R v Daniel Creagh

A Note by Max Hill Q.C.
Independent Reviewer of Terrorism Legislation
October 2018.

1. Daniel Creagh was acquitted by a Jury at the Central Criminal Court on 16th March 2018. He had been charged with offences under section 58 of the Terrorism Act 2000 (collection of information) and section 16(2) of the Forgery and Counterfeiting Act 1981 (possession of counterfeit currency). The information in the first charge was an online publication called 'Anarchist Cookbook of 2000'. The contents include instructions on how to make counterfeit currency. This explains the combination of both charges into one trial.

2. This case attracted some attention because of Mr Creagh's acquittal by the jury, in part because he and his legal team have publicised the outcome of the trial.

3. In light of the above, I decided to conduct a brief review of this case, because it included one of the often-used provisions of the terrorism legislation which I review, namely section 58 of the Terrorism Act 2000. For the avoidance of doubt, I have not conducted a formal inquiry, still less have I met or examined witnesses. I am not a judicial figure, nor do I have powers to convene a public inquiry. I am entitled to conduct a discretionary review of individual criminal investigations and cases involving the operation of the UK terrorism legislation, of which a recent example is my Report into Operation Classific, the police investigation into the Westminster Bridge terrorist attack on 22nd March 2017, which was presented to Parliament in March this year.

4. This Note is intended to be nothing more than a brief review of some of the features of the case of R v Creagh, where they concern our terrorism legislation. This Note does not have the status of a formal Report to Parliament. However, I have Mr Creagh's permission – confirmed by his solicitor whom I met to discuss this case on 25th May 2018 – to name him in this document.

5. I emphasise that I have not reviewed the verdicts reached by the jury in this case. My Note does not amount to any form of appellate review of the case, nor does it in any way impugn or call into question the verdicts reached by the jury. The legal proceedings are concluded.

6. During my review, I have received the following documents:

   a. From Mr Creagh's solicitors, Waterfords, a letter addressed to me and dated 23rd March 2018, the full content of which I produce at the end of this Note, below.
   b. From the Metropolitan Police Service case team, a PowerPoint presentation which I understand to have been used in evidence by PC Matthew Hamilton, entitled 'Testing into Downloading of Files on a Sony Xperia F3111 Handset'.
   c. From the Crown Prosecution Service and counsel who prosecuted the case, the Prosecution Opening Note dated 4th March, by prosecution counsel Mr Brocklehurst. Also, a copy of the Expert Witness statement dated 13th February 2018 by Nicholas Kluger-Langer, Senior Digital Forensic Analyst instructed on behalf of the defence.
   d. From the trial judge His Honour Judge Mark Lucraft QC, Legal Directions given to the jury at the start and end of the evidence, and a copy of the Judge's reminder to the jury of the evidence given.

7. At the start of the trial, HHJ Lucraft QC told the jury the essence of the case against Mr Creagh, as follows:

   There are two allegations in this case. It is alleged that the defendant was in possession of a document containing information of a kind likely to be useful to a person committing or preparing an act of terrorism. The second is an allegation of forgery and counterfeiting. 56 £10 notes were found when the defendant's home address was searched. The notes are said to be fake. The key events took place in May 2017 in North London. The defendant denies the allegations.

8. In legal directions after the evidence concluded, HHJ Lucraft QC addressed the issues or elements in the first allegation, possessing a document containing information useful for terrorist purposes, as follows:

To 'possess' something is to *<u>knowingly have the item in your physical custody or under your</u>* *control. Here the prosecution's case is that this item had been downloaded by the defendant on to his phone. There is evidence from PC Hamilton that the item is in the folder marked 'downloads' on the defendant's phone. The defendant's case is that if he downloaded it, he did not realise he had done so: he thought he had just read it.*

