had to be satisfied that the conditions in paragraph 6(2) and (3) were satisfied. It is common ground that this means that the judge himself had to be satisfied that the statutory requirements had been established. He was not simply asking himself whether the decision of the Chief Constable to make the application was reasonable: see *R v Central Criminal Court, ex parte Bright* [2001] All ER 244 at [78] and [142]. It is true that *ex parte Bright* is a decision on section 9 and paragraph 4 of Schedule 1 of PACE. But for present purposes, these provisions are not materially different from the provisions with which we are concerned.

35. It is also common ground in relation to the first access condition that the order sought by the Chief Constable was for the purposes of the two terrorist investigations to which we have referred.

36. Despite the contrary impression created by his skeleton argument, Mr Eadie does not submit that paragraph 6(2)(b) bears a special "Convention-infused" meaning. In our view, he is right not to do so. It is clear that the discretion which is given by paragraph 6 must be exercised compatibly with the Convention. There is, therefore, no need to give the language of the first access condition a special "Convention-infused" meaning. In our view, paragraph 6(2)(b) should be given its plain and ordinary meaning. It is true that the word "likely" has "several different shades of meaning" and that it is capable of encompassing different degrees of likelihood, varying from "more likely than not" to "may well": see per Lord Nicholls of Birkenhead in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2005] 1 AC 253 at [12]. We agree with Mr Eadie and Mr Andrew Edis QC that in paragraph 6(2)(a) "likely" means "probable". A "substantial value" is a value which is more than minimal: it must be significant. We doubt whether the deployment of synonyms is of assistance. "Substantial" is an ordinary English word.

37. It is important to emphasise that the judge does not have to be satisfied that the material is *in fact* likely to be of substantial value. He or she need only be satisfied that there are reasonable grounds for believing that it is likely to be of substantial value. On the other hand, *belief* is what is required: mere suspicion will not suffice. The judge will hear evidence on behalf of the constable who is making the application who will be expected not only to say that he considers that there are reasonable grounds for believing that the material sought is likely to be of substantial value to the investigation, but also to explain to the judge the basis for this belief. A bare assertion will not suffice. Thus, for example, in one of the cases heard in *ex parte Bright*, this court held that the circuit judge had been wrong to conclude that the statutory test had been satisfied: "on the evidence, at most, there was the possibility that such material might be available" [126]. See too the approach and conclusion on the facts in *Re Moloney's Application for Judicial Review* [2000] NIJB 195 per Carswell LCJ at p 206-207. Whether the first access condition is satisfied in any particular case is essentially a question of fact.

38. In his skeleton argument, Mr Eadie submits that, in order for the police to show that a production order would yield material of substantial value to an investigation, they must prove that such an order is *necessary;* and that, in view of Hassan Butt's evident willingness to co-operate with the police, it could not have been necessary at the time of the hearing before the judge to require the claimant to produce details which Hassan Butt himself might be prepared to provide if questioned by the police or which the police might be able to obtain by a search of his premises. The application was, therefore, premature. Mr Eadie also submits that material which only goes to test the credibility of Hassan Butt would not satisfy the first access condition. In any event, he says, it is unlikely that there would be material differences between the material sought and that which Hassan Butt was prepared to tell the police. The highest the case could fairly be put by the police was that the material that was sought might possibly be of some use to an investigation as some form of check on credibility of what the police might be told in interview by Hassan Butt. That does not pass the statutory threshold.

39. In his oral argument, Mr Eadie adopted his skeleton argument but he placed less emphasis on the necessity argument. He said that at its highest the material might bolster the police case against Hassan Butt whose kernel was already in place. Further, the police justification for seeking the order has undergone a "sea-change". Before the judge, it was that Hassan Butt would have given an honest account to the claimant and they needed the material as a reliable check against which to check the veracity of what Hassan Butt told the police when he came to be interviewed. Now that he has been interviewed and has disowned the account that he gave to the claimant, this justification no longer holds good. Mr Edis emphasises the fact that the police have not reached any conclusion as to which of Hassan Butt's accounts is correct.

40. In our judgment, the judge applied the correct statutory test and reached a conclusion which he was entitled to reach on the facts. We have carefully considered the closed material as did the judge. We reach our conclusion on the basis of the material that was before the judge and not taking account of what has occurred subsequently. We reject the argument that a necessity test is imported at the first access condition stage. There is nothing in the statutory language to support the argument. Parliament could have decided to require the police to satisfy the court that there were reasonable grounds for believing that production of the material was necessary for the purposes of conducting an investigation, but it did not do so. Instead, it stipulated the lower test of reasonable grounds for believing that production would be of substantial value to the investigation.

