Gavin Millar QC – Society of Editors Conference 2014

In 2008 I defended a journalist called Sally Murrer at Kingston Crown Court.

Sally worked for the *Milton Keynes Citizen*.

The Thames Valley Police wanted to identify one of their officers as one of her sources. So the Chief Constable granted authorisation under Part II of the Regulation of Investigatory Powers Act 2000 – or "RIPA" as it is known in the trade – to place a probe inside his car and record their discussions. This is called "*intrusive surveillance*" under the Act.

On the back of these recordings they arrested Sally and strip searched her. They searched both her home and her desk area in the newsroom. They subjected her to a gruelling interview in which it was suggested that she had paid the source (an allegation which was untrue and unsupported by any evidence) and that she could go to prison for what she had done.

Sally was charged with aiding and abetting misconduct in public office – being the alleged misconduct of the officer said to have disclosed information to her.

Once prosecuted, she was entitled to disclosure of all the police records of the investigation. These included the papers relating to the Chief Constable's authorisation and the approval of the authorisation by a Surveillance Commissioner (a retired judge).

When we saw them, the papers made no reference to the fact that Sally was a journalist or that the investigating officers were seeking to identify a confidential journalistic source.

This was a startling omission because the right of the journalist to protect the identity of such a source is strongly protected in our law and in European Human rights law. It can only be overridden if a judge decides that there is an even more important public interest requiring the source to be identified - and that the evidence being sought cannot be obtained in some other way. Examples of such an overriding public interest might be the need fully to investigate terrorism or serious organised crime.

The Surveillance Commissioner would not have known that these principles had to be applied in approving the authorisation – because the papers were silent about what was really going on.

Thankfully the prosecution was halted by an order of the Kingston Crown Court – which recognised that this key evidence against Sally and the officer had been obtained in violation of these fundamental journalistic rights.

Sally survived the ordeal and went on – as she was fully entitled to – to become a minor celebrity. She appeared on the dreaded breakfast TV sofa. And she was interviewed by the Mail – an article which had the epic headline *"I nearly went to prison for writing about Milton Keynes".*

I make a solemn vow not to make any jokes about Milton Keynes in this speech.

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The Murrer case didn't ring alarm bells. But it should have.

First the charge – aiding and abetting misconduct in public office - was a novel one against a journalist. Previous unsuccessful attempts to prosecute journalists in this sort of situation had alleged that the journalist acted *"corruptly"* in dealing with the source, within the meaning of the Prevention of Corruption Act 1906.

It is also a vague charge.

The underlying offence of the source, misconduct in public office, is a very old common law offence without the clear elements we see in modern statutory criminal legislation. The jury has to find that there was wilful misconduct by the source *"to such a degree as to amount to an abuse of the public's trust in the office holder, without reasonable excuse or justification"*. It may be difficult to know which way a jury will go on these, often difficult, issues relating to the source.

On top of this the jury has to be satisfied that the journalist *"aided and abetted"* any such misconduct, in the dealings with the source. Again it is difficult for the journalist to assess, when deciding how to deal with the source, whether a jury might find this additional element of the offence to be made out on the facts.

Journalists doing their jobs exercise basic human and common law rights of freedom of expression. Indeed our law now recognises that it is the duty of the journalist to pass on information and ideas to the public on all matters of public interest. As Arthur Miller famously put it *"A good newspaper is a nation talking to itself".*

For this reason any criminal offences which they might be accused of committing in the process should be clearly defined and should contain explicit defences protecting the public interest aspects of their work.

The charge faced by Sally Murrer in 2008 met neither of these important legal objectives.

Secondly, the RIPA powers were clearly being misused. This was so even in terms of the Act itself – which only allows *"intrusive surveillance"* where *"serious crime"* is being investigated. This was plainly not the case in ***R v Murrer***. [I repeat my vow not to make jokes about Milton Keynes, but will simply say that Sally's stories were good, solid local newspaper fare].

But it was also so because the right to protect the source was not being respected by the police.

One might perhaps, being charitable, forgive the error. Neither RIPA nor the Code of Practice that supports it identifies any of the legal principles relating to journalistic source protection that I have referred to. And there had not been a case like ***R v Murrer*** before.

But, being sceptical, one might suggest that the investigating officers' omission to mention her status as a journalist when seeking authority to bug the car was a deliberate and knowing omission.

