IN THE HIGH COURT OF JUSTICE **Claim No. CO/11732/2013**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

IN THE MATTER OF A CLAIM FOR JUDICIAL REVIEW

The Queen on the application of

DAVID MIRANDA

Claimant

-and-

(1) THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
(2) THE COMMISSIONER OF POLICE FOR THE METROPOLIS

Defendants

-and-

ARTICLE 19, ENGLISH PEN, AND THE MEDIA LEGAL DEFENCE INITIATIVE

Interveners

WRITTEN SUBMISSIONS ON BEHALF OF ARTICLE 19, ENGLISH PEN, AND THE MEDIA LEGAL DEFENCE INITIATIVE

Introduction

1. Article 19, English PEN, and the Media Legal Defence Initiative ("the Interveners") are grateful to the Court for granting permission to intervene.[1]

2. The present case holds considerable significance as an opportunity for the Court to enunciate what due respect for the right to freedom of expression requires in the context of detention, search, and seizure. The Interveners are particularly concerned that, while the Police and Criminal Evidence Act 1984 ("PACE") contains specific protections to safeguard journalistic material and free expression, the statutory powers relied on by the Defendants in this case under Schedule 7 to the Terrorism Act 2000 ("TACT") – powers that contain no such safeguards – were used in a manner that is incompatible with Mr Miranda's fundamental rights.

3. Mindful of their duty to assist the court, the Interveners support, but do not seek to duplicate, the submissions of the Claimant and other interveners in respect to Article 10 of the European Convention on Human Rights. Rather, the scope of these submissions will be to assist the Court on the position at the level of international human rights law and as a matter of general legal

[1] These submissions are provided pursuant to the permission granted by the Order of Lord Justice Laws dated 8 October 2013.

consensus in national systems worldwide. Should the Court be assisted by oral submissions in addition, the Interveners will attend by Counsel.

The Interveners

4. Article 19, the Global Campaign for Free Expression, is a registered charity which works globally to protect and to promote the right to freedom of expression, including the right to information. With an international focus since its foundation in 1987, Article 19 currently has offices in Bangladesh, Brazil, Kenya, Mexico, Myanmar, Senegal, and Tunisia. Article 19 has intervened in numerous key cases before the European Court of Human Rights, including the case of *Sanoma Uitgevers BV v Netherlands*,[2] on which the Claimant relies in these proceedings. In addition, Article 19 has participated in many interventions before the English courts, and in particular in *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court*.[3]

5. English PEN is a registered charity and membership organization which campaigns in the UK and around the world, working to protect the freedom to share information and ideas through writing, supporting authors and journalists in the UK and internationally who are prosecuted, persecuted, detained, or imprisoned for exercising the right to freedom of expression. English PEN has a strong record of campaigning for legal reform in the UK, and has experience as an intervener before the Strasbourg Court on issues of press freedom, including in the case of *MGN Ltd v UK*.[4]

6. The Media Legal Defence Initiative is a registered charity that works in all regions of the world to provide legal support to journalists and media outlets that seek to protect their right to freedom of expression. It works closely with a world-wide network of experienced media and human rights lawyers, and local, national, and international organizations who are all concerned with defending media freedom. The Media Legal Defence Initiative was granted permission to intervene before the Supreme Court in the case of *In Re Guardian News and Media*,[5] and it acted as an intervener before the European Court of Human Rights in the *Sanoma Uitgevers* case, among numerous other freedom of expression proceedings.

Summary of Submissions

7. The Claimant and the other parties granted permission to intervene in this claim have indicated that, insofar as their submissions relate to the right to freedom of expression, they will rely upon the jurisprudence of the Strasbourg Court, interpreting Article 10 of the European Convention on Human Rights ("the Convention").

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2 *Sanoma Uitgevers BV v Netherlands* [2010] ECHR 1284 (Grand Chamber).
3 *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420.
4 *MGN Ltd v United Kingdom* [2011] ECHR 919.
5 *In Re Guardian News and Media* [2010] 2 AC 697 (UKSC).

8. It is clearly established in the Strasbourg jurisprudence that a fundamental condition for the full realisation of the right of freedom of expression is that the press must be free to provide the forum in which opinions may be expressed and must be able to provide the access to information on which free expression depends:

> '[P]rotection of journalistic sources is one of the basic conditions for press freedom. 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 reporting may be adversely affected.'[6]

9. Accordingly, the Strasbourg Court has developed, in cases such as *Telegraaf Media Nederland Landelijke Media BV v Netherlands*[7] and *Sanoma Uitgevers v Netherlands*, a clear position that State laws may not be used to force disclosure either of journalists' communications or the identity of their sources, save in exceptional circumstances and, even then, under strictly defined procedures of judicial oversight and approval.

10. The rationale for this position is that, if journalists and their sources have no expectation of the security which confidentiality affords, they may decide against providing information on sensitive matters of public interest for fear of consequences. Further, this chilling effect on the provision of information by journalistic sources will arise by virtue of the potential for identification of sources and provision to authorities of journalistic communications, even if such outcomes do not occur on every occasion that journalists are targeted by the police.[8]

11. In addition to its recognition in Strasbourg jurisprudence, the importance of the right to freedom of expression is widely recognised in international legal standards, by authoritative regional bodies, and in regional and national legal systems outside Europe. This broad recognition underscores the importance of the right and demonstrates the degree of worldwide consensus as to what proper protection of freedom of expression entails.

12. Accordingly, the Interveners make four submissions in this case:

    12.1. First, protection of the right to freedom of expression contains within it a requirement to protect journalists.

    12.2. Secondly, protection of journalists entails protection of persons who assist journalists in their work.

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6 *Financial Times v United Kingdom* [2009] ECHR 2065; (2010) 50 EHRR 46, [59].
7 *Telegraaf Media Nederland Landelijke Media BV v Netherlands* [2012] ECHR 1965.
8 *Sanoma Uitgevers*, [71]; *Financial Times*, [70].