41. On the basis of all the material seen by the judge (and by ourselves) the judge was entitled to accept the view of the police that there were reasonable grounds for believing that Hassan Butt would not give an account to the police which was substantially the same as that which he had given to the claimant; and that it would be of value to the investigation into possible terrorist offences committed by Hassan Butt for the police to have the full account that he had given to the claimant before they interviewed him. That conclusion has not been invalidated by the fact that, in the events that have occurred, Hassan Butt was arrested and was interviewed without the benefit of the Butt material (save for the draft of the book that was handed to the police by the publisher). The arrest was forced on the police by his attempt on 9 May to leave the jurisdiction.

42. The alleged relationship between Hassan Butt and A (as disclosed by A's defence statement and in any event) is such that similar reasoning leads us to conclude that the judge was also entitled to decide that there were reasonable grounds for believing that the material sought would be of substantial value to the investigation in relation to A.

43. We reject Mr Eadie's criticism of the Chief Constable that there has been a "sea-change" in the justification he advances for requiring the production order. The question for us is whether the judge's decision that the first access condition was satisfied was lawful. As we have said, that must be determined in the light of the material that was available to the judge and the justification advanced by the Chief Constable on that material. For the reasons we have given, his decision was lawful. Since the making of the order, circumstances have changed. Hassan Butt has been interviewed without the benefit of the material that the claimant was ordered to produce (but with the benefit of the draft produced by the publisher). The Chief Constable asserts that, even in the changed circumstances, there are reasonable

grounds for believing that the material sought from the claimant would be of substantial benefit to the investigations. We are inclined to agree. But that is not the issue before us. The "sea-change" does not cast doubt on the validity of the conclusion reached by the judge on the material before him on 25 March.

44. In our judgment, therefore, the judge's conclusion that the first access condition was satisfied was valid.

The second access condition

45. There was disagreement in *ex parte Bright* on the analogous PACE provisions as to whether the conditions relevant to the public interest issue were "somewhat limited" [83] per Judge LJ (as accepted by Maurice Kay J at [160]), or sufficient to encompass wider considerations, as Gibbs J thought to be the position at [188]. In the present case, the judge dealt with the matter on the basis that issues such as whether an order would be compatible with the Convention were relevant to the question whether the second access condition was satisfied. We do not need to determine the scope of the second access condition, because it is clear that all relevant considerations (including Convention issues and the importance of the need to protect confidential journalist sources) must be taken into account when the court exercises its discretion under paragraph 6 of schedule 5. Since all the arguments advanced by Mr Eadie in criticism of the judge's decision that the second access condition was satisfied are deployed by him in his criticism of the judge's exercise of the discretion, we need say no more about the second access condition. On any view, there is a considerable overlap between the second access condition and the factors which are relevant to the exercise of the discretion.

The exercise of discretion and the Convention

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:

> "Article 10 – Freedom of expression
>
> 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.
>
> 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."

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.

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.

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

> "….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, 200F per Lord Nicholls.

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.

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.

59. It is true that the judge dealt only with Mr Malik's rights under article 10. He is criticised by Mr Eadie for failing to deal with the impact of disclosure on Mr Malik's rights under articles 2, 3 and 8 of the Convention and with the issue of self-incrimination and article 6 which we discuss separately below.

60. The foundation for the argument based on articles 2 and 3 is the last two sentences of paragraph 13 of the claimant's statement dated 20 March where he said that, should it become known that he had been made to reveal his entire contacts lists and other confidential information, his personal safety and that of his wife and family would be put in extreme danger. It is, however, right to point out that the claimant did not give oral evidence about this and it was not developed in oral argument by Mr Bailin. It is also of some relevance that journalists who investigate the world of terrorism must be taken to be aware of the fact that it is a criminal offence not to disclose to the police information relating to terrorism that is caught by sections 19 and 38B of the 2000 Act.

61. But the short answer to the criticism of the judge's failure to deal with article 2 and 3 is that disclosure of material emanating from Hassan Butt (but which did not reveal the identity of any confidential source or reveal confidential material from any source apart from Hassan Butt) would not put the claimant or his family at risk: the existence of Hassan Butt as a source was already in the public domain. In other words, article 2 and 3 were not a reason for refusing to make a production order at all. At most, they might be a reason for refusing to make an order whose effect would be to reveal the

identity of sources other than Hassan Butt. No separate argument was addressed to us in relation to article 8 and we propose to say nothing about it.

Article 6 and the privilege against incrimination

62. It is submitted by Mr Eadie that the production order should not have been made because there are reasonable grounds for believing that the documents produced by the claimant in compliance with the order would tend to expose him to a real risk of prosecution: see the test stated by the Court of Appeal in *Sociedade Nacional v Lundquist* [1991] 2 QB 310, 324 E-H and 335G. The privilege against self-incrimination would be destroyed by the order.

