Neutral Citation Number: [2009] EWHC 1727 (QB)

Case No: IHJ/09/0621

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/07/2009

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

HER MAJESTY'S ATTORNEY GENERAL	**Claimant**
- and -	
RANDOM HOUSE GROUP LTD	**Defendant**

- -
- -

Mr Richard Whittam QC and Mr Clive Sheldon (instructed by **the Treasury Solicitors**) for the Attorney-General
Ms Catrin Evans (instructed by **Group Legal, Random House Group Limited**) for the Defendant

Hearing dates: 9 July 2009

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Judgment

Mr Justice Tugendhat :

1. Her Majesty's Attorney General applies for an injunction to restrain the further sale of a book entitled "The Terrorist Hunters – the ultimate inside story of Britain's fight against terror" ("the Book"). She does so on the ground that such publication would create a substantial risk that the course of justice in a criminal trial currently proceeding ("the Trial") will be seriously impeded or prejudiced, within the meaning of the Contempt of Court Act 1981 s.2(2) ("the Act"). The Defendants in the Trial are Abdulla Ahmed Ali and seven co-accused ("the accused"). The Trial is proceeding before Henriques J ("the Trial Judge") and a jury at Woolwich Crown Court.

2. The Defendant is the publisher of the Book ("the Publisher"). It opposes the application on the ground that the Book does not create any substantial risk of prejudice to the Trial, and an injunction would be an unnecessary and disproportionate interference with the right of freedom of expression (Art 10 of the European Convention on Human Rights ("the Convention")). Alternatively, such risk as there may be can be sufficiently addressed by directions to the jury, such as the Trial Judge gave on 24 February, at the start of the Trial, and on 30 June, and any further directions he may gave in the future.

3. The circumstances of this application include a number of significant matters which together, and in some cases separately, are so unusual that it is difficult to imagine a comparable case happening again. Of particular significance is the timing of the publication in question, just at the close of speeches for the defence, the authoritative position of the author and the scale and gravity of the Trial, involving as it does so many accused on such serious charges.

4. The trial is a retrial. The accused were arrested in a police investigation called "Operation Overt". I have been told that it was the largest investigation ever conducted by the police. The investigation was into a plot, known as "the airline plot", allegedly to use on aircraft improvised explosive devices, some concealed in soft drink bottles. The main count on the indictment is count 1: conspiracy to murder by detonation of improvised explosive devices on board transatlantic passenger aircraft. The first trial lasted from April to September 2008. On 8 September 2008 the jury acquitted Mohammed Gulzar. Ali, Sarwar and Tanvir Hussain were convicted of conspiracy to murder (Count 1A, not involving aircraft). The jury failed to agree on Count 1 in respect of these three accused, and failed to agree on any verdict in respect of the other four accused. The jury was discharged.

5. That outcome attracted vast publicity in and after September 2008. Much of that publicity is still easily accessible on the internet, including at the most popular websites, such as that of the BBC. On the basis of the publicity the accused sought a stay of proceedings on the ground that they could not have a fair trial. Further details of these matters are set out below.

6. The Book is written by Andy Hayman "with Margaret Gilmore", as it is put on the title page. Mr Hayman was the police officer in charge of Operation Overt. He has since retired. At the time he was Assistant Commissioner in the Metropolitan Police Service ("MPS"). His responsibilities included management of the Counter Terrorism Command in London. Of all people, he might be thought the least likely to intend that the trial be impeded or prejudiced. It is not suggested that he has any such intention. It

is accepted that the Book has been written and published in good faith. However, the fact that he had those responsibilities means that anything written by him has the credibility of someone at or close to the original source of the information he gives. The weight a reader will accord to anything he says will be much greater than the weight accorded to an author who was not personally involved in the events he recounts.

7. Margaret Gilmore is a Senior Research Fellow with the Royal United Services Institute. She specialises in homeland security. Before taking that position she was a very experienced journalist

8. The Book is over 300 pages in length. The Publisher states that it is "the story of how UK police are hunting a new and lethal threat … Commissioner Andy Hayman, CBE, QPM, was … at the centre of every major terrorist investigation – overt and covert – during the dramatic events of 2005 to 2007… [including] the 7 July bomb attacks in London, the attempted bombings of 21 July … and many other cases…" The Book was sent in draft in advance of publication to MI5 and to the Metropolitan Police Authority ("the MPA"). The MPA is separate from the MPS, but is the former employer of Mr Hayman. Changes to the draft were made as a result, and no objection to the book going on sale was outstanding from these two organisations. These matters are referred to on a page at the front of book headed "Acknowledgement". The references to MI5 and the MPA must add to the weight which a reader will give to the contents.

9. There are just five pages in chapter 9 of the Book which give rise to this application. Those pages describe events that in fact occurred as part of Operation Overt, although that is not expressly stated, and none of the accused is expressly identified. Before it went on sale, chapter 9 of the Book was not seen by the MPS or the Crown Prosecution Service ("CPS"). The reasons for this are set out in the evidence before me. The parties are not agreed on this point. But that issue is not material to anything that I have to decide.

10. It is an accident that when copies of the Book were sent to booksellers for sale on 25 June, in the normal course of book publishing, that happened to be just days before evidence in the trial closed on 29 June 2009. Speeches started on 30 June. At the date of the hearing one speech for the defence was being delivered, and two speeches for the defence remained to be made. It was expected that the summing up by the Trial Judge would commence in the week beginning 13 July, and that the jury would retire during the week of 27 July. Verdicts may be expected at some time in August.

11. The period during which the injunction is sought to run would expire at, or shortly after, the date of the verdicts. Thus it is a period which is not expected to last longer than about 8 weeks.

12. A copy of the Book was obtained by the MPS and brought to the attention of the prosecution team on Monday 29 June. The Attorney-General's office approached the Publisher. The Publisher explained that by then a number of copies of the Book had been sold by retailers (about 800 as it is now understood), 10,461 had been sent to retailers in preparation for the publication date of 2 July and 3,430 had been sent to export markets. The Publisher was not willing to take voluntary steps to halt sales of the Book. Late on Wednesday, 1 July 2008 Saunders J granted an interim injunction

to preserve the position, so far as possible, pending the hearing before me. The terms of that order are not material. Following that, all copies of the Book were removed from sale as required by the Order.

13. The Trial Judge was informed. On 30 June he reminded the jury of a direction he had given earlier (that their duty was to decide the case only on the evidence), but he did not refer to the Book. The Trial is proceeding. There is no suggestion that any copy of the Book so far sold has come to the notice of any juror. Extracts from the Book were serialised in The Times on 20, 22 and 23 June, and attracted some publicity. But there was no reference to the passages which have given rise to this application.

THE ORDER SOUGHT

14. The injunction sought is an order to restrain the Publishers from distributing the Book or publicising the contents of pages 258-262.

CONTEMPT OF COURT – THE STRICT LIABILITY RULE

15. The applicable law is substantially in statutory form. The Act provides, so far as material:

> "1 The strict liability rule
>
> In this Act "the strict liability rule" means the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so.
>
> 2 Limitation of scope of strict liability
>
> (1) The strict liability rule applies only in relation to publications, and for this purpose "publication" includes any …, writing, .. or other communication in whatever form, which is addressed to the public at large or any section of the public.
>
> (2) The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced....
>
> 5 Discussion of public affairs
>
> A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion."