12.3. Thirdly, the restriction of the right to freedom of expression in this case was not necessary in pursuit of the legitimate aim of investigating *'terrorists'* under the proper meaning of that term.

12.4. Finally, the use of Schedule 7 to the Terrorism Act 2000 in this case constituted a disproportionate interference with the right of freedom of expression.

13. Before continuing to the substance of these submissions, the Interveners wish to clarify the status of the standards and materials to which this submission will refer. In particular:

13.1. Treaty Law: The submissions below will refer to legal materials including international treaties, such as the International Covenant on Civil and Political Rights ("ICCPR"), to which the United Kingdom is a signatory but in relation to which there is currently no direct mechanism by which individual claimants may enforce compliance as a matter of domestic law.[9] That said, there is a presumption that statute[10] and common law[11] will be interpreted to be compatible with international law, including unincorporated international treaties, except where the provisions of statute or the relevant common law doctrine clearly precludes such an interpretation.[12] As Lord Justice Laws stated in *A v Secretary of State for the Home Department*:[13]

> '(1) An unincorporated treaty confers no rights directly enforceable in our courts. But (2) there is a strong presumption that our law, judge-made or statutory should be interpreted so as not to place the United Kingdom in breach of an international obligation.'

Accordingly, where reference is made below to the provisions of the ICCPR, and the views of its authoritative interpretative body, the United Nations Human Rights Committee, the Interveners invite this court to interpret domestic law in a compatible manner.

13.2. Customary international law: Further, the Interveners refer below to various principles which, it is submitted, have become so broadly accepted by general custom among States (where States consider their actions to be demanded by law) and eminent experts as to

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9 The instrument giving effect to the right of individual petition to the UN Human Rights Committee for violation of the ICCPR is the First Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. The United Kingdom is not a party to the First Optional Protocol.

10 *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 (HL), 747; and *Boyce v The Queen* [2005] 1 AC 400 (PC), [25]-[26] (Lord Hoffmann).

11 *R v Lyons* [2003] 1 AC 976 (HL), [27] (Lord Hoffmann).

12 *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116 (CA), 143 (Lord Diplock).

13 *A v Secretary of State for the Home Department* [2005] 1 WLR 414 (CA), [266] (Laws LJ).

have become provisions of international law.[14] As Lord Justice Latham noted in *Jones & Milling, Olditch & Pritchard v Gloucestershire CPS:* [15]

> 'a rule of international law is capable of being incorporated into English law if it is an established rule derived from one or more of the recognized sources, that [there] is a clear consensus, evidenced by the writings of scholars or otherwise, or by treaty.'

Where the Interveners refer to general principles evidenced in the laws and standards adopted by States at the international, regional, and national level, and where the Interveners refer to general standards enunciated by authoritative experts (typically appointed by the international community specifically for the purposes of determining an enunciating international human rights standards), the Interveners invite this court to consider those principles as indicative of international law, and to interpret domestic law in a manner compatible with those principles.

13.3. Comparative law: In addition, the Interveners refer below to examples of the treatment of similar questions concerning the balance between freedom of expression and State power across a range of jurisdictions internationally. Even where these examples are not indicative of a standard which has become accepted as customary international law, the Interveners consider that the Court may properly consider the approach taken by eminent courts overseas in its own determination of similar issues in this case. As Lord Bingham noted in *Fairchild v Glenhaven Funeral Services Ltd*:[16]

> 'Development of the law in this country cannot of course depend on a head-count of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions. The law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice. If, however, a decision is given in this country which offends one's basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question.'

Submission 1: The protection of journalists is an inherent condition of freedom of expression

14. The right to freedom of expression is recognised worldwide in human rights treaty law at the international and regional level, as well as in the constitutions and jurisprudence of a vast range of nations. The United Nations Universal Declaration of Human Rights provides, at Article 19, that *'[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without*

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14 See the sources of international law set out in the Statute of the International Court of Justice (18 April 1946), Art 38(1)(b) and (d).

15 *Jones & Milling, Olditch & Pritchard v Gloucestershire CPS* [2004] 2 WLR 1362, [24] (Latham LJ).

16 *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 (HL), [32] (Lord Bingham).

interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'[17] This declared right was embodied in binding treaty law in the ICCPR[18] – to which the United Kingdom is a State party – as Article 19, in the following terms:

> '1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
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> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.'

15. Further, the right to freedom of expression is enunciated in similar terms in the European Union Charter of Fundamental Rights,[19] the American Convention on Human Rights,[20] the African Charter of Human and Peoples' Rights,[21] the Arab Charter on Human Rights,[22] and the Association of South-East Asian Nations ('ASEAN') Human Rights Declaration[23] as well as in national constitutions and statutes worldwide across disparate legal traditions.[24]

16. Just as in the jurisprudence of the European Court of Human Rights, it has been consistently recognised in international human rights law that the full realisation of the right to freedom of expression relies upon, inter alia, the freedom of the press and journalists to investigate, receive, and impart information relating to matters of public importance. Further, there is consensus among the UN bodies that the integrity of such investigation in turn relies upon the comfort that

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17 United Nations General Assembly, GA Res.217A(III) (1948), UN Doc.A/810 at 71.

18 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR').

19 European Union, Charter of Fundamental Rights of the European Union (2000), OJ C364/01, Art 11.

20 Organization of American States ('OAS'), American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143 ('American Convention'), Art 13.

21 Organization of African Unity (now African Union), African Charter of Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1980) 1520 UNTS 217 ('African Charter'), Art 9.

22 League of Arab States, Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008), Reprinted in (2005) 12 *International Human Rights Reports* 892 ('Arab Charter'), Art 32.