63. The offences in respect of which it is said disclosure would tend to expose Mr Malik to a real risk of prosecution are those created by sections 19 and 38B of the 2000 Act. Section 19 provides, so far as material:

> "(1) This section applies where a person-
>
> (a) believes or suspects that another person has committed an offence under any of sections 15 to 18, and
>
> (b) bases his belief or suspicion on information which comes to his attention in the course of a trade, profession, business or employment.
>
> (1A) But this section does not apply if the information came to the person in the course of a business in the regulated sector.
>
> (2) The person commits an offence if he does not disclose to a constable as soon as is reasonably practicable-
>
> (a) his belief or suspicion, and
>
> (b) the information on which it is based.
>
> (3) It is a defence for a person charged with an offence under subsection (2) to prove that he had a reasonable excuse for not making the disclosure".

64. The offences under sections 15 to 18 are fundraising (section 15), use and possession of money and other property (section 16), funding arrangements (section 17) and money laundering (section 18).

65. Section 38B, so far as material, provides:

> "(1) This section applies where a person has information which he knows or believes might be of material assistance-
>
> (a) in preventing the commission by another person of an act of terrorism, or

> (b) in securing the apprehension, prosecution or conviction of another person, in the United Kingdom, for an offence involving the commission, preparation or instigation of an act of terrorism.
>
> (2) The person commits an offence if he does not disclose the information as soon as reasonably practicable in accordance with subsection (3).
>
> (3) Disclosure is in accordance with this subsection if it is made-
>
> (a) in England and Wales, to a constable,
>
> …….
>
> (4) it is a defence for a person charged with an offence under subsection (2) to prove that he had a reasonable excuse for not making the disclosure."

66. It is established practice that any person who wishes to rely on the privilege against self-incrimination as a ground for not answering questions or refusing to disclose a document must do so on oath: see *Downie v Coe* QBENI 97/0665/ E at [24] to [26]. The claimant did not do this. But like Lord Bingham CJ in *Downie's* case, we do not propose to determine the self-incrimination issue that has been raised on behalf of the claimant on that technical ground. We are in no doubt, however, that, if a person wishes to rely on the privilege against self-incrimination, he or she must raise it as an issue. In the present case, the issue was raised at paragraph 21 of Mr Bailin's skeleton argument before the judge in the following terms:

> "**Self-incrimination**:
>
> 21. To the extent that the police may contend that the Respondent might himself have unwittingly committed any criminal offence by his contact with Hassan Butt or otherwise, the Respondent relies on the privilege against self-incrimination. In its exercise of discretion, the Court is required to take into account the fact that a possible consequence of the order sought by the Claimant would be the danger of self-incrimination (*ex p. Bright*, [121])."

67. Neither section 19 nor section 38B was mentioned to the judge. The issue of self-incrimination did, however, surface (albeit briefly) during Mr Bailin's submissions before the judge. The following exchange took place:

> "MR. BAILIN: Rather than infringe upon Article 10, and if the source is known, it makes it no less egregious because in this case the effect is the same. If Mr. Malik is required to reveal all the unpublished research material with the contacts, his duty of confidence is so undermined that it is as bad as if he were required to disclose the identity of the source. Furthermore,

> there may be contacts included which are unknown to the police, other than Mr. Butt. There seems to be some suggestion that perhaps they were active terrorists. Well, if they are active terrorists, then Mr. Malik commits a criminal offence …..
>
> JUDGE GOLDSTONE: No, the prosecution are saying there is only one contact or source named, or not named, but by implication referred to and that is Mr. Butt, and that is at paragraph 13.
>
> MR. BAILIN: Well, your Honour, to the extent that they rely upon the drafting of that statement, your Honour, clearly I cannot fill in every … gaps.
>
> JUDGE GOLDSTONE: No.
>
> MR. BAILIN: But the material which is sought includes more sources than Mr. Butt. That is our case, your Honour."

68. Thus, the claimant raised the issue in a somewhat laconic and unspecific manner in the skeleton argument. If it had been intended to raise the issue by reference to the risk of his being exposed to a prosecution for an offence contrary to section 19 and/or 38B, this could and should have been done (as has been unequivocally done before us), so that the nature of the risk could have been assessed by the judge. Instead, the skeleton did not identify any offence for which the claimant might have been at risk of being prosecuted.