16. Injunctions to restrain a contempt of court are rare. As Ralph Gibson LJ stated in *Leary v BBC*, CA September 29 1989 unreported, and cited in Arlidge Eady & Smith on Contempt of Court (3rd ed 2005) para 6-3:

"The primary defence of the administration of justice from unlawful interference by [publications] is the heavy sanction of prosecution if a contempt of court is committed".

17. There is little dispute between the parties as to the meaning of the Act. In s.2(2) of the Act "substantial" describes the degree of risk. "Seriously" describes the degree of impediment or prejudice to the course of justice. In combination the two words are intended to exclude a risk that is only remote. See *A-G v English* [1981] 1 AC 116, 142-2. In *A-G v MGN* Ltd [1997] 1 All ER 456, 460, the principles governing an application for committal for contempt of court were summarised by Schiemann LJ. They are all also relevant to applications for an injunction, but the standard of proof (in (6) below) needs separate consideration in relation to applications for injunctions. He said as follows:

"(1) Each case must be decided on its own facts[c].

c See *A-G v News Group Newspapers Ltd* [1986] 2 All ER 833 at 843, [1987] QB 1 at 18 per Parker LJ and *A-G v BBC* (11 June 1996, unreported), where Auld LJ said: 'The degree of risk of impact of a publication on a trial and the extent of that impact may both be affected, in differing degrees according to the circumstances, by the nature and form of the publication and how long it occurred before trial. Much depends on the combination of circumstances in the case in question and the court's own assessment of their likely effect at the time of publication. This is essentially a value judgment for the court, albeit that it must be sure of its judgment before it can find that there has been contempt. There is little value in making detailed comparisons with the facts of other cases.'

(2) The court will look at each publication separately and test matters as at the time of publication (see *A-G v English* [1982] 2 All ER 903 at 918, [1983] 1 AC 116 at 141 per Lord Diplock and *A-G v Guardian Newspapers Ltd* …[1992] 3 All ER 38 at 48–49, [1992] 1 WLR 874 at 885); nevertheless, the mere fact that, by reason of earlier publications, there is already some risk of prejudice does not prevent a finding that the latest publication has created a further risk[d]. [It was common ground that there was no room for reading the singular word 'publication' in s 2 of the 1981 Act as the plural in accord with s 6 of the Interpretation Act of 1978.]

d See *A-G v Independent Television News Ltd* [1995] 2 All ER 370 at 381: 'Mr Moses contended that it does not follow that because a risk had been created by the broadcast (on the night before) further publication in newspapers would not create fresh and added risk of prejudice. In other words, if several newspapers published prejudicial material, they cannot escape from liability by contending that the damage has already been done, because each affords its own

additional risk of prejudice, or, as it might be said, each exacerbates and increases that risk. In my judgment, that submission is correct.'

(3) The publication in question must create some risk that the course of justice in the proceedings in question will be impeded or prejudiced by that publication.

(4) That risk must be substantial[e].

e In *A-G v BBC* Auld LJ said: '… the threshold of risk is not high, simply of more than a remote or minimal risk of serious prejudice.'

(5) The substantial risk must be that the course of justice in the proceedings in question will not only be impeded or prejudiced but seriously so.

(6) The court will not convict of contempt unless it is sure that the publication has created this substantial risk of that serious effect on the course of justice.

(7) In making an assessment of whether the publication does create this substantial risk of that serious effect on the course of justice the following amongst other matters arise for consideration: (a) the likelihood of the publication coming to the attention of a potential juror; (b) the likely impact of the publication on an ordinary reader at the time of publication; and (c) the residual impact of the publication on a notional juror at the time of trial. It is this last matter which is crucial.

One must remember that in this, as in any exercise of risk assessment, a small risk multiplied by a small risk results in an even smaller risk[f].

f In *A-G v Independent Television News Ltd* [1995] 2 All ER 370 at 383 Leggatt LJ said: 'During the nine months that passed after anyone had read the offending articles, the likelihood is that he no longer would have remembered it sufficiently to prejudice the trial. When the long odds against the potential juror reading any of the publications is multiplied by the long odds against any reader remembering it, the risk of prejudice is, in my judgment, remote.'

(8) In making an assessment of the likelihood of the publication coming to the attention of a potential juror the court will consider amongst other matters: (a) whether the publication circulates in the area from which the jurors are likely to be drawn, and (b) how many copies circulated.

(9) In making an assessment of the likely impact of the publication on an ordinary reader at the time of publication the court will consider amongst other matters: (a) the prominence of the article in the publication, and (b) the novelty of the content of the article in the context of likely readers of that publication.

(10) In making an assessment of the residual impact of the publication on a notional juror at the time of trial the court will consider amongst other matters: (a) the length of time between publication and the likely date of trial[g], (b) the focusing effect of listening over a prolonged period to evidence in a case[h], and (c) the likely effect of the judge's directions to a jury.

g This was discussed both in *A-G v Independent Television News Ltd* [1995] 2 All ER 370 and in *A-G v News Group Newspapers Ltd* [1986] 2 All ER 833 at 843, [1987] QB 1 at 17–18, where Parker LJ explained: 'The imminence or remoteness of the proceedings will still vitally affect both the existence of a substantial risk of prejudice and the question whether, if there is such a risk, it is a risk that the course of justice will be seriously impeded or prejudiced. Both the risk and the degree of prejudice will, as it seems to me, increase with the proximity of the trial ….' In the same case Donaldson MR had said ([1986] 2 All ER 833 at 841, [1987] QB 1 at 15): 'Proximity in time between the publication and the proceedings would probably have a greater bearing on the risk limb than on the seriousness limb, but could go to both.'

h In *Ex p Telegraph plc* [1993] 2 All ER 971 at 978, [1993] 1 WLR 980 at 987 Lord Taylor CJ said: '… a court should credit the jury with the will and ability to abide by the judge's direction to decide the case only on the evidence before them. The court should also bear in mind that the staying power and detail of publicity, even in cases of notoriety, are limited and that the nature of a trial is to focus the jury's minds on the evidence before them rather than on matters outside the courtroom …'

This last matter in particular has been the subject of extensive judicial comment in two different contexts: in the context of a trial or an appeal from a trial verdict and in the context of contempt proceedings. There have been many cases where, notwithstanding such prejudicial publications, the convictions have not been quashed. However, undoubtedly there have also been occasions where convictions have been quashed notwithstanding judicial directions to the jury to ignore prejudicial comments in the media.

> In the former category of cases what has been stressed is that the whole system of trial by jury is predicated upon the ability and willingness of juries to abide by the directions given to them by the judge and not to accept as true the content of a publication just because it has been published…."

18. There are more recent cases on some of these points, but none that need to be cited at this stage. I shall consider s.5 below.

19. Impediment and prejudice are not the same thing. The two concerns raised by the Attorney-General are: (1) that a juror will be influenced by the book and (2) that because of this fear (whether it is justified or not), the proceedings will be impeded by the measures that may be sought, in particular by defence counsel, and those that may be adopted by the Trial judge, to ensure the fairness of the Trial Judge.