23 ASEAN Human Rights Declaration (adopted 18 November 2012), Art 23.

24 See, for example, United States: Constitution of the United States (1787), Amendment I; Canada: Constitution Act 1982 (Canada), Pt 1, s2(b); Japan: Constitution of Japan (1946), Art 21; France: Declaration of the Rights of Man and the Citizen (1789), Art 11, incorporated into the Constitution of the French Fifth Republic (1958); South Africa: Constitution of the Republic of South Africa (1996), s 16; Italy: Constitution of the Italian Republic (1947), Art 21; Germany: Basic Law for the Federal Republic of Germany (1949), Art 5; Brazil: Constitution of the Federative Republic of Brazil (1988), Art 5; Philippines: Constitution of the Philippines (1987), Art III, s 4; Nigeria: Constitution of the Federal Republic of Nigeria (1999), s 39; India: Constitution of India (1950), Art 19(1)(a); New Zealand: New Zealand Bill of Rights Act 1990, s 14; Ireland: Constitution of Ireland (1937), Art 40.6.1; East Timor: Constitution of the Democratic Republic of East Timor (2002), s 40; Australian State of Victoria: Charter of Human Rights and Responsibilities Act 2006 (Victoria), s 15.

journalists and their sources have that information provided to journalists, and the identity of persons providing it, will remain confidential. In particular:

16.1. The UN Human Rights Committee, the authoritative interpretative body for the ICCPR, in its recent General Comment 34 on the right to freedom of opinion and expression noted that: [25]

> '[a] free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Convention rights'
> […]
> 'States parties should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources.'

16.2. The UN Special Rapporteur of the right to freedom of opinion and express has long emphasized the necessary link between the protection of journalists' sources and communications and the respect for freedom of expression, employing the same rationale as the Strasbourg Court, *viz* that a chilling effect on the provision of information will occur if States too readily compel disclosure of information and sources: [26]

> '[T]he protection of sources assumes primary importance for journalists, as a lack of this guarantee may create obstacles to journalists' right to seek and receive information, as sources will no longer disclose information on matters of public interest. Any compulsion to reveal sources should therefore be limited to exceptional circumstances where a vital public or individual interest is at stake.'

16.3. In his most recent report the UN Special Rapporteur has reiterated the need for particular protection of journalists, including the requirement that any attempt by State authorities to compel disclosure of sources or information will only be compatible with human rights where the authorities' request for disclosure has been specifically approved by an independent judicial body: [27]

> 'Journalists should not be held accountable for receiving, storing and disseminating classified data which they have obtained in a way that is not illegal, including leaks and information received from unidentified sources
> […]
> Journalists should never be forced to reveal their sources except for certain exceptional cases where the interests of investigating a serious crime or protecting the life of other individuals prevail over the possible

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25 UN Human Rights Committee, General Comment 34 (2011), UN Doc.CCPR/C/GC/34, [13] and [45].

26 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Addendum: Report on the Mission of the Special Rapporteur to the Republic of Poland (1998), UN Doc.E/CN.4/1998/40/Add.2.

27 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012), UN Doc.A/HRC/20/17, [107] and [109].

> risk to the source. Such pressing needs must be clearly demonstrated and ordered by an independent court.'

17. In the case of Mr Miranda, the significance of a chilling effect lies in its capacity to discourage potential future journalistic sources from providing information in the public interest. As a result, the fact that, in this case, Mr Edward Snowden had already voluntarily revealed his identity ought not to be afforded particular weight. That is because the unlawfulness of actions taken with respect to Mr Miranda and related to information ultimately leaked by Mr Snowden is not solely to be judged by reference to the impact on Mr Snowden as a source, as the Defendants seek to argue,[28] but on the potential discouragement of future journalistic sources who may not elect to waive their anonymity.

18. The principle that States, as part of their duty to protect freedom of expression, are necessarily required to provide strong safeguards for the confidentiality of journalists' sources and the information they provide to journalists is a principle on which there has long been widespread international agreement.

    18.1. Almost twenty years ago, the European Parliament called upon Member States to enact legislation to secure the confidentiality of journalists' sources.[29] For just as long, the Council of Europe has considered the protection of the confidentiality of sources of journalists' information a key element of the freedom of expression and the media which is itself a *'fundamental condition of a genuine democratic society*.'[30]

    18.2. In 2000, as the Claimant has stressed,[31] the Council of Europe's Committee of Ministers adopted a specific recommendation providing detailed guidance on the agreed standards for legislation and practices relating to the confidentiality of journalists' sources and information.[32] Further, in 2008, the Parliamentary Assembly of the Council of Europe issued a renewed call for national parliaments to reconsider legislation according to a range of principles giving effect to freedom of expression, including that *'the confidentiality of journalists' sources of information must be respected.*'[33]

    18.3. Beyond Western Europe, the Organisation for Security and Co-operation in Europe ("OSCE"), with 56 member states across Europe, Central Asia, North America, has similarly considered the protection of journalistic information and sources from forced

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28 First Defendant's Detailed Grounds for Resisting the Claim, [58]-[72]; and Second Defendant's Detailed Grounds for Resisting the Claim, [32.2]-[32.3] and [41.2].

29 European Parliament, Resolution on Confidentiality for Journalists' Sources and the Right of Civil Servants to Disclose Information (18 January 1994), OJ C44/34.

30 See Council of Europe, 4th European Ministerial Conference on Mass Media Policy (7-8 December 1994), Resolution No 2: Journalistic Freedoms and Human Rights.