69. As we have said, there was no reference to section 19 or 38B in the course of oral submissions. The issue was raised in the context of a discussion about the scope of any disclosure that might be ordered. Mr Bailin submitted to the judge that, if the claimant was ordered to disclose the identity of sources other than Hassan Butt who might be active terrorists, that wider disclosure might indicate that the claimant had committed a criminal offence. The judge reassured Mr Bailin that he need have no concerns on that score, because paragraph 13 of the claimant's statement showed that there was only one source and that was Hassan Butt. The self-incrimination issue was taken no further. It was not addressed on behalf of the Chief Constable either in the skeleton submissions written by Mr Edis dated 24 March or in oral submissions by Miss Whyte. In these circumstances, it is not at all surprising that the judge did not deal with the issue in his judgment. In so far as the point was raised at all, it was by reference to the possibility that disclosure might show that one or more of the claimant's contacts (other than Hassan Butt) were active terrorists and that the claimant was on that account committing a criminal offence. But the judge made it clear in the course of argument that he was proceeding on the basis that the claimant had only one source, i.e. Hassan Butt.

70. We recognise the seriousness of the privilege against self-incrimination. But in our judgment, it is not open to a party to seek judicial review of an exercise of discretion on the grounds that the judge failed to take into account the privilege against self-incrimination if he did not raise that issue before the judge. In our view, if the claimant wished to rely on the privilege against self-incrimination in relation to the risk of prosecution for offences contrary to section 19 and/or 38B, then it was

incumbent on him to raise that issue before the judge. We do not accept that the judge was under a duty to consider the point of his own motion. First, the point was by no means obvious. Even in the context of the apparently absolute offences created by sections 19 and 38B, it is a defence for a person to prove that he had a reasonable excuse for not making the disclosure. Secondly, the claimant was represented by counsel who did, albeit rather faintly, raise a self-incrimination point. That point had an altogether different basis. It is not suggested that the judge was in error in not taking account of *that* suggested basis for the issue.

71. Nevertheless, it seems to us that it is open to the claimant to apply to the judge to vary or discharge the production order on the grounds that the risk of prosecution under section 19 and/or 38B is a material point which was not taken before him which he now wishes to take. We heard submissions as to (i) whether the privilege against self-incrimination has been ousted by paragraph 6 of schedule 5, (ii) whether, if it has not been ousted, the privilege can be claimed in respect of pre-existing documents, and (iii) if the answers to (i) and (ii) are in the negative, how the privilege should be reflected in the exercise of the discretion granted to the court by paragraph 6. We also heard submissions about waiver.

72. We have already given our reasons for our conclusion that the challenge to the way in which the judge dealt with the self-incrimination point must fail. That is sufficient to dispose of this part of the claimant's challenge to the judge's order. But in deference to the detailed submissions of counsel, and in case the claimant seeks to argue the point before the judge on an application to discharge or vary, we propose to express our views, albeit fairly briefly, on the subject as best we can on the material before us and in the light of the uncertain state of this area of the law.

73. There is no doubt that compliance with an order which requires a person to produce to the police material in his or her possession where the first and second access conditions are satisfied *may* disclose that the person has committed on offence contrary to sections 19 or 38B of the 2000 Act. It is open to Parliament to abrogate the privilege against self-incrimination. It is convenient to start with the question whether, on the assumption that there are circumstances in which compulsory disclosure would infringe the privilege against self-incrimination, paragraph 6 has ousted that privilege. In our judgment, it has not. Clear language (express or by necessary implication) would be required to show that Parliament intended to abrogate such a fundamental principle of the common law: see, for example, *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131F per Lord Hoffmann. There is no such language. The express exclusion of items subject to legal privilege (paragraphs 6(1)(b) and 8(1)(a)) do not carry with it the *necessary* implication that the different privilege against self-incrimination was not to be excluded. Nor do we accept that para 8(1)(b) is a clear indication of an intention by Parliament to override the privilege against self-incrimination. The privilege against self-incrimination is not aptly described as a "restriction on the disclosure of information imposed by statute": it is not an imposed "restriction on the disclosure of information" at all.

74. The next question is whether the privilege against self-incrimination is a right which can in principle be invoked in relation to pre-existing documents which are "real" and "independent" evidence and are not "compelled testimony". We shall refer to this evidence as "pre-existing documents". In recent years, this issue has been the subject

of considerable debate in our domestic law and in the Strasbourg jurisprudence. In view of the decision that we have reached that the self-incrimination issue arising from sections 19 and 38B was not raised before the judge, we do not intend to undertake an exhaustive review of the authorities. The most recent decision of our courts is *C plc v P* [2007] EWCA Civ 493, [2007] 3 WLR 437. It seems to us that the ratio of the decision of the majority of the Court of Appeal was that no privilege against self-incrimination exists in relation to pre-existing documents: see [36] to [38] in the judgment of Longmore LJ (with whom Sir Martin Nourse agreed). The House of Lords has given leave to appeal against this decision.