20. What is meant by an impediment was considered in *A-G v Birmingham Post and Mail Ltd* [1999] 1 WLR 361. First it is helpful to note what the court said about the degree of prejudice that is required under s.2(2) of the Act. As summarised in the headnote it is:

> "on an application under section 2(2) of the Contempt of Court Act 1981 it was a sufficient basis for finding strict liability contempt that the publication created a seriously arguable ground of appeal against conviction, and it was not necessary to demonstrate a degree of prejudice that would justify an order for a stay; that the questions for the trial judge when considering whether to abandon a trial or order a stay and for the Divisional Court when considering an application under section 2(2) were not the same, although it was unlikely that a publication which had resulted in the discharge of the jury would not amount to a contempt;…"

21. At p 366E-G Simon Brown LJ cited the following from the judgment of Watkins LJ in *A-G v BBC* [1992] COD 264 (a case where there had been no stay of the criminal proceedings and where in the event the accused was acquitted). This supports the proposition that an impediment occurs where it was (or would be) on the cards after the publication in question that the jury would have to be discharged, or if the jury was not discharged, and the defendants were convicted, the failure by the judge to discharge the jury would found a ground of appeal:

> "… the question of whether there was a similar risk of the course of justice being seriously impeded also requires to be answered. As to that Mr. Eady submitted there was no such risk. Anyhow the trial, apart from a few hours interruption, proceeded. Such a matter, regrettable though it is, is, in effect, I think he would say, de minimis, it disturbed the trial but little. Mr. Havers maintains that that is the wrong approach to providing an answer to the question. It was on the cards after the broadcast that the jury would have to be discharged. That was the risk present at that time and moreover it was accompanied by the risk that if the jury was not discharged and

> the defendants were convicted the failure by the judge to discharge the jury would found a ground of appeal . . . In my view Mr. Havers is right. Such procedural changes to a trial as might have come about and the effects of them could rightly be said to delay and obstruct the course of justice. In the circumstances it cannot have been difficult to foresee that just that would happen. There would have existed in the words of the statute a substantial risk that the course of justice would be seriously impeded, with the additional consequence, I would add, of possible prejudice to the defendants through having to wait for a fresh trial and being tried by another jury."

22. At p 369H Simon Brown LJ said:

> "one and the same publication may well constitute a contempt and yet, even though not substantially mitigated in its effect by a temporary stay and/or change of venue, not so prejudice the trial as to undermine the safety of any subsequent conviction. To my mind that can only be because section 2(2) postulates a lesser degree of prejudice than is required to make good an appeal against conviction. Similarly it seems to me to postulate a lesser degree of prejudice than would justify an order for a stay. In short, section 2(2) is designed to avoid (and where necessary punish) publications even if they merely risk prejudicing proceedings, whereas a stay will generally only be granted where it is recognised that any subsequent conviction would otherwise be imperilled, and a conviction will only be set aside (at all events now, since section 2 of the Criminal Appeal Act 1995) if it is actually unsafe. Whilst, therefore, it is correct to say that the Attorney-General has to prove a contempt application beyond reasonable doubt, one must also bear in mind, as Auld L.J. observed in *Attorney-General v. British Broadcasting Corporation* [1997] E.M.L.R. 76, 82-83, that the threshold of risk is not high."

23. At p370F he referred to what he had himself said in *A-G v Unger* [1998] 1 Cr App R 308 and said:

> "I was there envisaging a publication being held in contempt even though it does not require (to ensure a safe conviction) the trial to be moved or delayed, provided only it requires some extreme direction to be given to the jury "or creates at the very least a seriously arguable ground for an appeal on the basis of prejudice." Put aside the need merely for a special direction (which, if it stood alone, would perhaps be a debatable basis for a finding of contempt). I still think that to create a seriously arguable ground of appeal is a sufficient basis for finding strict liability contempt.
>
> Clearly it is a relevant consideration too when a judge at first instance is deciding whether or not to grant a temporary stay.

> But more particularly the trial judge will ask himself: "Is there a real danger that the jury cannot reach a just verdict, or the defendant have a fair trial?" The judge will have to form a view as to just how seriously prejudicial the publication is, to what extent it can be mitigated by special directions, how desirable it is to avert a possible risk of a successful appeal on that ground …, and how inconvenient and costly in the particular circumstances a stay would be (depending in large part no doubt on how far into the trial the problem arises). In reaching his decision the judge will of course bear well in mind the many powerful and authoritative dicta summarised in the passage I have already cited from Auld L.J.'s judgment in *Attorney-General v. British Broadcasting Corporation* [1997] E.M.L.R. 76 and emphasised afresh by Lord Taylor of Gosforth C.J. in *Reg. v. West* [1996] 2 Cr.App.R. 374, to the effect that juries generally can be expected to comply with their oaths and to decide cases solely according to the evidence put before them and the directions they are given. Mr. Pannick not surprisingly lays great stress on these. But, as Mr. Havers points out, if one carries this principle too far, there would be no need for a law of contempt in the first place, and on occasions it is quite unrealistic to expect the jury to disregard extraneous material, in particular when published contemporaneously with the trial."

24. On this basis there can be a contempt within s.2(2) by a publication provided only it requires some extreme direction to be given to the jury or creates at the very least a seriously arguable ground for an appeal on the basis of prejudice.

25. Ms Evans submits that a different view was expressed by Sedley LJ in *A-G v Guardian* [1999] EMLR 904. At p925 he expressed the view that if an appeal (by a convicted accused) on the ground of prejudice (by reason of a publication) would not succeed, no more should the publisher be guilty of contempt. In other words Sedley LJ would look to the existence of grounds of appeal, rather than for granting leave to appeal. He suggested that Simon Brown LJ may have set the threshold too low. Collins J did not express agreement with Sedley LJ on this point. It seems to me that I should follow the view of Simon Brown LJ, with whom Thomas J agreed.

26. One reason for the jurisdiction to punish publications that may affect a trial, and in some cases to grant injunctions, is that juries are no longer required to be kept together during a trial. As Arlidge Eady & Smith explain at para 10-185, until 1897, it was regarded as necessary in all cases of felony that the jury should remain together from the time the prisoner was given into their charge at the beginning of the trial until their verdict was delivered. This would protect them from exposure to risk of interference by any one, including from publications in the media. Restrictions upon juries were always understood to put undue pressure on them. As Alexander Pope put it in *The Rape of the Lock* published in 1715: "wretches hang that jury-men may dine". So the law was relaxed, and is now set out in the Juries Act 1974 s.13. But the relaxation of the demands put upon juries has had a corresponding (and unintended) effect in that it requires greater interference with freedom of expression than would

otherwise be called for. Even the Juries Act s.13 appears to imply that the general rule has remained the same, but with an exception. In fact it is the exception that almost always applies. The section reads (as substituted as recently as the Criminal Justice and Public Order Act 1994, s43(1)):

> "If, on the trial of any person for an offence on indictment, the court thinks fit, it may at any time (whether before or after the jury have been directed to consider their verdict) permit the jury to separate."

THE TEST FOR GRANTING AN INTERIM INJUNCTION

27. The Act does not in terms provide for injunctions. While it is common ground that an injunction may be granted to restrain what would be a contempt of court under s.2 of the Act, there is an issue as to the conditions which the Attorney-General must satisfy if such an injunction is to be granted. There is no authority governing the standard of proof that is to be met by the Attorney-General, and certainly none since the coming into force of The Human Rights Act 1998 ("HRA").

28. In Arlidge Eady & Smith para 6-3 there are cited the words of Lord Donaldson MR in *P v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370 at 381-2 in which he gives two reasons why injunctions to restrain publication are rarely appropriate, one of which is relevant to the present case:

> "Where the contempt would consist of impeding or prejudicing the course of justice, it will rarely be appropriate for two reasons. ... The second is that it is the wise and settled practice of the courts not to grant injunctions restraining the commission of a criminal act (and contempt of court is a criminal or quasi-criminal act) unless the penalties available under the criminal law have proved to be inadequate to deter the commission of the offences. Unlawful street trading and breaches of the provisions of the Shops Acts are well-known examples."