31 Claimant's Summary Statement of Facts and Grounds, [79]-[82].

32 Committee of Ministers of the Council of Europe, Recommendation (2000)7 on Protection of Sources.

33 Parliamentary Assembly of the Council of Europe, Resolution 1636(2008), Indicators for Media in a Democracy, [8.8].

disclosure, save in exceptional circumstances, to be a fundamental requirement of respect for human rights. The OSCE Representative on Freedom of the Media has recommended harmonization of Member State laws to ensure explicit protection of journalistic information and source confidentiality, even going so far as to consider that journalists ought not to be compelled to testify in court.[34]

18.4. The Inter-American Commission on Human Rights has also agreed, as part of its Declaration of Principles on Freedom of Expression, that: *'[e]very social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.'*[35] Again, the rationale is that *'revealing sources of information has a negative and intimidating effect on journalistic investigations [meaning that] future sources of information will be less willing to assist reporters.'* [36] Similarly, the African Commission on Human and Peoples' Rights ("ACHPR"), in its equivalent Declaration of Principles on Freedom of Expression in Africa, has declared that: *'[m]edia practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with [principles including that] disclosure has been ordered by a court, after a full hearing.'*[37]

19. Not only is there widespread commitment at the international level to the presumptive protection of the confidentiality of journalists' information and sources, there is a similar widespread consensus as to the procedural requirements with which any attempt by State authorities to breach that confidentiality must comply. Just as in the jurisprudence of the Strasbourg Court,[38] a forced disclosure of journalistic information or sources will only be lawful where there has been specific authorization by an independent judicial body. This requirement was set out within the ACHPR 2002 Declaration, just as it had been previously in the Council of Europe's Committee of Ministers 2000 Recommendation. Most significantly, perhaps, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media, the Organization of American States ("OAS") Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information all jointly issued a declaration in 2008 relating to the treatment of the media in the context of terrorism which described the requirement for a court order authorizing breach of journalistic confidentiality as one of the *'[n]ormal rules on the protection of confidentiality of journalists' sources of information.'*[39]

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34 OSCE, Representative on Freedom of the Media, Access to Information by the Media in the OSCE Region: Trends and Recommendations, Summary of Preliminary Results of the Survey (30 April 2007).

35 Inter-American Commission on Human Rights ('IACHR'), Declaration of Principles on Freedom of Expression (October 2000), [8].

36 IACHR, Report on the Situation of Human Rights in Venezuela (29 December 2003), OEA/Ser.L/V/II.118 doc.4 rev.2.

37 African Commission on Human and Peoples' Rights ('ACHPR'), Declaration of Principles on Freedom of Expression in Africa (2002), [15].

38 See, for instance, *Sanoma Uitgevers*, [88]-[100].

39 UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression, and ACHPR Special Rapporteur on Freedom

20. On the basis of this survey of international human rights opinion, it is plain that the confidentiality of journalistic information and journalists' sources is a principle recognised worldwide. Further, it is clear that, while in specific circumstances State authorities may be allowed to force journalists to reveal information in breach of that confidentiality, the importance of journalistic protection and the freedom of expression it fosters necessitate that any such State powers may only be exercised pursuant to specific judicial authorisation.

21. These international standards have been incorporated into national law both within and outside Europe in comparable jurisdictions. German law requires prior judicial approval for warrants of search and seizure of journalistic material,[40] as does Poland[41] and much of Eastern Europe.[42] The United States establishes prior judicial authorization as a minimum protection,[43] and certain European jurisdictions go even further, such as Sweden and Switzerland, where any material subject to journalistic confidentiality is for that reason immune from seizure.[44] The Interveners note that the provisions in PACE regarding judicial authorisation reflect this important requirement, whereas no equivalent safeguards appear in Schedule 7 to TACT.

22. Accordingly, the Interveners submit that the Second Defendant's acts in detaining Mr Miranda pursuant to Schedule 7 to TACT (rather than PACE), and compelling Mr Miranda to provide information (under threat of criminal prosecution for failing to comply), all without specific judicial authorisation or oversight, were not only in breach of European Convention obligations but were also plainly in contravention of international legal standards.

<u>Submission 2</u>: The protection of journalists entails the protection of persons who assist journalists in their work

23. The Defendants have suggested that there is no requirement to extend journalistic safeguards to Mr Miranda for the reason that Mr Miranda is not formally employed as a journalist. The First Defendant has stated that Mr Miranda *'is not a journalist'* nor was the information he was carrying *'journalistic material.'*[45] The Second Defendant has stated that Mr Miranda *'did not and does not claim to*

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of Expression and Access to Information, Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation, December 2008.

40 Code of Criminal Procedure (Germany), s 98.

41 Code of Criminal Procedure (Poland), Art 180, Law No. 97.89.555.

42 Radio and Television Law (Bulgaria), s 15, Decree No. 406; Law on Radio and Television Broadcasting (Romania), Art 7, Law No. 504; Law on Dissemination of Mass Information (Armenia), Art 5; Media Act (Croatia), Art 30, Official Gazette No. 59/2004; Lithuanian Constitutional Court, Decision of 23 October 2002.

43 28 Code of Federal Regulations (USA) §59.4.

44 See Freedom of Press Act (Sweden), Ch 27, Art 2; Ch 38, Art 2; and Ch 39, Art 5; and Penal Code (Switzerland), Art 28a.

45 First Defendant's Detailed Grounds for Resisting the Claim, [53] and [49].

be a journalist,' and echoes the First Defendant's denial that the material carried by Mr Miranda constituted *'journalistic material.'* [46]

24. The Interveners submit that any suggestion that the standards applicable to the treatment of journalists are limited only to persons formally accredited as such would be highly artificial and inconsistent with the broad approach taken to the protection of journalists across the world.