75. The decision of this court in *ex parte Bright* was apparently not cited to the Court of Appeal in *C plc v P*. As we have said, *ex parte Bright*, was not concerned with paragraph 6 of schedule 5 of the 2000 Act; but it was concerned with the analogous provisions of PACE. This court considered the impact of the privilege against self-incrimination. All three members of the court considered that the privilege against self-incrimination was applicable to pre-existing documents, although they differed about its effect. Judge LJ said that it was a complete answer to the application for disclosure. Maurice Kay and Gibbs JJ, however, disagreed, although they agreed that it was an important relevant factor to be taken into account by the judge when exercising his discretion.

76. Furthermore, as Lawrence Collins LJ said in his judgment in *C plc v P*, there are decisions of the House of Lords which appear to be inconsistent with the ratio of the majority of the Court of Appeal in that case. These were analysed by Lawrence Collins LJ at [54] to [65] of his judgment and led him to hesitate to distinguish those decisions on the basis that they involved a "testimonial" obligation to disclose and verify documents and were not authority for the proposition that the privilege against self-incrimination did apply to pre-existing documents.

77. We were referred to a number of decisions of the ECtHR on the subject of the privilege against self-incrimination and pre-existing documents. These included: *Funke v France* (1993) 16 EHRR 297, *Saunders v UK* (1997) 23 EHRR 313' *JB v Switzerland* [2001] Crim LR 748 (Application 31827/96), *Heaney & McGuiness v Ireland* (2001) 33 EHRR 12, *Shannon v UK* (2006) 42 EHRR 31, *Jalloh v Germany* (2007) 44 EHRR 32 and *O'Halloran & Francis v UK* (Applications 15809/02 and 25624/02). We do not propose to embark on an attempt to analyse these decisions. They are somewhat problematic and we find it difficult to extract from them a clear statement of principle as to whether the privilege against self-incrimination applies to pre-existing documents. We are inclined to accept the submission of Mr Eadie that they seem to indicate that the privilege against self-incrimination protected by article 6 is in play even where the potential for self-incrimination derives from pre-existing documents.

78. In view of the uncertain state of the law, it seems to us that the preferred approach for a Circuit Judge to adopt, at any rate until the House of Lords has resolved the appeal in *C plc v P* is, like the majority in *ex parte Bright*, to treat the privilege against self-incrimination as an important relevant factor to be taken into account when exercising the discretion in respect of pre-existing documents. We should add that 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.

79. We turn, therefore, to the impact of the privilege against self-incrimination on the exercise of discretion adopting the approach of the majority in *ex parte Bright*. In our view, the following non-exhaustive factors should be taken into account in deciding whether a person should be required to disclose material under paragraph 6 where to do so risks infringing his or her privilege against self-incrimination. First, it is necessary to assess the true benefit to the investigation of the material which is sought to be obtained in breach of the privilege. The smaller the benefit, the less justification there is for the infringement; and the greater the benefit, the greater the justification. Part of this evaluation involves a consideration of the extent to which the material 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.

80. 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.

81. Thirdly, it is relevant to consider the gravity of the offence with which the person 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, it is material that these are serious offences which can lead on conviction on indictment to imprisonment for a term not exceeding 5 years.

82. Fourthly, it is relevant to consider the risk of prosecution. In some cases, the crown may offer the person immunity from prosecution. In the present case, Mr Edis has told us that the interest of the police in the claimant is in what he can tell them about Hassan Butt and not in whether the claimant has committed offences under sections 19 or 38B. He says (and we accept) that a prosecution would not be instituted against the claimant unless it was thought that there was a realistic prospect of conviction and that it was in the public interest to prosecute him. In our view, however, in the absence of immunity the court should be slow to attach much weight to the prospect that a prosecution for an offence of non-disclosure is unlikely. It is open to the crown to put the matter beyond doubt by making an unequivocal offer of immunity.

83. Fifthly, it should always be borne in mind that if a person is prosecuted for an offence under section 19 or 38B, the trial judge has the power to exclude evidence under section 78 of PACE if that is required in the interests of fairness.

84. All of these seem to us to be relevant considerations to be taken into account when the court exercises its discretion and decides whether to order disclosure which will infringe a person's privilege against self-incrimination. We do not feel able to say how the balance should have been struck in the present case if the point had been taken before the judge. It is a fact-sensitive exercise. It would only have been appropriate for this court to perform the exercise for itself if we were confident that the outcome was clear and there could only be one answer. But we are not satisfied

that this is the case. In these circumstances, we have limited this part of our judgment to giving some general guidance.