29. There is no suggestion in the present case that the penalties available have proved to be inadequate in the sense referred to by Lord Donaldson MR. The Publishers have not defied the law. But the Publishers maintain that putting the Book on sale would not be a contempt of court, and they are willing to take the risk of putting it on sale and facing committal proceedings. At those proceedings they would raise in their defence the arguments that they raise now as reasons why the injunction sought should not be granted.

30. The editors of Arlidge Eady & Smith at para 6-5 remind readers that this approach is consistent with Blackstone's famous definition of the liberty of the press:

> "… the liberty of the press consists in laying no previous restraints on publications … Every man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes

what is improper, mischievous or illegal, he must take the consequences of his own temerity".

31. The right of freedom of expression is now set out in Art 10 of the Convention which reads as follows:

> " 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 ....
>
> 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, ... or public safety, for the prevention of disorder or crime, ..., for the protection of the ...the rights of others, ..., or for maintaining the authority and impartiality of the judiciary."

32. The Human Rights Act 1998 ("HRA") s.12, so far as material, provides:

> "12 Freedom of expression
>
> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression...
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
>
> (a) the extent to which—
>
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published;...
>
> (5) In this section— ... "relief" includes any remedy or order …."

33. The application before me is not a trial. It is agreed that all the above provisions of s.12 apply, but the application of s.12(3) is unclear. In reality there will never be a trial of this application for an injunction. Whether the injunction is granted or refused, there is not likely to be any issue remaining to be tried after that decision has been made. If there were any issue remaining to be tried, the trial could not in practice take place before the end of the period during which the injunction would be expected to run. And if an injunction is not granted, there will be no point in a trial. The horse will have bolted, and there will be no point in shutting the stable door. Any subsequent proceedings would be not the trial of this application for an injunction, but a fresh application to commit for contempt of court.

34. Mr Sheldon submits that the approach to be adopted is that set out in *American Cyanamid v Ethicon* [1975], adjusted to give effect to s.12(3). That is the Court should consider: (i) whether the Attorney-General is 'likely', at trial, 'to establish that publication should not be allowed'; (ii) whether damages would be an adequate remedy; and (iii) where the balance of convenience lies. He then referred to *Cream Holdings v Bannerjee* [2005] 1 AC 253.

35. Before turning to *Cream* I can say at once that in my judgment the approach in *Cyanamid* has no application to this case. As noted in the White Book Vol II Part 15-8, it is a prerequisite to the application of those guidelines that a trial is in fact likely to take place. That was recognised long before HRA, in *Cayne v Global Resources* [1984] 1 All ER 225, 234, 238 and *Cambridge Nutrition v BBC* [1990] 3 All ER 523.

36. Further, while the Publishers are concerned about the damage they have suffered, and would continue to suffer, in complying with the injunction, this case is not about damages on either side. On the one hand it is about the right to a fair trial. This is not just a private right of the accused. If it were, they would be the proper applicants. That there should be a fair trial is a matter of public interest, and the Attorney-General comes to court to uphold that public right and interest.

37. On the Publisher's side it is not just about their private right to freedom of expression. Art 10 includes the "right … to receive and impart information without interference with public authority…" An injunction would interfere with that right of the public (*The Sunday Times v UK* (1979-80) 2 EHRR 245 paras 65-66). What requires to be balanced are these rights, and in this context the preservation of the status quo is not a material consideration.

38. As Ms Evans submits, this was recognised as long ago as 1979 by Lord Denning MR, when *AG v BBC* was heard in the Court of Appeal: see [1981] AC 303. At p311 he said: "the courts should not award such an injunction except in a clear case where there would manifestly be a contempt of court for the publication to take place". Lord Denning said that even before the decision of the ECHR given later the same month in *The Sunday Times v UK* (1979-80) 2 EHRR 245. The test laid down by the ECHR in that case is that the injunction must be necessary and proportionate. As that Court said in *The Observer and the Guardian v United Kingdom* (1992) 14 E.H.R.R. 153 para 59 :

> "Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly

> interpreted and the necessity for any restrictions must be convincingly established."

39. In *Cream* the House of Lords was considering an interim injunction to restrain the publication of confidential information. It was not a case relating to contempt of court. Nor was it one of those cases where a trial was unlikely to take place. Nevertheless, Mr Sheldon's citation of para 22 of the speech of Lord Nicholls is helpful:

> "Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy section 12(3) must depend on the circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success "sufficiently favourable", the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ("more likely than not") succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal."

40. It is the last part of that citation that is most helpful. The very last sentence sets out the basis on which Saunders J was able to grant the short-lived injunction that he did grant. The guidance that "There can be no single, rigid standard governing all applications for interim restraint orders" is also helpful. So too is the reminder that the court must "duly tak[e] into account the relevant jurisprudence on article 10 and any countervailing Convention rights". But I do not find it easy to apply s.12(3) to a case where no trial is in fact likely to take place, and Lord Nicholls did not have to consider that situation. The cases relating to such a situation did not need to be cited.

41. The editors of Arlidge Eady & Smith conclude their consideration of this subject at para 6-18 by stating that the test in *ex p HTV Cymru (Wales) Ltd* [2002] EMLR 11 applies. Ms Evans adopts this, and I accept her submission.

42. In that case Aikens J (as he then was) was considering what was alleged to be a threatened contempt of court during a trial before himself and a jury in the Crown Court at Cardiff. The threat was not of a publication. It was of interviews to be conducted with witnesses who had already given evidence, for use in the preparation of a post trial broadcast. He said this at paras 24 and 25:

> "24. … what standard of proof has to be satisfied by the applicant before it can obtain an injunction?
>
> 25 I am prepared to accept … that the applicant must satisfy the "criminal standard": i.e. that the court should be "sure". That begs the question: sure of what? In my view the court has to be "sure" that there is a threatened contempt of court. That means that the applicant must demonstrate:
>
> (1) that the court is sure that the alleged acts are going to be carried out, if not restrained;
>
> (2) that the court is sure that if the alleged acts are carried out, then they would amount to a contempt of court. For the present case the test must be … that the acts would create a substantial risk that the course of justice in this trial will be seriously impeded or prejudiced."

43. In the present case there is no dispute, and I am sure, that further sales of the Book will be made if not restrained. So the question for me to decide is whether I am sure that that would create a substantial risk that the course of justice in the Trial will be seriously impeded or prejudiced. If so, it would not follow as a matter of course that an injunction should be granted. That would mean no more than that the jurisdiction of the court to grant an injunction had been established. I would then have to consider whether the remedy of an injunction was necessary and proportionate.

THE ISSUES TO BE DETERMINED

44. The following questions arise, adapting the questions posed by Schiemann LJ:

i) Does the proposed sale of the Book create some risk that the course of justice in the Trial will be impeded or prejudiced by that publication (sub-para (3))?

ii) If so, is that risk substantial (sub-paras (4), (7), (8), (9), (10))?

iii) If so, is the risk that the course of justice at the Trial will not only be impeded or prejudiced, but seriously so (sub-paras (5), (7), (8), (9), (10))?

iv) If so, does s.5 of the Act provide a defence to the alleged contempt that is threatened?

v) If not, is an injunction the necessary and proportionate remedy to meet the risk, having regard to HRA s.12(4)(a)(i) and (ii), and any alternatives measures that may be available?