    24.1. The UN Special Rapporteur has noted that persons not formally employed as journalists should *'benefit from the same safeguards as all journalists, since a person's status as a journalist is determined by the work that he or she performs and is not subject to any job title or form of registration.'*[47]

    24.2. The UN Human Rights Committee has further observed that *'[j]ournalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet and elsewhere.'*[48]

    24.3. The principle that persons associated with journalists are due the same standard of treatment and rights protections has also been explicitly endorsed by the UN Security Council. Security Council Resolution 1738, relating to the protection of journalists in situations of armed conflict, expressed its objects in broad terms as *'journalists, media professionals and associated personnel.'*[49]

25. As both Mr Miranda and Mr Glenn Greenwald have stated in their evidence to the Court, Mr Miranda habitually assists Mr Greenwald in his work as a journalist and was doing so at the material time by conveying material from Ms Laura Poitras (in Berlin), ultimately provided by Mr Snowden, to Mr Greenwald (in Rio de Janeiro).[50] The Defendants have acknowledged as much. The Witness Statement of Detective Superintendent 'B' specifically adverts to the Second Defendant's knowledge of Mr Miranda's links to Ms Poitras and to Mr Greenwald and records that Mr Miranda was potentially carrying material between those parties which related to sensitive material leaked by Mr Snowden.[51] The Witness Statement of Mr Oliver Robbins further reveals that the *'Security Service assessed that Mr Miranda, who is the husband of Mr Greenwald, had been tasked by Mr Greenwald to transport material from Ms Poitras in Berlin to Mr Greenwald in Brazil which would significantly assist Mr Greenwald in his exploitation and disclosure of the UK classified material in his possession.'*[52]

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46 Second Defendant's Detailed Grounds for Resisting the Claim, [32.2] and [41.1].
47 Annual Report of the Special Rapporteur on the Promotion and Protection of the Right of Freedom of Opinion and Expression (2010), UN Doc.A/HRC/14/23, [101].
48 UN Human Rights Committee, General Comment 34 (2011), [44].
49 UN Security Council, Resolution 1738(2006), UN Doc.S/RES/1738(2006).
50 Witness Statement of Mr David Miranda, dated 23 October 2013, [9]-[11]; and Witness Statement of Mr Glenn Greenwald, dated 23 October 2012, [62]-[71].
51 Witness Statement "B," dated 23 September 2013, [9], [25], and [27]-[29].
52 Second Witness Statement of Mr Oliver Robbins, dated 24 September 2013, [6].

26. Accordingly, it cannot seriously be in dispute in the present proceedings that Mr Miranda, at the material time, was performing a role in communicating information, including information which originated from a journalistic source (Mr Snowden), from one journalist (Ms Poitras) to another (Mr Greenwald). Nor was Mr Miranda's role incidental or ad hoc – his travel to Berlin for the purposes of assisting Mr Greenwald had been planned in advance and was paid for by Mr Greenwald's employer, *The Guardian*.[53] To determine that, because Mr Miranda's role appeared to be that of conduit, the safeguards which relate to journalistic sources and journalists do not apply, would be to adopt a rigid formalism entirely inconsistent with the broad approach consistently endorsed by the authoritative international bodies. The Interveners invite the Court to note that in the recent case of *Nagla v Latvia*, the Strasbourg Court has explicitly considered that the protections due to a *'journalistic source'* apply to *'any person who provides information to a journalist.'*[54]

27. The Interveners further submit that a broad application of the internationally-agreed principles of journalistic protection from forced disclosure of information and sources is a logical consequence of the reasons for that journalistic protection in the first place. The rationale for respect for journalistic confidentiality as to information and sources lies in the recognition that, if such confidentiality is too readily breached, this will deter people from providing information to journalists on matters of public importance, with a consequent negative impact on the extent of important information provided to citizens.

28. The Interveners submit that exactly the same rationale exists in relation to persons such as Mr Miranda who, while neither formally employed as a journalist nor the originating source of the relevant information passed to a journalist, act as conduits through which information is transmitted from source to journalist, and between journalists. Just as wide powers for State authorities to detain and compel disclosure from formal journalists have a chilling effect on the willingness of sources to come forward, so too do wide powers for State authorities to detain and compel disclosure from those who are directly assisting journalists, or are presumed to be doing so.

29. The end result of both such displays of power is that potential sources of important information may avoid providing that information for fear that it will be examined and their own safety or livelihoods compromised. Accordingly, the same reasoning which necessitates strict standards as to the protection of journalistic confidentiality necessitates no less strict standards for protecting the confidentiality of persons, such as Mr Miranda, who assist journalists in their work.

30. The logic that persons who assist in the communication between source and journalist must be afforded the same protections has been specifically adopted by the Special Court for Sierra Leone, a tribunal jointly established by the United Nations and the Sierra Leone government to consider

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53 Witness Statement of Mr David Miranda, dated 23 October 2013, [11]-[16].

54 *Nagla v Latvia* [2013] ECHR 688, [81].

alleged war crimes and other violations of international law. In the *Prosecutor v Taylor* case, the Court was faced with a preliminary issue relating to a Defence application to compel the disclosure of the identity of certain personnel from the multilateral peacekeeping force Economic Community of West African States Monitoring Group who had facilitated the travel of a journalist from Liberia into Sierra Leone in 1997.[55] Dismissing the Defence application, the Court stated that:

> '[The Court] is of the opinion that a wide definition of a journalistic "source" should be adopted and that no principled distinction can be drawn, as suggested by the Defence, between a "facilitator" and a "source" insofar as both types of person assist journalists in producing information which might otherwise remain uncovered … [B]oth a "facilitator" and a "source" may run similar risks to personal safety and/or face other reprisals as a result of their willingness to assist a journalist in his or her reporting.'[56]

31. Further, the Interveners submit that the approach suggested by the Defendants with respect to the nature of the information being carried by Mr Miranda is similarly out of step with international human rights standards. The First Defendant asserts that the fact that information carried between journalists is not itself *'prepared by a journalist with a view to publication*' necessarily means that journalistic safeguards do not apply.[57] The Interveners submit that a formalistic approach which only considers material to be *'journalistic*' once it has already been written by a journalist cannot be correct. If it were, that would mean that all information provided by whistle-blowers and journalistic sources could potentially be open to seizure simply because it has not yet been incorporated into journalists' reporting. Nor was the potential use of the material likely being carried by Mr Miranda as source material for journalism speculative: at the relevant time, significant reporting on other material provided by the same source, Mr Snowden, had already been published in *The Guardian*, the *Washington Post*, and elsewhere. In addition, as Mr Miranda has confirmed in his evidence, the material being carried by him comprised not only 'raw data' provided by Mr Snowden, but included material which had been indexed and filed specifically with a view to assessment by journalists.[58]