The second element is whether information in the record (the Anarchy Cookbook) *<u>is of a kind likely to be useful to a person committing or preparing an act of terrorism</u>**: i.e. was it likely to provide practical assistance to a person committing or preparing an act of terrorism? The prosecution case is that the item the 'Anarchy Cookbook Version 2000' has within it information of a kind likely to be useful to a person committing or preparing an act of terrorism. The prosecution has identified sections of the book [sections: 3, 7, 11 and 195, 18, 26, 131 and 184, 132 and 197, 139, 140, 165, 181, 193, 199 and 202]. Sharon Broome gave evidence that those sections do provide details of the ingredients and the methods to be used that could create viable explosives and devices connected with explosives. The defendant's evidence was that he did not agree that anything in the book was of practical assistance to anyone planning or preparing to commit an act of terrorism.*

The third element and the key question for you that flows from it goes back to the definition of possession that I have given to you: did the defendant "<u>*know that he had the record*</u>*" in his physical custody or under his control?*

The fourth element and second key question for you is: <u>*did he know the kind of information it contained*</u>*?*

So, the questions on <u>*count 1*</u> *for you to consider are:*

- *Are we satisfied so that we are sure that the defendant knew that he had the record in his physical custody or under his control?*
- *Are we satisfied so that we are sure that the defendant knew the kind of information it contained?*

9. In relation to the second allegation, control of counterfeit currency, the legal directions as to the issues or elements were as follows:

In law a 'thing' is a counterfeit currency note if it resembles a currency note (whether on one side or on both) to such an extent that it is <u>*reasonably capable of passing for a currency note*</u> *of that description.*

With this count it is not in dispute that the defendant <u>*had in his custody or under his control*</u> *the 56 fake £10 notes. It is* <u>*not*</u> *accepted that the notes are, in law,* <u>*counterfeit currency notes*</u>*. It is a question of fact for you to consider. You have the evidence of Nina Woodward that, in*

her opinion they are counterfeit and you have the evidence of the defendant that he disputes they are capable of passing for genuine £10 notes.
It is accepted that the defendant had no lawful authority or excuse to have them in his custody or under his control.
The second issue for you to determine is whether he knew or believed the items to be counterfeit currency notes?
As set out above to 'know' something is to have actual knowledge of a state of affairs. To 'believe' something is to accept something but without proof: because of the circumstances, what you have seen or heard you realise that the only reasonable explanation is that something is the case, or to close your eyes to the obvious – so something less than actual knowledge.
The questions for you on count 2 are:

- *Are we satisfied so that we are sure that the 'things' resemble a currency note (whether on one side or on both) to such an extent that it is reasonably capable of passing for a currency note of that description?*
- *Are we satisfied so that we are sure that the defendant knew or believed that the 56 items were counterfeit currency notes?*

10. The legal elements of the section 58 offence, on which the trial judge gave clear directions to the jury, have been considered on a number of occasions by the Court of Appeal. A brief digest of the key decisions is as follows:

    1. In *R v G, R v J* [2010] 1 A.C.43, the Court of Appeal described what the prosecution must establish in order to prove possession: *'under section 58(1) the Crown must prove beyond a reasonable doubt that the defendant knew that he had the document or record and that he had control of it… the Crown must prove that the defendant was aware of the kind of information which was in the document or record which he possessed…This does not mean, of course, that the Crown has to show that the defendant knew everything that was in the document or record. It is enough if he knew the nature of the material which it contains'.* The Court also noted that the prosecution are not required to prove a terrorist purpose to secure a conviction under section 58, saying *'In particular, there is nothing in the terms of section 58(1) that requires the Crown to show that the defendant had a terrorist purpose for doing what he did'… 'section 58 focusses on the nature of the information which the defendant collects, records or possesses in a document or*

record. Subject to the defence in section 58(3), the circumstances in which the defendant did these things are irrelevant. So, unless it amounts to a reasonable excuse under subsection 58(3), his purpose in doing them is irrelevant.'