THE HISTORY OF THE PROCEEDINGS

45. Before considering these questions a brief review of the events that have occurred so far is necessary. These are recounted in a witness statement by Susan Hemming, Head of Counter Terrorism Division ("CTD"). She is a lawyer who formerly worked with Mr Hayman. She worked on Operation Overt in the pre-charge stage.

46. The Crown is represented at the Trial by two Senior Treasury Counsel and one junior. Richard Whittam QC was one of these, and he appeared before me to assist in explaining the course that the Trial has taken, and may take, in the future.

47. After the arrests that took place on or after 9 August 2006 there were 14 accused to be tried. For case management reasons they were to be tried in a number of separate trials. The first trial of 8 accused started on 2 April 2008 before Calvert-Smith J and a jury. After amendments, the trial indictment contained the following counts:

    i) Two counts of conspiracy to murder: Counts 1 and 1A – Count 1 was conspiracy to murder by detonation of improvised explosive devices on board transatlantic passenger aircraft; Count 1A was 'simple' conspiracy to murder (the difference being sufficiently important for purposes of any sentence to justify a determination by the jury);

    ii) Count 2: conspiracy to endanger the safety of an aircraft – the jury were discharged from returning verdicts on count 2;

    iii) Count 3: conspiracy to cause an explosion likely to endanger life or cause serious damage to property;

    iv) Count 4: conspiracy to cause a public nuisance by the publication or distribution of video recordings threatening the murder of persons by means of suicide operations, such threats being designed to influence government and intimidate the public.

48. Counts 3 and 4 were added to meet the offences which the accused admitted when they gave evidence, the generality of their defence being that they had been involved in the making of propaganda videos. The first three accused accepted that the videos were to be published after a small IED had been detonated at an 'iconic site', to draw the attention of the public to their cause. Ali Sarwar and Tanvir Hussain pleaded guilty to counts 3 and 4. Ibrahim Savant, Umar Islam, Araf Khan and Waheed Zaman pleaded guilty to count 4.

49. Following the outcome described at the start of this judgment, it was decided that there be a retrial, and that Donald Douglas Stewart-Whyte be added to the trial, following the acquittal of Mohammed Gulzar. The accused made applications that there should be no retrial, and for a stay, on the grounds that the jury had returned a verdict on the conspiracy to murder, and that a fair retrial would be impossible because of the adverse publicity. These submissions failed.

50. The ruling was given by the Trial Judge on 18 December 2008. The transcript extends to 65 pages, of which p7 and onwards were devoted to the adverse publicity point. He recounts that instant widespread media coverage followed the partial verdicts. The

defence case was that this coverage was manipulated and orchestrated by state sources, intelligence services, police anti-terrorist branches or government officials. Further, there were press briefings, and the state failed to notify the court or the accused of these, thus preventing appropriate orders from being made to prevent prejudicial publicity resulting from its own briefings. This was said to be an abuse of process, justifying a stay, whether or not the publicity would prevent a fair retrial. Further, the revelation of a number of inadmissible matters to potential jurors and the continued availability of that material upon the internet was of devastatingly prejudicial effect to the accused's prospects of receiving a fair trial. The effect of the publicity was to demonstrate that a guilty verdict on count 1 necessarily included a finding of suicide bombing, whereas count 1A does not.

51. A number of examples were given (pp10-15 of the Transcript). Some of these examples are relevant to the application before me. First was disclosure of evidence not adduced at trial as to contact with the leader of the 21 July failed attack. Second was disclosure of evidence not adduced of deeper links between some of the accused and other men convicted of terrorist offences. Third was disclosure of evidence not adduced at trial as to Rashid Rauf being believed to have put the accused in touch with Al Qaeda leadership. Fourth was disclosure of mere assertions that the alleged plot was overseen by a former leader of Al Qaeda, since deceased. Fifth was disclosure of mere assertions of as to how this alleged plot was disrupted. Sixth was disclosure of mere assertions that the telephones of unspecified accuseds' were being intercepted. Seventh was disclosure of mere assertions that the US Government had pressured Pakistan into making arrests before all the legal evidence had been gathered.

52. On 11 September every national newspaper reported that the seven accused were to face a retrial. Nevertheless, reporting continued. The Trial Judge said (at pp17-20) that it was not possible to recite all the objectionable material that was published by the media, and he described it as 'an avalanche', including 'vast internet coverage which can be accessed with ease'. The essence of the vast majority was that all the accused were guilty of conspiracy to blow up aircraft. Apart from the attacks on the accused, there were attacks on the competence of the jury and the alleged mishandling of the trial, in particular a two week break which was permitted during the jury retirement.

53. The Trial Judge considered (at p30) Mr Whittam's submission that there is frequently a public debate concerning topics raised by a case, and instant reporting is demanded by the public. That is their right. But before there can be immediate post-verdict reporting, there must be pre-verdict briefing. In addition, there had been briefings in August in the USA, and a press releases in Islamabad.

54. The Trial Judge concluded (p36-39) that the submissions that the state deliberately briefed the press during the trial to the disadvantage of the accused in any retrial, or deliberately sat back and allowed the publicity after the verdicts, were both fanciful. It would have required foresight that the press would breach the embargo that they had agreed to, and foresight that a retrial might be required. But the Trial Judge said that in very high profile cases retrials brought about by jury disagreements are very rare and most difficult to foresee. He and the 25 counsel in the case could only recollect two instances where that had occurred. The admissions which the accused had made

(in respect of counts 3 and 4) did not make the present case a likely candidate. He rejected both allegations, not on any balance of probabilities, but with certainty.

55. The Trial Judge then considered whether a fair retrial was still possible. He set out in his ruling (pp39-54) a few of what he said were the worst examples. He considered submissions from counsel for each of the accused, and he directed himself on the law, citing the many relevant cases including *Montgomery v HM Advocate* [2003] 1 AC 641, *R v Abu Hamza* [2006] EWCA Crim 2918, *R v McCann* [1991] 92 Cr App R 238 (a case in which the words complained of had been spoken during the closing speeches of a terrorist trial, following which convictions were quashed on appeal), *Taylor* [1994] 98 Cr App R 361 (publicity during a trial, following which convictions were quashed on appeal) and *R v B* [2006] EWCA Crim 2692 para [31].

56. He concluded (pp63-66) that a fair retrial was possible. One point he made was that the jurors at the retrial would know that they could not believe everything that they read in the press, and another was that sufficient time would have passed before the commencement of the retrial in February 2009 (five months from the publicity), together with the fact that there had been other terrorist trials in the meantime, would mean that the publicity in question would have faded from their memories.

57. I have been told that the volume of material that he read was included in 7 lever arch files, and that much of it is still readily accessible on the internet.

58. Ms Hemmings states that when the retrial started on 16 February 2009, it was beset with difficulties. Two juries had to be discharged. The evidence was called between 26 February and 29 June, as noted above.

59. Three other accused are to be tried in October 2009 and a further two at the beginning of 2010. The Attorney-General does not seek to extend an injunction restraining the sale of the Book to cover the period of these trials.