32. There is no bright line distinction in international legal approaches between the protection afforded to material formally prepared by a journalist for publication as against the protection of the underlying source material. In 2007, the Committee of Ministers of the Council of Europe recommended, with respect to the protection of freedom of expression in times of crisis, that Member States should ensure that media professionals are not required to hand over *'information or material (for example notes, photographs, audio and video recordings) gathered in the context of covering crisis*

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55 *Prosecutor v Taylor*, Case no. SCSL-03-1-T-759, Decision on the Defence Motion for the Disclosure of the Identity of a Confidential 'Source' Raised During Cross-Examination of TF1-355 (6 March 2009).

56 *Prosecutor v Taylor*, [25] (Doherty and Sebutinde JJ).

57 First Defendant's Detailed Grounds for Resisting the Claim, [49].

58 Witness Statement of Mr David Miranda, dated 23 October 2013, [18(2)(d)].

situations nor should such material be liable to seizure for use in legal proceedings.'[59] As set out above, the Inter-American Commission on Human Rights Declaration of Principles on Freedom of Expression extends protection not only to sources but *'notes, personal and professional archives*.'[60] Given the purposive approach of avoiding the chilling effect of discouraging potential future sources of information, the Interveners consider that the restrictive interpretation of *'journalistic material'* for which the Defendants argue ought not to be adopted.

33. The Interveners consider that there is no principled basis upon which a distinction may be drawn between the standard required for the protection of the right of confidentiality held by a person formally employed as a journalist and the standard required in the present case of Mr Miranda. Consequently, the Interveners submit that the use of Schedule 7 to TACT to enable the detention and questioning of Mr Miranda, and the seizure of his journalistic material, not being subject to judicial approval, was contrary to generally accepted standards of international human rights law.

<u>Submission 3</u>: The restriction of the right to freedom of expression in this case was not necessary in pursuit of the legitimate aim of investigating 'terrorists' under the proper meaning of that term

34. The Interveners recognise that, subject to generally accepted procedural safeguards, the common legal position worldwide is that in exceptional circumstances where such restriction is necessary for a legitimate purpose journalistic freedom of expression may be interfered with by State authorities. The possibility of such lawful interference is a common feature of definitions found in international and regional human rights law:

    34.1. The ICCPR, for instance, provides that freedom of expression may subject to such restrictions as are *'provided by law and are necessary: (a) For respect of the rights or reputations of others; [and] (b) For the protection of national security or of public order* (ordre public)*, or of public health or morals*.'[61]

    34.2. The UN Human Rights Committee, in its recent General Comment 34, has provided clear guidance as to what will suffice to demonstrate that a restriction is *'necessary*' for a legitimate purpose:[62]

> '[w]here a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate

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59 Guidelines of the Committee of Ministers of the Council of Europe on the Protection of Freedom of Expression and Information in Times of Crisis (26 September 2007).

60 IACHR, Declaration of Principles on Freedom of Expression (October 2000), [8].

61 ICCPR, Art 19(3).

62 UN Human Rights Committee, General Comment 34 (2011), [22], [33]-[35]. See also UN Human Rights Committee, General Comment 22 (1993), [8].

> connection between the expression and the threat. […] Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they were predicated.'

34.3. The UN Human Rights Committee has consistently reiterated the strict requirement that if restrictions are to be lawful they must be directly related to their legitimate stated aim, recalling the principle in views adopted in the cases of: *Kim v Republic of Korea*,[63] *Shin v Republic of Korea*,[64] *Shumilin v Belarus*,[65] *Belyazeka v Belarus*,[66] *Pivonos v Belarus*,[67] and *Fedotova v Russia*.[68] The same stipulation that restrictions must be *'directly related to the specific need on which they are predicated'* has been explicitly endorsed in the jurisprudence of the ACHPR.[69]

35. The strictness of the test applicable at international human rights law to purported restrictions on the right of freedom of expression means that State authorities may not merely make generalised claims as to the public policy justification for their actions. As the Inter-American Court of Human Rights has noted in the case of *Palamara-Iribarne v Chile*,[70] and in its Advisory Opinion on *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*,[71] given the *'necessity'* standard, *'it is not sufficient [for a State] to prove, for example, that the law serves a useful or suitable purpose'* of some general nature.

36. In the communicated cases of *Shumilin*, *Belyazeka* and *Pivonos* (referred to above), the UN Human Rights Committee found violations of Article 19 because Belarus was unable to demonstrate that the statutory provisions in question directly addressed the purpose of protecting national security upon which it sought to rely. Each of those communications related to Article 8 of the Belarus Law on Mass Events, which provides that, prior to receipt of authorisation for a mass political assembly or event, it is unlawful to publicise or otherwise promote that event.[72] The preamble to that Law on Mass Events makes it clear that the aim of regulating mass meetings is to ensure that state authorities can prepare for such meetings so as to ensure public safety in public spaces and the protection of the freedoms of citizens.[73] Such purposes are clearly legitimate, and potentially provide justification for restrictions on qualified rights. The UN Human Rights Committee determined, however, that Belarus could not establish that the prosecution of the applicants in those cases was in fact related to the risk those applicants posed to public safety and protection of