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In the years since ***R v Murrer*** nothing has changed. In fact things have got worse.

Parliament should have removed the possibility of this obscure charge being laid against journalists in this situation. It should have debated whether there should be any criminal offence for journalists in dealing with sources and, if so, framed clear legislation so that everyone would know where they stand. This is the proper approach in a mature democracy where important rights are at stake. In the course of such a debate the difficult issues about criminalising payments to sources would have been considered by those we elect rather than being left to prosecutors and juries to grapple with.

Instead this offence is now being charged regularly against journalists who, unsurprisingly, all seem to say the same sorts of things – *"we didn't know about this offence", "we didn't know were breaking the law"* and "*we were just doing our job".* The results of these prosecutions are, equally unsurprisingly, difficult to predict.

Parliament should also have written the right to protect confidential journalistic sources into RIPA - along with explicit procedural safeguards for this important right. These should make clear that when investigating authorities want to use covert powers to identify sources they must go before a judge with a full account of the issues in the case. The legislation should <u>explicitly</u> require the application by the judge of the established legal principles on source protection.

None of this has happened.

Instead, I and fellow lawyers acting for the online news outlet the *Bureau of Investigative Journalism* have had to take a case to the European Court of Human Rights in Strasbourg – arguing that RIPA is incompatible with the right to protect sources. This should not have been necessary.

The RIPA powers are <u>still</u> being misused to identify confidential sources.

We are all familiar with the recent revelations but I need to mention them.

Part I of RIPA contains a different set of covert instigation powers to Part II. Under this part of the Act a police officer of the rank of superintendent – without oversight or approval by a judge – can require a telecoms service provider to hand over phone records. The records of a journalist can be used to identify the source. The journalist will know nothing about this.

In the prosecution of Chris Huhne and Vicky Pryce the judge ordered some emails of my client David Dillon of the *Mail on Sunday* to be disclosed. But he also ordered that redactions should be made to protect the identity of David's source, Andrew Alderson. The police nonetheless went away and used these RIPA Part I powers to obtain the phone records of both men in order to identify Andrew as the source for the *MoS* story.

And when the Met were investigating the source of the *Sun's* story about Andrew Mitchell and his verbal exchanges with a police officer at the Downing Street gates in September 2012, they used the same powers to identify the confidential source. We have filed applications on behalf of the *Sun* and its political editor in the Investigatory Powers Tribunal to challenge this misuse of the RIPA powers.

None of this would have happened if Parliament had done its job properly and protected the journalists' rights in the legislation.

Most worryingly of all we go not know how often and in what situations the police and other public authorities are using these covert powers against journalists. There is no information in the reports presented to Parliament about the operation of the legislation. And the police themselves cannot or will not say. Information about individual cases surfaces only sporadically, usually in a court case. I believe they have been used in many other cases, particularly in recent years.

Again this is not what one would expect in a democratic society with strong traditions of press freedom.

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There are a number of ironies here, and it would not be right for me to conclude without alighting on a few of them.

At the Leveson Inquiry the Met Police complained about how difficult it was for their officers to get access to confidential journalistic information by making applications to circuit judges under the Police and Criminal Evidence Act 1984. In response the Inquiry recommended consideration of relaxing these statutory protections for journalists. The Met did <u>not</u>, however, explain to the Inquiry that it considers itself entitled to use sidestep these protections and use covert powers identify in confidential journalistic sources. Nor did the Inquiry recommend tightening RIPA to prevent this form of unlawful identification of sources.

And I suppose one might, if one was being cynical, contrast the apparent enthusiasm of many Parliamentarians to legislate for press regulation with their marked reluctance to legislate to protect press rights and due process in the areas I have discussed.

But my personal favourite is as follows.

It is a common misconception that RIPA was enacted to counter terrorism. RIPA was in fact enacted because of case brought before the European Court of Human Rights by a senior police officer in 1992.

Alison Halford, a former Assistant Chief Constable of the Merseyside Police was pursuing a sex discrimination case against her own force and discovered that it was intercepting her home and office calls to find out what her litigation strategy was. She subsequently complained to Strasbourg that there was no UK law regulating the power of the police to intercept her calls in this way – and she won her case. RIPA was passed to remedy this gap in our law.

Perhaps it is time for a senior police officer somewhere to stand up and be honest enough to acknowledge that all fundamental rights have to be protected in our law – including those of journalists.

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