60. On 24 February 2009 the Trial Judge gave the jury a direction to the effect that they must decide the case only upon the evidence that they received in court. They had, of course, recently sworn their oaths, which set out their duty: to give a true verdict according to the evidence. He directed them that it was critically important that they carry out no research by computer or otherwise. One reason he gave for that was that what they found might not be accurately reported. He directed them to refrain from reading about the case. One reason he gave for that was that anything they read would be edited, that is incomplete. It is a direction similar to one which many judges and some jurors will have given or heard. It is longer than such directions usually are, extending over two pages of transcript, because of the unusual amount of pre-trial publicity. It includes a direction as to what to do if a fellow juror causes a juror concern, namely put that concern in a note to the judge.

61. On 30 June 2009 the Trial Judge reminded the jury again of what he had said about information which might come to them outside court. He specifically told them not to read any books about terrorism.

PREJUDICE

62. The pages of the Book relevant to this application are pp258-267. Mr Whittam drew my attention to two categories of words. The first consisted of those words by which a juror who read the Book might understand that the pages in question referred to the Trial ("the reference passages"). The second category consisted of those which (once the juror had so understood them) were or might be prejudicial ("the prejudicial passages"). Of 14 passages identified in this way only three are said to be prejudicial passages.

63. Whether or not there is a risk that the passages would be understood to refer to the Trial depends upon what the reader already knows about the Trial. Mr Whittam and others concerned with the bringing of this application are very well placed to assess this point. Ms Hemmings states that it is easy to identify the passages in Book as referring to the airline plot the subject of the Trial, and that the passages do this both individually and in the aggregate. Two examples of reference passages are: one identifying items observed by surveillance officers being bought by the accused said to be the quartermaster, including "clamps, drills, syringes, glue and latex gloves" and another about numbers which it is said the accused were overheard discussing.

64. Ms Evans submits that many or even all of the passages relied on as reference passages recount matters or events that are common to a number of other police operations which are the subject of other chapters in the book. It follows that there is little or no risk that a juror who read the passages would make the identification.

65. It is difficult for me, Ms Gilmore and for Ms Evans, to put ourselves in the position of Mr Whittam and Ms Hemmings, with their detailed knowledge of this and other alleged plots. Ms Gilmore has devoted considerable skill and time in attempting to do so. She has made a statement setting out the passages identified by Ms Hemmings and Mr Whittam and responding point by point to what they say. In effect, when she was writing the Book, she had made every effort to anonymise the description of Operation Overt, and she believes that this had been achieved. She explains why she believes that.

66. Having had these passages explained to me by Mr Whittam, and heard how they relate to the evidence that has been put before the jury, I am sure that there is a very substantial risk that if any jurors did read the pages in question, then they would understand them to be referring to the airline plot. I do not discount what Ms Gilmore says. She may be right at the end of the day. But what I have to do is to assess whether there is a risk.

67. Mr Whittam identified three passages in particular as being prejudicial. One passage was said to be prejudicial because it could cause the jury to confuse the second accused with the third accused, to the prejudice of both. The second (and most crucial) example was said to be prejudicial because it describes surveillance officers watching certain of the accused make and test peroxide explosives, and police scientists trying to copy what they were doing, and concluding that they would be viable bombs. There has been no evidence of this adduced at the Trial. It is a central part of the defence case that it was impossible to construct an IED in the manner in which it is alleged the accused did it. So this passage in the Book would seriously undermine what is a central plank in the defence case. The third passage was said to

be prejudicial because what is being described in the Book was what the police suspected about a man who was arrested in Pakistan, and with whom the first and second accused admitted that they had been in contact. Their defences are that the contacts are innocent. Of course there has been no evidence adduced of what the police suspected, and Mr Whittam told me that the jury have not been told that the man was arrested in Pakistan.

68. In relation to these passages Ms Gilmore refers to the Crown's opening note. As to the first incident she says it was referred to in the Trial, and in any event it is referred to in articles easily accessible on the internet.

69. As to the second passage, Ms Gilmore states that the surveillance observation was referred to in the Crown's opening note, and she refers to the transcript of the trial. She accepts that the evidence does not include any account of contemporaneous testing by police scientists, but notes that the Book does not make clear that it was contemporaneous.

70. As to the third passage, Ms Gilmore states that there are articles currently accessible on the internet, including one from the Daily Telegraph of 8 September 2009, and another from the BBC, which contain the same information about the man's arrest.

71. The hearing before me started at 11.00, and in the afternoon I sat until 6pm to complete the hearing. I have spent some time since then reading the papers and endeavouring to evaluate the force of these important points. I have not had transcripts of the Trial put before me, and it is difficult to see how time could have been found for me to read any transcripts, and to receive submissions, without prolonging this hearing, or delaying it, so much that it would be impossible for me to reach my decision (if it were in favour of the Publisher) in time for the discharge of the injunction to be useful. Extending the hearing would carry the risk of extending the injunction by default.

72. I turn to consider the risk of prejudice in the event that a juror would read "the prejudicial passages". There are only three points. They do not stand out very clearly, at least to me, from a reading of the Book. The jury have heard evidence and speeches since February on a number of points. These three points will be considered by a juror in the light of the whole of the evidence in the case, and of the directions of the Trial Judge.

73. It is impossible for me to discount Mr Whittam's submissions to the effect that there is a risk of some prejudice. Having considered the arguments, I accept that there is a risk of some prejudice from the three passages he refers to. But the question I have to ask is whether it is a risk of serious prejudice. I am unable to be sure of that.

74. Ms Evans submits that even if there is a risk of serious prejudice, it is not a substantial risk. She notes what the court would be required to find, namely: (1) one or more jurors would read the relevant pages of the Book; and (2) understand that the Book referred to the airline plot and these accused in particular.

75. She submits that such a finding would imply that the juror had disobeyed the directions given by the Trial Judge on more than one occasion. And the finding would have to be made notwithstanding the numerous judicial dicta to the effect that juries

can be trusted to abide by the directions of the judge. If the court is willing to make the assumption that a juror may disobey the direction in relation to the Book, then that is less prejudicial than it might otherwise have been, because by the same token the court should assume that the juror will have disobeyed the direction in relation to the internet. The Book will thus add little if any prejudice to the prejudice that will already have occurred as a result of internet searches.

76. Mr Whittam submits that if the Book goes back on sale, it will be visible in bookshops and is likely to attract the attention of jurors in a way that their attention is not attracted to embark upon researches on the internet. Looking into the Book would not require such conscious disobedience to the direction as carrying out researches. Further, friends or relatives may be expected to draw the Book to the attention of jurors.

77. I prefer the submissions of Ms Evans on this point. I am not sure, and that is the test, that there is a substantial risk that a juror would read the Book if it were put back on sale. I am not sure that there is a substantial risk that a juror would so plainly display disobedience to the direction of the Trial Judge.

IMPEDIMENT

78. Mr Whittam addressed me on what might happen if the Book were to be put back on sale. His submissions impliedly referred to matters of the kind set out in Archbold (2009 edition) para 4-419 (new information emerging after closure of the defence case).

79. First he submitted that it was inevitable that there would be an application to discharge the jury. The speeches for the defence will have finished, or nearly so, and it will be impossible for the accused to alter the way their defences are presented to take account of the Book (as might have been possible, perhaps, if the Book had been put on sale before, or at an earlier stage during, the Trial).

80. If the Trial Judge were not minded to discharge the jury, there would be applications that enquiries be made of the jurors to find out if any of them had read the Book. Any juror who had read it would be the subject of an application to discharge, with investigation whether he had contaminated other members of the jury. Fortunately, there are still all twelve jurors present, but losing any juror can put a trial at risk.