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63 *Kim v Republic of Korea* (Communication No. 574/1994), UN Doc.CCPR/C/64/D/574/1994, [12.4]-[12.5].
64 *Shin v Republic of Korea* (Communication No. 926/2000), UN Doc.CCPR/C/80/D/926/2000, [7.3].
65 *Shumilin v Belarus* (Communication No. 1784/2008), UN Doc.CCPR/C/105/D/1784/2008, [9.3].
66 *Belyazeka v Belarus* (Communication No. 1772/2008), UN Doc.CCPR/C/104/D/1772/2008, [11.4].
67 *Pivonos v Belarus* (Communication No. 1830/2008), UN Doc.CCPR/C/106/D/1830/2008, [9.2].
68 *Fedotova v Russia* (Communication No. 1932/2010), UN Doc.CCPR/C/106/D/1932/2010, [10.3].
69 *Centre for Minority Rights Development v Kenya* (276/2003), [171].
70 *Palamara Iribarne v Chile*, Judgment of 22 November 2005, Series C No. 135, [85].
71 *Compulsory Membership of an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion of 13 November 1985, Series A No 5, [46].
72 See, for instance, *Shumilin*, [4.4].
73 Ibid., [6.2].

other citizens' freedoms. Absent a direct link between the legitimate aim and State action, that action in restriction of human rights will not be lawful.[74]

37. In the circumstances of the present case, the Interveners submit that the use of the Schedule 7 powers with respect to Mr Miranda can only be lawful if the Second Defendant is able to demonstrate that Mr Miranda, at the material time, *'appear[ed] to be a person falling within section 40(1)(b)*' of TACT,[75] properly construed. Section 40(1)(b) defines a *'terrorist*' as a person who *'is or has been concerned in the commission, preparation or instigation of acts of terrorism*,' while section 1 provides that *'terrorism*' is made out by, inter alia, the use or threat of action which endangers a person's life,[76] which is designed to influence the government,[77] and the use of threat is made for the purpose of advancing a political, religious and ideological cause.[78]

38. The Defendants argue that Mr Miranda could properly be considered to be a *'terrorist*' under section 40(1)(b) of TACT, and could therefore be subject to detention pursuant to Schedule 7, because his conduct, in apparently carrying information from Ms Poitras to Mr Greenwald, appeared to constitute his being '*concerned in the commission, preparation or instigation of acts of terrorism*' (emphasis added). The First Defendant submits that *'[t]he phrase "concerned in" is a wide one, apt to include encouraging or assisting crime*,'[79] while the Second Defendant similarly submits that the word *'concerned' 'covers any kind of participation*.'[80] The Defendants' argument rests on their being able to persuade the Court that the act of carrying information which could be used by terrorists to influence governments and to endanger peoples' lives amounts to being *'concerned in*' terrorism and, therefore, renders a person so doing a *'terrorist*' for the purposes of section 40(1)(b).

39. The Interveners consider that a reading of section 40(1)(b) which permits the type of activity carried out by Mr Miranda to fall within the definition of being *'concerned in the commission, preparation or instigation of acts of terrorism*' is overbroad and inconsistent with well-recognised international principles that media reporting on terrorism ought not to be considered equivalent to assisting terrorists. The Committee of Ministers of the Council of Europe in 2005 adopted a declaration specifically relating to the freedom of expression and the media in the context of the terrorism which called upon Member States to *'refrain from adopting measures equating media reporting on terrorism with support for terrorism*.'[81] The same concern that facilitating media reporting ought not to be considered giving assistance to terrorists was reiterated by high representative voices on human rights law from across international institutions in the 2010 joint declaration of the UN Special

74 Ibid., [9.4].
75 Terrorism Act 2000, Schedule 7, paragraph 2(1).
76 Terrorism Act 2000, s1(2)(c).
77 Terrorism Act 2000, s1(1)(b).
78 Terrorism Act 2000, s1(1)(c).
79 First Defendant's Detailed Grounds for Resisting the Claim, [45].
80 Second Defendant's Detailed Grounds for Resisting the Claim, [31.2].
81 Council of Europe Committee of Ministers, Declaration on Freedom of Expression and Information in the Media in the Context of the Fight Against Terrorism (2 March 2005).

Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information. That declaration noted concern as to: [82]

> 'vague and/or overbroad definitions of key terms such as security and terrorism, as well as what it prohibited, such as providing communications support to terrorism or extremism, the "glorification" or "promotion" of terrorism or extremism, and the mere repetition of statements by terrorists'
> [and]
> '[f]ormal or informal pressures on the media not to report on terrorism, on the grounds that this may promote the objectives of terrorism.'

Similarly, the UN Human Rights Committee has stipulated that terrorism offences *'should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression*,'[83] as did Council of Europe Ministers in the 2009 Reykjavik Declaration and Resolutions.[84]

40. In the same way that a definition of *'terrorist'* which embraced a journalist or person assisting a journalist who published information about terrorism would be overbroad, the definition for which the Defendants argue in this case – that any person publishing or assisting in the publication of information which might be misused by others to further terrorist purposes – is also too wide. If the Defendants are correct, and any person dealing with information leaked by Mr Snowden can appear to come within section 40(1)(b) of TACT, there is no principled basis upon which to stop at Mr Miranda. Any person subsequently publishing the material, such as Mr Greenwald or the editors of *The Guardian*, the *Washington Post* and most major newspapers across the world could be *'terrorists'* under the same definition, since in facilitating publication they could be said each to have made it possible for the leaked information to be misused for political purposes which endanger human lives.

41. The Interveners submit that a definition of *'terrorist'* for the purposes of section 40(1)(b) which is apt to include thousands of journalists and associated personnel in reputable news organisations across the world, rendering each of them liable to detention and seizure pursuant to Schedule 7, would be a paradigmatic instance of a definition which is overbroad. Accordingly, the Interveners submit that such a reading of the Schedule 7 power – and section 40(1)(b) – cannot be correct, mindful of the uniform international standard that laws relating to terrorism must be strictly defined and specifically targeted. In the present case, therefore, the Interveners consider that the Defendant's use of powers enacted for the stated purpose of investigating direct involvement in

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82 UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade (2 February 2010), [8](a) & (c).