The width of the production order

85. For the reasons that we have given, we have concluded that the judge was entitled to decide *in principle* to grant a production order. But it is also necessary to consider whether it was right to grant an order in terms as wide as those that he made. The question here is whether, to use the language of Judge LJ in *ex parte Bright* at [140], the width of the order was "disproportionate to any practical advantages to the prosecution process". Mr Eadie submits that there is nothing to justify the blanket production of "drafts and source material for the book" or "all images associated with the publication, whether intended for use or otherwise; audio and video recordings; notes regardless of format and source material".

86. In considering the width of the order, it is important to keep in mind that the judge made it clear that he intended by his order to "do what can reasonably and properly be done without prejudice to those competing rights to preserve the anonymity of his contacts as opposed to that of Mr Butt". The "competing interests" were "the investigations of the police or the public interest in discouraging serious crime and in detecting and bringing to justice those who are responsible for it". That is why he said that "for the moment at any rate" he did not think it appropriate to require the claimant to give up contact lists of "all persons featured in the book or contractual agreements, arrangements and negotiations in respect of Mr Butt". In our view, however, the order was drafted in terms which might lead to the disclosure of the claimant's sources other than Hassan Butt. The identity of such sources might be discoverable from the "source material for the book" including the material provided by Hassan Butt; so too they might be discoverable from the material described in paragraph (4) of the order. In fact, at paragraph 7 of his statement dated 8 May 2008, the claimant says that there is material in the handwritten notebooks, typed-up notes, interview tapes and interview transcripts which, if disclosed, *would* lead to the identification of some of his sources (other than Hassan Butt), although they are not named. At paragraph 8, he says that this was background research material which was provided to him by his sources in confidence on the understanding that it would never be published by him or otherwise disclosed.

87. In view of the importance of the need to protect a journalist's sources in aid of his or her article 10 rights, the limitations created by article 10(2) must be applied with caution and convincingly established. That is why the judge was right to adopt a step by step approach. His decision "for the moment at any rate" not to require the claimant to give up his contact lists gave expression to that approach. But in our view, the terms of the order did not sufficiently reflect the judge's intention of doing what could reasonably and properly be done without prejudice to the competing rights to preserve the anonymity of the claimant's contacts (other than Hassan Butt).

88. At the close of the hearing of this application, we invited counsel to submit suggested draft orders (in the case of Mr Eadie, without prejudice to his submission that a production order was wrong in principle).

89. The draft submitted by Mr Eadie was in these terms:

> "(1) Subject to (2) below, all material in your possession provided to you by Hassan Butt (including any audio/video recordings of Hassan Butt and any written notes of what Hassan Butt said to you):;
>
> (2) You are not required to provide any material which would or might (a) reveal or confirm the identity of any confidential source (b) reveal the content of any confidential material from any source apart from Hassan Butt."

90. The draft submitted by Mr Edis included the following:

> "All records of information provided to Shiv Malik by Hassan Butt whether such records are tape recordings of interviews, transcripts of interviews, notes of discussions, written material supplied by Hassan Butt to Shiv Malik or any records of any kind.
>
> The Order requires production of material including information about third parties provided to Shiv Malik by Hassan Butt. It does not require production of any information provided to Shiv Malik by any other person."

91. We have received no oral or written submissions on these suggested drafts. It will be apparent that it is common to them that they require the production of material or information which has been provided to the claimant by Hassan Butt and not by any other person. To the extent that the order made by the judge went further and required the production of material in the possession of the claimant relating to Hassan Butt provided by *any* source (ie not only Hassan Butt himself), it was in our judgment too wide.

92. But we do not think that we should determine the precise form of the order without giving the parties the opportunity to make submissions on it in the light of this judgment. We are particularly interested in whether the order should permit the claimant to redact from material in his possession so as to exclude the means of identifying the claimant's sources (i) what Hassan Butt may have said to him and/or (ii) what the claimant has recorded Hassan Butt as saying, where, because of the way the claimant has organised his research, it is mixed up with what others have said.

Special Advocate

93. At the outset of this part of our judgment, we record our gratitude to Mr Andrew Nicol QC who was instructed by the Attorney-General to make submissions as to the role of special advocates and the circumstances in which they may be employed.

94. Mr Eadie submits that it is clear from the judgment that material, apparently decisive of the outcome of the application for the production order, was not seen by the claimant or his legal representatives. We have read the closed documentation carefully and can confirm that it does contain material which had an important bearing on the outcome of the application before the judge and that the judge was right so to regard it. Mr Eadie submits that the common law requirements of natural justice were not satisfied by the procedure that was adopted in this case. It is fundamental to a judicial inquiry that a person must have the right to see all the information that is put before the judge, so that he may comment on it, challenge it and, if necessary, counter it by contrary evidence. In addition, Mr Eadie submits that

the claimants article 6 civil rights were engaged by the Chief Constable's application and the procedure adopted did not afford the claimant a substantial measure of procedural justice as required by the Convention. At the very least, a special advocate was required to view the closed material and attend the closed hearing in order to cross-examine Detective Inspector Richardson and make submissions to the judge.