81. This is not a case in which the Trial Judge could be expected to exercise his power under the Juries Act 1974 s.13 to prohibit the jury from separating. The Trial has already been a very great interference in their private lives for many months. If they were not to be permitted to separate, then they would be expected to be in isolation for a period of up to eight weeks, of which two or three weeks would be before they retired to consider their verdicts.

82. The jury have been told to expect that the case should finish by the end of August. They are likely to require a substantial period in retirement. If there is a delay, then the Trial may continue into September. This court should have regard to the rights and interests of the jurors.

83. Ms Evans accepts that there may be some disruption to the Trial. But she submits that in such a long trial as this, where there have already been delays, I cannot be sure that there is a substantial risk that the Trial would be seriously impeded.

84. Having considered these submissions, I am sure that if the Book were put back on sale there would be a substantial risk that the course of justice would be seriously impeded. The impediments would include the applications to which Mr Whittam has referred. With so many accused, there is a substantial risk that these applications would take days. The jury would have to wait, when they had expected the summing up to start. The Trial Judge would be distracted from his summing up by having to deal with these applications. The extent to which these accused's submissions may be time consuming is clearly illustrated by the hearing that took place in December 2008. There is a substantial risk that much of that ground would be retraced, because the Book cannot be considered in isolation from other publications which the jury may be prompted to look at, if any of them reads the Book. After so long a trial, it is important that continuity be maintained. It would be difficult for the jury not start their deliberations, but by then they would not yet have the directions in the summing-up which were necessary for them to do so.

85. I am also sure that there is a substantial risk that Trial Judge would discharge the jury. He has a knowledge of the Trial which is of a different order to my knowledge. The fact that, on the limited material before me, I have reached the view I have reached as to the risk of prejudice, cannot require me to assume that there is no substantial risk of him taking a different view. I am sure that if he did not discharge the jury, then there is a substantial risk that that would found a ground of appeal. I am not sure that, if he did not discharge the jury, he would have to give an extreme direction. I expect that a form of words could be found. But it would not carry the same weight as the direction that he gave on 24 February (para 60 above). He would not be able to tell the jury that the information in the Book might not be accurately reported. Neither the defence, nor the prosecution, could be expected to submit that he should say that to the jury. This is not a case where a trial judge could be expected to exercise his powers under s.13 of the Juries Act.

86. I have answered the questions in para 44 above as follows. I have answered Yes to question (i) in respect of both prejudice and impediment. In respect of questions (ii) and (iii) I have answered No on the subject of prejudice, but Yes on the subject of impediment. In short I am sure that the putting of the Book on sale again would create a substantial risk that the course of justice in the Trial will be seriously impeded, but I am not sure that that would create a substantial risk that it would be seriously prejudiced.

87. I must turn next to consider s.5, because if, in spite of these answers, there is no contempt of court, it will follow that there should be no injunction on the basis advanced by the Attorney-General (namely to restrain the commission of an offence).

s5 OF THE ACT

88. S.5 of the Act is set out at para 15 above. As already noted, it is agreed that the Publishers and the authors are in good faith, but it is not accepted for the Attorney-General that the passages complained of are part of a discussion of public affairs or other matters of general public importance. So the questions are: first, are the

passages complained part of a discussion of public affairs or other matters of general public importance, and, second, if so is the risk of impediment to the Trial which they create merely incidental to that discussion?

89. As to the first question, Mr Sheldon submits that they are not part of such discussion because they are narrative, describing his work, and how it affected his family life. I reject this submission without hesitation. The literary form of the discussion is immaterial. In my judgment the Book aims to inform the public on matters of the greatest public interest, and it does so in a serious way. The fact that the account given includes homely details of the impact of the work on the lives of the police officers concerned does nothing to take the discussion out of the scope of public affairs and other matters of general public importance.

90. But Mr Sheldon is on stronger ground when he submits that the passages complained of do not simply touch on an aspect of Operation Overt. They provide a detailed narrative as to what went on.

91. Mr Sheldon refers to *A-G v English* [1983] 1 AC 116 at p 143 where Lord Diplock said that 'incidental' in s.5 meant "no more than an incidental consequence of expounding its main theme". In *A-G v Guardian Newspapers Ltd* [1992] 1 WLR 874 the publication related to an order made by a trial judge restricting reporting of that trial. The publication was held not to have created the risk of prejudice required under s.2(2), so what was said about s.5 was not necessary for the decision of the court. The publication referred to the trial in which the order had been made. Both judges in the Divisional Court referred to the test set out in *A-G v TVS Television Ltd* The Times, 7 July 1989, in which Lloyd LJ as he then was said:

> "a better test is surely to look at the subject matter of the discussion and see how closely it relates to the particular legal proceedings. The more closely it relates the easier it will be for the Attorney-General to show that the risk of prejudice is not merely incidental to the discussion. The application of the test is largely a matter of first impression".

92. Collins J also considered this point in *A-G v Guardian Newspapers* [1999] EMLR 904 at p921. He noted that an incident that gave rise to a trial, and so the trial itself, may create the matter of public interest. He referred to a discussion about the safety of the Queen, following an incident when an intruder reached her bedroom. The discussion was held to be incidental to the trial of the intruder. But in the case Collins J was considering (the exhibition of necrophilic works, and the trial of the artist) he held that:

> "the prejudice was not merely incidental to the discussion since the discussion was about [the artist]'s actions which had led to the trial".

93. Ms Evans submits that the burden of proving that the publication does not come within the section lies on the Attorney-General. That must be right, because s.2(2) creates a criminal offence, and it must be for the prosecuting authority to disprove any defence.

94. This case seems to me to come close to the line. But as in the case considered by Collins J, the impediment in the present case arises from the fact that the passages complained of discuss the very acts which led to the Trial. On reflection, but not without hesitation, I am sure that these passages are not incidental to the discussion.

95. It follows that I must go on to consider whether I should grant an injunction.

WHETHER AN INJUNCTION SHOULD BE GRANTED

96. Before doing so I observe that if this were an application to commit for contempt following widespread sale of many thousands of copies of the Book, the court would not be obliged to impose a severe, or indeed any penalty. What relief the court grants in applications to commit publishers for a contempt of court under s.2(2) depends upon the circumstances. In *A-G v English* [1983] AC 117, at p 131 it is recorded that the Divisional Court imposed no penalty on the editor of the Daily Mail, and only what Watkins LJ referred to as "a nominal fine" of £500, together with an order to pay costs, on the publishers. Watkins LJ referred (p130H-131A) to the problems to which the press were exposed and called the Daily Mail a great newspaper. He plainly had in mind the importance of the liberty of the press.

97. An injunction is not a penalty. Both a penalty and an injunction are capable of interfering with the right of freedom of expression, and whether or not s.12 applies, s.6 of HRA requires the acts of the court to be compatible with Convention rights. The test for making an order under s.4(2) of the Act is also relevant. In *Ex p The Telegraph Group Ltd* [2001] EWCA Crim 1075; [2001] 1 WLR 1983, 1991, para [22] the Court said that if the risk required by the Act was found to exist (the first question), two further questions arose. The second question was: would the order eliminate the risk? If not, obviously there could be no necessity to make the order, and that would be the end of the matter. Clearly that test is satisfied in the present case. The third question was:

> "… even if the judge is satisfied that an order would achieve the objective, he or she would still have to consider whether the risk could satisfactorily be overcome by some less restrictive means. If so it could not be said to be necessary…"

98. I have already set out Article 10 and s.12 of HRA. But it is relevant to consider the guidance of what is meant by proportionality given by the House of Lords in *Huang v Home Secretary* [2007] UKHL 11; [2007] 2 A.C. 167 :

> "19 In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80, the Privy Council, drawing on South African, Canadian and Zimbabwean authority, defined the questions generally to be asked in deciding whether a measure is proportionate:
>
> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair

> the right or freedom are no more than is necessary to accomplish the objective."
>
> This formulation … omits[s] reference to an overriding requirement which … is … the need to balance the interests of society with those of individuals and groups. This is indeed an aspect which should never be overlooked or discounted. The House recognised as much in *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368, paras 17-20, 26, 27, 60, 77, when, having suggested a series of questions which an adjudicator would have to ask and answer in deciding a Convention question, it said that the judgment on proportionality:
>
> > "must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage." (see para 20).
>
> If, as counsel suggest, insufficient attention has been paid to this requirement, the failure should be made good."