83 UN Human Rights Committee, General Comment 34 (2011), [46].

84 1st Council of Europe Conference of Ministers Responsible for Media and New Communication Services, Reykjavik, Political Declaration and Resolutions, MCM(2009)011 (29 May 2009), p11, [5]-[6].

terrorism to detain Mr Miranda, who cannot properly be considered a *'terrorist'* under section 40(1)(b), constitutes a violation of the right of freedom of expression.

42. The Interveners submit that, while there may, on the one hand, be legitimate reasons for State authorities to seek to investigate leaked information going to certain matters of national security, and while there may, on the other, be legitimate reasons for State authorities to seek to investigate suspected terrorism through the seizure of information under Schedule 7 to TACT, it was not legitimate for the Second Defendant to seek to press the latter power in service of the former aim, as appears to have occurred in the present case. Accordingly, the Interveners submit that, were this Court to endorse the use of powers under Schedule 7 to detain, question, and seize information from Mr Miranda when he properly falls outside the scope of being a terrorist, would be inconsistent with universal human rights law standards.

<u>Submission 4</u>*:* The use of schedule 7 to the Terrorism Act 2000 constituted a disproportionate interference with the right of freedom of expression

43. Finally, interference with the right to freedom of expression will only be lawful if the interference in question is strictly proportionate to the aim served. The assessment of proportionality requires that due consideration be afforded to the significance of the right at issue. In this regard, the Interveners note that the right of freedom of expression is consistently held to be a right of particular importance, given that it is through free expression that a range of other human rights, such as rights of political participation,[85] freedom of association, and freedom of religion are realised. As the UN Human Rights Committee has declared in its General Comment 34: [86]

> 'Freedom of opinion and freedom of expression are indispensible conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society […]
> Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.'

44. Courts worldwide have also declared the foundational significance of free expression and freedom of the press for individual fulfillment, the proper scrutiny of government, and the functioning of a democratic society. The Court of Justice of the European Union observed in the case of *Criminal Proceedings Against Patriciello* that freedom of expression is *'an essential foundation of a pluralist, democratic society reflecting the values on which the Union … is based.'* [87] The Supreme Court of India, having

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85 See *Gauthier v Canada* (Communication No. 633/1995), UN Doc.CCPR/C/65/D/633/1995, [13.4]; *Aduayom, Diasso and Dobou v Togo* (Communications Nos 422/1990, 423/1990, and 424/1990), UN Doc.CCPR/C/57/D/422-4/1990, [7.4]

86 UN Human Rights Committee, General Comment 34 (2011), [2] and [3].

87 Case C-163/10 *Criminal Proceedings Against Patriciello* [2011] ECR I-7565, [31].

memorably stated in the case of *Bennet Coleman v Union of India* that *'[f]reedom of the press is the ark of the Covenant of democracy*,'[88] enunciated a series of broad values secured by free expression in the case of *India Express Newspapers v Union of India*, including the attainment of self-fulfillment and the capacity for participation in democratic society.[89] As a general principle, due regard to the fundamental importance of the right is necessary whenever restrictions upon it fall for consideration. Further, free expression in particular contexts is even more significant. The UN Human Rights Committee observes in its General Comment 34 that *'[t]he principle of proportionality must also take account of the form of expression at issue … For example, the value placed by the Covenant upon uninhibited expression is particularly high in circumstances of public debate in a democratic society concerning figures in the public and political domain.*'[90] This reflects the position in the Strasbourg case law that there is little scope for restrictions of speech or debate on matters of public and political interest.[91]

45. In the present case, as Mr Miranda has stated,[92] the information seized included information leaked by Mr Snowden regarding large-scale internet and telephone surveillance programs operated by the government of the United States (with the assistance of the UK security services and a range of private sector internet and telephone companies). Such matters appear clearly to fall within the public and political field which the UN Human Rights Committee considers necessitates special respect, requiring that States provide a particularly pressing justification for restrictions on free expression.

46. Even if journalistic confidentiality may be overridden in extreme circumstances, and even if a pressing need exists, the assessment of proportionality in this case entails granting due weight to the fact that the free expression being exercised related not only to matters of public importance, but to reporting on human rights itself. Accordingly, the Court ought to consider that this case lies at the end of the spectrum where the most stringent journalistic protection is required.

Conclusion

47. For the reasons set out above, the Interveners submit that the right to freedom of expression, including its specific freedom for journalistic confidentiality, is universally recognised to be of such value that any attempted restriction of that right must be strictly defined, clearly necessary in service of a stated pressing need, and proportionate to the import of the right curtailed. In the present case, the Interveners consider that the restriction on Mr Miranda's freedom of expression was incompatible with the standards recognised at international law and by comparable legal systems worldwide. On the basis of this survey of international, regional, and national human

88 *Bennett Coleman v Union of India* AIR [1973] SC 106.
89 *India Express Newspapers v Union of India* AIR [1986] SC 515.
90 UN Human Rights Committee, General Comment 34, [34]. See also *Aduayom, Diasso and Dobou v Togo*, [7.4]; and *Bodrozic v Serbia and Montenegro* (Communication No. 1180/2003), UN Doc.CCPR/C/85/1180/2003, [7.2].
91 *Sürek v Turkey (No 1)* [1999] ECHR 51, [61].
92 Witness Statement of Mr David Miranda, dated 23 October 2013, [18] and [24].

rights standards, the Interveners submit that the use of Schedule 7 to TACT in this case clearly falls outside the scope of what is acceptable in human rights law. Consequently, the Interveners submit that interpreting the statutory powers at issue in this case compatibly with international human rights law requires that the treatment of Mr Miranda be held to constitute an unlawful violation of his right to freedom of expression.

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