2. In *R v A(Y)* [2010] 2 Cr.App.R 15, the Court of Appeal explained that there was no bar to a defendant adducing evidence as to his purpose in possessing information/documents as that may be central to an assertion of reasonable excuse, which is a defence under section 58(3); *'A defendant must be allowed to say what his purpose was in possessing the documents in order to submit for the jury's consideration his assertion that that purpose was an objectively reasonable one'*.
3. In *R v K* [2008] EWCA Crim 185, the Court of Appeal considered the kind of information captured by section 58; '*A document or record will only fall within section 58 if it is of a kind that is likely to provide practical assistance to a person committing or preparing an act of terrorism. A document that simply encourages the commission of acts of terrorism does not fall within section 58'*.
4. A challenge to section 58 based upon ECHR principles including Article 7, which requires the offence to provide legal certainty as to its meaning, was launched in *R v Brown* [2011] EWCA Crim 2751. The Court of Appeal decided; *'The legislation is entirely clear…The ingredients of criminal behaviour prohibited by section 58, subject to the reasonable excuse defence are clear'*.

11. Having reviewed the appellate cases above, I am in no doubt that HHJ Lucraft QC applied the relevant decisions of the Court of Appeal in formulating His careful directions to the jury in this case.

12. Whilst considering this case, I have paused to reflect on the use of section 58 TACT 2000 in relation to the same publication ie the Anarchist Cookbook in other cases. There are several examples of the use of this offence to prosecute in relation to the same publication. The most recent example I have found was in the cases of *R v Sneddon* earlier this year. The Indictment included the following:

Count 8

STATEMENT OF OFFENCE

POSSESSING A DOCUMENT CONTAINING INFORMATION USEFUL FOR TERRORIST PURPOSES, contrary to section 58(1)(b) of the Terrorism Act 2000

PARTICULARS OF OFFENCE

WARREN SNEDDON, on or before 29 September 2017, possessed a document containing information of a kind likely to be useful to a person committing or preparing an act of terrorism, namely an electronic document called 'The Anarchist Cookbook'.

13. I am informed that Mr Sneddon pleaded Guilty to this offence.

14. In addition to *R v Sneddon*, other recent cases involving the Anarchist Cookbook include:

R v Roger Smith (2017); 2 years' imprisonment for possession of the Anarchist Cookbook version 2000, ordered to run concurrently with custodial sentences for offences under the Explosive Substances Act 1883.
R v Mohammed Saeed Ahmed and Mohammed Naeem Ahmed (2014), suspended sentences of imprisonment imposed for possession of documents including the Anarchist Cookbook, the Al-Qaeda Manual and Inspire Magazine.

15. Therefore, I observe that Mr Creagh's case was one amongst a number of occasions on which the same publication has been prosecuted pursuant to section 58 TACT. To this extent, there was nothing unusual or novel in charging Mr Creagh. I add only this; generally speaking, section 58 is used in multiple-count Indictments, rather than as a standalone count for trial. Indeed, Mr Creagh was not charged solely under section 58. It is perfectly permissible for section 58 to be used on its own, but only where there is a clear case for taking a defendant to trial on that allegation alone.

16. In relation to Mr Creagh's case, I note that there was no defence application to dismiss the charges before they reached trial, nor was there any application by the defence at the close of the prosecution case to stop the trial. Both applications were available to the defence, the latter in accordance with the well-known principles enunciated in *R v Galbraith*, where – in short – a judge will stop a case if there is no evidence upon which to convict, or where there is some evidence but it is inherently weak or too tenuous to support a conviction. It is notable that no such application was made in relation to Mr Creagh's case. The inescapable conclusion is that all parties to the trial were satisfied that there was sufficient evidence upon which a reasonable jury could convict Mr Creagh.

17. Thus, this was a 'classic case for a jury'. In other words, the evidential issues in relation to both counts or criminal charges were laid before the jury, no doubt articulated with precision and force on either side, and the jury decided the evidence and applied the judge's directions on the law to that evidence. One of the principal directions of law, in this case as in every case, is that no jury can convict if they are less than sure of the defendant's guilt in respect of the individual offence that they are considering. This is what must have happened in Mr Creagh's case. I say no more, because it is impermissible to question the logic or chain of reasoning applied by a jury to the factual decisions they make, and because the verdict once delivered is sacrosanct and the proceedings are closed.