99. Mr Sheldon submits that an injunction is necessary and proportionate, having regard to the unique circumstances of this case which are summarised at para 3 above. In addition he stresses the short period, expected to be not more than about eight weeks, during which the injunction sought is to run. Further, he submits that the Publishers and the authors have already enjoyed the opportunity to express themselves in the form of the serialisation in the Times which did not include the words complained of. And notwithstanding the difficulties encountered by the Publishers, the court may consider that the Book is of sufficient interest to the public for the Publishers to plan a fresh publication at a later date. These points are made by reference to s.12(4)(a)(i).

100. Detailed evidence has been given for the Publishers of the consequences of the grant of the injunction. The most significant evidence for the Publishers relates to the planning and preparation which is necessary for the sale of a book such as this. If the injunction is not lifted immediately (and to some extent, even if it is) the damage to the marketing of the Book will be irreparable. Deals with retailers and distributors were negotiated and agreed as long ago as February 2009. It is difficult to persuade major retailers to provide space on their shelves. There is not empty space waiting for books. The vacant space left by books that are returned to a publisher are filled by something else. The retailers plan well in advance what books they will stock, and what they will not. The Publishers were fortunate to obtain for the Book initial subscription orders which were very strong indeed for a serious work of non-fiction. This was one of the biggest hardback non-fiction releases from the Publishers this year. The publicity campaign, which was crucial to stimulate sales during the week following serialisation and running up to the official publication day, 2 July 2009, had been carefully planned and very successfully orchestrated. It took place from 23 to 30 June. The first week is the one in which publishers expect to make their maximum sales. If the injunction is upheld, the Publishers' evidence is that their entire

publication of the Book might effectively be destroyed. They had expected a number of reprints. But experience has shown that booksellers are not interested in taking a book back once it has been returned, if much time goes by. This is partly because there is nervousness about any publication that has been returned as a result of legal action. In the present case the position has been made worse because reporting restrictions have prevented the Publishers from explaining why the injunction was granted. If the retailers are willing to take the Book back, new arrangements with them and new promotions would have to be made, at a cost.

101. Some of the evidence for the Publishers relates to the consequences already suffered following the order of Saunders J. Of itself that is of little relevance to what should be done in the future. But it is relevant in so far as it gives an idea of the effect upon the Publishers of these proceedings generally, and of the costs that might be incurred in a future promotion of the Book, if it were to happen. Costs of between £40,000 and £50,000 have been incurred so far. Much of that is now wasted, including costs of wasted publicity and costs of distributing and then recalling books. In addition much management time was spent in complying with the order of Saunders J. In the current economic situation, this has all been very difficult for the Publishers to accept.

102. More important than any of this evidence, in my judgment, is the subject matter of the Book and the nature of the "expression" it represents. The courts have recognised different types of speech, some of which attract more protection than others. Political speech, or speech on public affairs is the category which attracts the most protection. The Book is in that category. I am satisfied that it would be in the public interest for the Book to be published (s.12(4)(a)(ii)).

103. Causing a publisher to recall a book (or any other publication) is always a major step to take. The costs will exceed by a very large measure the amount which the court might be expected to impose, following a committal for contempt, by way of fine in a case such as the present, assuming the facts were as I have set them out here. If the Book had been sold out and no application made to the court for an injunction, it is for consideration whether the Attorney-General would have thought it in the public interest in this case to apply to commit for contempt of court. That would have depended upon all the circumstances, which may have included what happened at the Trial. It is in any case not a matter for this court, so I shall assume that the Attorney-General would have applied to commit. If she had, and depending on the circumstances, it seems to me that the court might have taken a lenient view in this case. It is unlikely that the financial consequences would have been as great as the evidence shows the consequences of this injunction have been and, if it is continued, will be in the future.

104. I have considered what other measures might be to hand to address the risk which I have held to exist. A direction to the jury would not carry the weight that such directions usually carry, for reasons already discussed (para 85 above). The powers of the court under s.13 of the Juries Act have rarely been exercised in recent years. They should not be overlooked, but nor should the difficulties in exercising those powers. There may be cases where that would be the proportionate response. If so, there would be difficulties, except in those rare cases where an injunction is sought from a High Court Judge during a trial, as happened in the *HTV Cymru* case. A circuit judge sitting in the Crown Court could not grant an injunction, and the judge of the High Court to whom the Attorney-General applied for an injunction cannot exercise the

powers of the trial judge over the jury, nor require that any powers be exercised by him.

105. In my judgment the unique features of this case referred to at the start of this judgment put the case in a category of its own. It is important not to lose sight of what is at stake in the Trial. While I recall the finding that I have made as to the limited risk of prejudice that would be created in this case, what is at stake in the Trial makes it of the highest importance that the Trial be not seriously impeded.

106. The public interest in the Trial being fair could not be higher. If any of the accused is convicted on count 1, he will face the prospect of spending much if not all of the rest of his life in custody.

107. If any of the accused is innocent, and is nevertheless convicted, the scale of the injustice involved would be difficult to exaggerate. In addition, experience over the last 30 years shows that such injustice (on those occasions when it has occurred) has had a long lasting, and extremely adverse effect upon public confidence in the administration of justice. This is to the detriment of society as a whole.

108. On the other hand, if any of the accused did indeed take part in the conspiracy alleged in count 1, and if he is not convicted, or if his conviction has to be set aside on appeal and if he cannot be retried for a second time, the injustice and danger to the public is again difficult to exaggerate. In that event the lives of very many people may be put at risk.

109. In many cases less weight might be attached to the implications of any appeal and retrial that might follow if the jury were to be discharged, or any appeal against conviction succeeds. But in this case seven accused have been in custody for three years already, and there are three further accused (two in custody) whose trial is to follow the trial of these accused. If there is a retrial, they will have to wait for many more months before there is a verdict. Two juries have sat for many months in two separate trials. This places a very great strain on them and upon the administration of justice. There is not unlimited capacity in the criminal justice system. When one case is being tried, or retried, another case must be kept waiting. The cost to the public of each trial of the scale of the Trial runs into millions of pounds. The financial implications for the Publishers of a delay even as short as eight weeks are great. But they cannot be compared to the financial implications for the public at large of a delay to this trial, or an appeal. Even a trial of a single accused for a few days or weeks is expensive, but the administrative and financial implications of the trials of those accused of the airline plot is exceptional. The disparity of risk which exists between what the Publishers must suffer if this injunction is granted, and what the public must risk suffering if it is not, is beyond measurement, and is another unique feature of this case.

110. In my judgment, in the present case, for the reasons I have stated, it is necessary and proportionate that the injunction be granted.