95. Mr Eadie further submits that the need for a special advocate was heightened on the facts of this case by the seriousness of the consequences for the claimant if a production order was made. If he complies with the order, he runs all the risks to which we have earlier referred. If he does not comply, then he commits a contempt of court.

96. The use of special advocates was first sanctioned by Parliament in the context of national security deportations by the creation of the Special Immigration Appeals Commission ("SIAC") to hear immigration appeals in matters with a national security element: see section 2 of the Special Immigration Appeals Commission Act 1997. The functions of a special advocate in that context are set out in rule 35 of the Special Immigration Appeals Commission Rules SI 2003 No 1034 (as amended). A special advocate in SIAC proceedings has, broadly speaking, two principal tasks: (i) to test the Secretary of State's objections to disclosure of material to the appellant and see whether more can be moved from the closed to the open part of the proceedings; and (ii) to represent the interests of the appellant in any closed proceedings. Once a special advocate has received closed material, his ability to communicate with the appellant or his representatives is severely curtailed (rule 36). The SIAC model has been adopted in various other legislative contexts. It is not necessary to describe these. They do not include applications for production orders under the 2000 Act.

97. There have been cases where, without an applicable statutory scheme, the court has asked the Attorney-General for a special advocate. Examples are *Secretary of State for the Home Department v Rehman* in the Court of Appeal at [2003] UKHL 47 at [31] and [32]; *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247 at [34]; *R v H* [2004] UKHL 3, [2004] 2 AC 134 at [22] (in the context of an ordinary criminal trial); and *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738.

98. In *R v H* at [22], Lord Bingham, giving the opinion of the Appellate Committee of the House of Lords said, in the context of a discussion about criminal trials, that the court should not be deterred from requesting the appointment of a special advocate to represent a defendant in public interest immunity matters, where the interests of justice are shown to require it. He said: "But the need must be shown. Such an appointment will always be exceptional, never automatic; a course of last and never first resort". In *R (Murungaru) v Secretary of State for the Home Department* [2006] EWHC 3726 (Admin), Mitting J drew attention to the fact that Lord Bingham's comments were made in the context of criminal procedure. That is true, but we doubt whether the court should be more willing to request the appointment of a special advocate in other contexts. In *R (Roberts) v Parole Board*, (not in the context of a criminal trial), it is to be noted that Lord Carswell said at [144] that the special advocate procedure should be used only in "rare and exceptional cases" and as a course of last and never first resort. And Lord Woolf CJ said at [42] that what Lord Bingham said in *R v H* "could be even more apposite in the case of the [parole] board."

99. We accept, therefore, that there is power in the court to request the appointment of a special advocate of its own motion. But that power should be exercised only in an exceptional case and as a last resort.

100. In deciding whether to request the Attorney-General to appoint a special advocate, the court should have regard to the seriousness of the issue that the court has to determine. We accept that the consequences for the claimant of an order that requires him to disclose his sources (other than Hassan Butt) are very serious for him. But as against that, the entitlement to disclosure of relevant evidence is not an absolute right. One important competing interest which may justify non-disclosure is national security: see *Botmeh and Alami v UK* (Application No 15187/03 (unreported)) at [37] cited by Baroness Hale of Richmond in *Secretary of State for the Home Department v MB* [2007] 3 WLR 681 at [62].

101. As Mr Nicol points out, even in a procedure which is entirely *ex parte*, the court may consider that the absent party is afforded a sufficient measure of procedural protection by the obligation on the party who is present to lay before the court any material that undermines or qualifies his case or which would assist the absent party. Further, the court itself can be expected to perform a role of testing and probing the case which is presented. All these features may satisfy the court that the procedure is fair and complies with article 6, even without a special advocate. We would wish to place particular emphasis on the duty of the court to test and probe the material that is laid before it in the absence of the person who is affected. Judges who conduct criminal trials routinely perform this role when they hold public interest immunity hearings.

102. A further relevant question is the extent to which a special advocate is likely to be able to further the absent party's case before the court. It may not always be possible for the court to form a view as to how far, realistically, a special advocate is likely to be able to advance the party's case. But sometimes, it is possible. If the court concludes that the special advocate is unlikely to be able to make a significant contribution to the party's case, that is a relevant factor for the court to weigh in the balance. It should always, however, be borne in mind that it is exceptional to appoint a special advocate outside an applicable statutory scheme.