18. What remains is to consider whether there was anything in this case that calls into question the provisions of section 58 TACT. I have already noted that there was no legal challenge to this case before or during the trial. I have also observed that the particular publication in question has been routinely prosecuted in other cases, often with success. Was there anything unusual in Mr Creagh's case? His solicitors have posed a number of questions in their letter to me, set out below. In deference to their industry in drawing this case to my attention, my views and comments on those questions are as follows:

    (i) *There are no adequate safeguards against drawing false inferences of support for terrorism from classified information.*

    Comment: See (vi) below, the allegation in Mr Creagh's case was one of collection of material likely to be of use to terrorists. That is the essence of the

section 58 offence alleged. Support for terrorism, or a terrorist purpose behind the collection of material, is a feature of the more serious Terrorism Act 2000 offence under section 57, which was not alleged in this case. The trial judge laid before the jury all of the issues encompassed within the offences which were alleged, and 'inferences of support' was not one of those issues. I note there was no application to stop the trial as an abuse of process; an application which could have been made were it thought that the trial was proceeding on a basis that was unfair to the defendant or removed from him the possibility of a fair trial.

(ii) *There are no adequate safeguards to prevent the prosecution proceeding at mid-trial on a wholly different and less serious different factual basis than the one on which the DPP granted consent to prosecute.*

Comment: I find this assertion difficult to understand in the context of this case. So far as I can see, the prosecution did not materially alter their stance as this trial progressed. They did not amend the Indictment, nor did they advance a case substantially different from that outlined to the jury at the start of the trial. Whilst it is true that the prosecution in any trial is entitled to follow the evidence and to change the basis upon which the case is advanced – subject always to the twin imperatives of obeying any legal or other case management directions made by the trial judge, and ensuring that the case remains within the parameters set by Parliament by the elements and meaning of the statutory offences alleged – I cannot see any evidence that impermissible changes to the case were made by the prosecution during this trial. As noted in my comment to *(i)* above, there was no application to stop the trial as an abuse of process.

(iii) *There are no adequate facilities available to the defence to prepare or present such trials, including poor access to suitably qualified experts who can review the work of the prosecution's experts.*

Comment: This is difficult to accept, in light of the presence of an expert report, obtained by the defence, referred to in my paragraph 6(c) above.

(iv) *There are no adequate procedures in place for Crown Prosecutors to make timely and efficient disclosure of material helpful to the defence in terrorism cases where the accused has answered all questions in interview and has served a Defence Case Statement.*

Comment: The Criminal Procedure Investigations Act 1996 places a statutory responsibility upon the prosecution in every case, and throughout every trial, to consider whether at any stage there is material which might reasonably be expected to undermine the prosecution case or to support the defence case. If there is any material held by the prosecution which satisfies that test, it must be disclosed to the defence. Therefore, a defendant who answers questions in interview and supplies a Defence Case Statement is not placed at any disadvantage.

(v) *There is an urgent need for the law allowing 'social friends' of serving police officers to sit on the jury to be reviewed and replaced in terrorism cases.*

Comment: The rules on jury service are well established. Mr Creagh was acquitted. If there were 'social friends' on this jury, that did not stand in the way of acquittal, on both counts.

(vi) *The current construction of section 58 TACT appears to allow conviction for the offence even when the prosecution accept the accused had no intention to help someone preparing or committing an act of terrorism (and was not reckless about this).*

Comment: As to terrorist purpose, beyond mere possession, that is an element of section 57 TACT, therefore a separate offence. Section 58 is not a strict liability offence, but (as directed by HHJ Lucraft QC) depends upon both the 'likelihood of use to terrorists' element, as well as being subject to the 58(3) reasonable excuse defence, which must be left to the jury in every case where it is raised by the defence, save in the rare cases envisaged by the Court of Appeal in *R v G. R v J* and *R v A(Y)*, see above.

(vii) *The wording of section 58 TACT 'likely to be of use' (even if supplemented by the judicial direction 'practical assistance) is likely to provide confusion to a jury, is imprecise and should be reviewed and replaced immediately.*

Comment: See my digest of appellate cases above. The jury acquitted Mr Creagh, and were not in any state of confusion so far as I can tell.

(viii) *The evidential burden for section 58 TACT provides little scope for a trial judge to intervene and dismiss a case even if she* (sic) *thinks there is no reasonable chance of conviction and so fails to provide proper protection for the vulnerable.*

Comment: This is specifically catered for by *R v Galbraith*, see above. There was no submission of no case to answer by the defence team for Mr Creagh.

19. Therefore, having done my best to consider the information and documents I have seen, I have reached the conclusion that although there were clearly aspects of the evidence in this particular trial which led the jury to acquit as was their prerogative, the case does not call into question the utility of section 58 TACT 2000, save where I have indicated any ground for further consideration in my answers to the questions posed in paragraph 18 above.

20. This concludes my discretionary review of this case. I repeat, the verdicts returned by the jury in Mr Creagh's favour are an end of the matter. On my analysis of the law and the evidence in this case, I have not found any basis to suggest that section 58 Terrorism Act 2000 is defective in any of the ways alleged by the defence team, though I am grateful to them for this opportunity to review the matter.

MAX HILL Q.C.
October 2018.

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MAX HILL QC
INDEPENDENT REVIEWER OF TERRORISM LEGISLATION
18 RED LION COURT
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Your Ref :

Our Ref:

Date:

23rd March 2018

Dear Max,

RE: DANIEL CREAGH INQUIRY:
INDEPENDENT REVIEWER OF TERRORISM LEGISLATION AND SECTION 58 TACT

We represent Daniel Creagh. He was unanimously acquitted of possession of the anarchist cookbook contrary to section 58 Terrorism Act 2000 (TACT) on Friday 16th March 2018. The case was heard before HHJ Lucraft QC and a jury at the Central Criminal Court.

We are writing to thank you for announcing you would 'make your own inquiries' into the case of Daniel Creagh. We would like to know if you would be prepared to hear from Daniel Creagh and his legal team about his case.

We believe Daniel can provide important evidence about the practical effect of section 58 TACT. This is vital to your proper understanding of the workings of the current legislation.

In particular his case raises important questions about the operation of Section 58 TACT, including whether:

(i) There are no adequate safeguards against drawing false inferences of support for terrorism from classified information.

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Associates: Amarjit Bhachu (Resolution Accredited Specialist, HRA & Family Mediator) * Gaye Moran * Mohammed Akunjee * Baljit Somal (HRA)
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Barrister: Sarah Iskarous - **Trainee Solicitor:** Sangeeta Lola - **Senior Litigators:** Gurnam Bhakar * Gulzar Hussain * Christine Thompson * Imtiaz Shaikh * Ravinder Banga
Sam Yazigi * Amy Hooper * Sarah Kent-Lemon * Randip Birring
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(ii) There are no adequate safeguards to prevent the prosecution proceeding at mid-trial upon a wholly different and less serious factual different basis than the one on which the DPP granted consent to prosecute.

(iii) There are no adequate facilities available to the defence to prepare or present such trials, including poor access to suitably qualified experts who can review the work of the prosecution's experts.

(iv) There are no adequate procedures in place for Crown Prosecutors to make timely and efficient disclosure of material helpful to the defence in terrorism cases where the accused has answered all questions in interview and has served a Defence Case Statement.

(v) There is an urgent need for the law allowing 'social' friends of serving police officers to sit on the jury to be reviewed and replaced in terrorism cases.

(vi) The current construction of section 58 TACT appears to allow conviction for the offence even when the prosecution accept the accused had no intention to help someone preparing or committing an act of terrorism (and was not reckless about this).

(vii) The wording of section 58 TACT 'likely to be of use', (even if supplemented by the judicial direction 'practical assistance') is likely to provide confusion to a jury, is imprecise and should be reviewed and replaced immediately.

(viii) The evidential burden for section 58 TACT provides little scope for a trial judge to intervene and dismiss a case even if she thinks there is no reasonable chance of a conviction and so fails to provide proper protection for the vulnerable.

We look forward to hearing from you. We are happy to discuss with your office appropriate ground rules for hearing evidence in your inquiry. Please do not hesitate to contact us if you require any further information.

Yours sincerely,
Waterfords
Mohammed T Akunjee
WATERFORDS SOLICITORS