103. So much for the general approach. We now turn to the question whether the judge erred in failing to request the appointment of a special advocate in this case. In our view, he did not for the reasons advanced by Mr Edis. Mr Bailin had been made aware on 24 March when he received Mr Edis's skeleton argument that the Chief Constable intended to invite the judge to conduct a closed as well as an open hearing. If Mr Bailin had considered that a special advocate should be appointed, he could and should have said so. Instead, immediately before the court went into closed session, he reminded the judge that the conduct of the closed hearing "carried a very heavy responsibility indeed". He referred the judge to para 15-84 in *Archbold Criminal Pleading and Practice* and the cases which deal with the way in which a judge should deal with applications for orders for access to material made in the absence of the person affected. Counsel said that the passage "deals with the onerous responsibilities on judges *ex parte* PACE applications, and we submit that the same ought to apply here". With those words ringing in his ears, the judge proceeded to conduct the closed hearing.

104. The first reason, therefore, why the judge did not err in not requesting the appointment of a special advocate is that counsel representing the claimant did not ask him to do so. Mr Bailin implied to the judge that, if he discharged the "onerous responsibilities" that are placed on judges when dealing with important *ex parte* applications, the claimant's interests would be safeguarded. Judge Goldstone has huge experience of criminal law and procedure. He was entitled to take Mr Bailin's submissions at face value.

105. But secondly, even if the claimant had not been represented, we doubt whether this is one of those exceptional cases where the judge should of his own motion have requested the appointment of a special advocate. We acknowledge the potential seriousness of the consequences of a production order for the claimant. But the closed hearing was not, and was not likely to be, concerned to investigate the consequences of an order for the claimant. That would be the subject of evidence and argument in the open hearing; and so it proved to be. The claimant was able to explain by evidence and argument the effect on his career of disclosure of his sources and the risk that he and his family would face if an order were to be made. The purpose of the closed hearing was to adduce before the judge certain sensitive information in the possession of the police which was relevant to proving that the first and second access conditions were satisfied and to showing that the interference with Mr Malik's article 10 rights entailed by the production order sought was justified by the national security interest. The claimant could not give any evidence on these issues and could not give a special advocate instructions as to facts which might undermine the evidence of Detective Inspector Richardson. It is true that a special advocate could test and probe the evidence and assessments of the officer, but so too could the judge. In these circumstances, we are far from persuaded that, even if Mr Bailin had not acquiesced in the non-participation of a special advocate, the judge would have been in error in not requesting a special advocate of his own motion.

106. For these reasons, the failure of the judge to request the appointment of a special advocate to peruse the closed material and take part in the closed hearing did not render the whole process unfair and did not violate the claimant's article 6 rights.

Breach of the duty of disclosure

107. In October 2006, the Chief Constable obtained a production order against an employed journalist of The Times newspaper which included the following material"....any other material or documents linked to [A] or the subject Hassan Butt". Mr Eadie submits that this order should have been disclosed to the judge (and the claimant) at the Crown Court. It was relevant to the first access condition, because it was evidence of what other steps the same police force had taken to obtain material relating to Hassan Butt apart from arresting him. It is said that it would also have been relevant to whether the material sought from the claimant would be of substantial value to the investigations of A and/or Hassan Butt, bearing in mind that the police already had access via another route to information about them. It was also relevant to the second access condition, because it was evidence of the wider chilling and/or stifling effect of such orders. Mr Eadie submits that, on any view, it was relevant to the exercise of the judge's discretion which is broad enough to take account of such matters.

108. In our judgment, there is no substance in this point. The issue for the judge was whether, on the material placed before him, the two access conditions were satisfied and, if they were, whether he should exercise his discretion to grant a production order in the terms sought or in different terms. We do not see how the fact that a production order had been obtained several months earlier against a different journalist in respect of different material was relevant to the decision that Judge Goldstone had to make.

Conclusion

109. This application has attracted a good deal of media attention for obvious reasons. The previous accounts given by Hassan Butt of Al-Qaeda's activities and his own participation in them are chilling. He spoke of his having spent "a decade of killing for killing's sake". Since the production order made by Judge Goldstone on 31 March, Hassan Butt has disowned his earlier accounts and now says that he lied to the media in order to make money and achieve fame. In view of the threat to national security posed by Al-Qaeda, the Chief Constable would be acting irresponsibly if he did not investigate the activities of Hassan Butt thoroughly and seek to obtain all material that might assist him in his investigations.

110. 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.

111. It is for the police to satisfy the court that the balance should be struck in favour of making a production order. For the reasons that we have given, we are of the view that, on the material and argument before him, the judge was entitled to conclude that a production order should be made *in principle*. But as we have said, we consider that the terms of the order that he made were too wide: see [87] to [91] above. As stated at [92], we invite further submissions as to the precise terms of the order.