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A former SAS soldier has lost a judicial review bid over a challenge to ban him from publishing a book about his counter-terrorism actions in Nairobi Kenya which earned him a bravery award. 6th October 2023.

The hearing was heard in private on the grounds of national security. The decision for it to be held with the media and public excluded was taken by Mr Justice Peter Lane 8th June 2023.

See: CC, R (On the Application Of) v Secretary of State for Defence [2023] EWHC 1804 (Admin) (08 June 2023) at: <https://www.bailii.org/ew/cases/EWHC/Admin/2023/1804.html>

He said at paragraph 13 that if the hearing was in open court: ‘...I agree that matters would come into the public domain which would, in effect, make the proceedings a dead letter. I am also of the view that national security interests concerning UKSF [UK Special Forces] will play a prominent part in the hearing and that those matters should not be disclosed in open court. I also accept what Mr Sanders KC says, that the policy of neither confirm nor deny on the part of the defendant would be put at risk if the proceedings were held entirely in open.’

Following the full judicial review hearing held in private on 13th and 14th June Mrs Justice Steyn released a public ruling that the application for judicial review by Christian Craighead of the decision by the Secretary of State for Defence had been unsuccessful.

See: Craighead, R (On the Application Of) v The Secretary of State for Defence [2023] EWHC 2413 (Admin) (03 October 2023) at: <https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2023/2413.html>

The judge summarised the case in her introductory paragraphs 1 to 4:

‘1 The claimant is a former member of the United Kingdom Special Forces ('UKSF', also referred to as 'the Group'). In accordance with the anonymity order made on 21 November 2022, I shall refer to him in this judgment by his pseudonym, "**Christian Craighead**". While serving in Kenya, in January 2019, Mr Craighead engaged in a counter-terrorist operation at the DusitD2 hotel complex in Nairobi ('the Dusit Incident'). He was subsequently awarded the Conspicuous Gallantry Cross, an award which may be given to "*all ranks of the services in recognition of an act (or acts) of conspicuous gallantry during operations against the*

enemy". As the Ministry of Defence ('MOD') readily acknowledges, Mr Craighead served the UK with honour, and he is a valued and respected member of the wider UKSF community.



Neutral Citation Number: [2023] EWHC 2413 (Admin)

Case No: CO/3889/2022

**IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/10/2023

Before :

THE HON. MRS JUSTICE STEYN DBE

Between :

THE KING

on the application of

CHRISTIAN CRAIGHEAD

Claimant

- and -

THE SECRETARY OF STATE FOR DEFENCE

Defendant

2 By this claim for judicial review, Mr Craighead challenges the Secretary of State's refusal on 25 July 2022 to give him "*express prior authority in writing*" ('EPAW') to publish a memoir he has written which contains an account of his involvement in the Dusit Incident ('the memoir'). The central issue is whether that refusal unlawfully interfered with Mr Craighead's right to freedom of expression. The focus of the claim, and consequently of this judgment, has been on article 10 of the European Convention on Human Rights ('the ECHR'). The jurisprudence in respect of that Convention right is substantially at one with the long-established common law right to freedom of expression: see *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247, [21] (Lord Bingham); *R (Lord Carlile) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945, [13] (Lord Sumption JSC).

3 The parties have taken a cooperative approach to this litigation, with the Secretary of State acknowledging that Mr Craighead has approached this matter appropriately first by seeking EPAW and then, as he is entitled to do, by challenging the refusal through these proceedings. Although the courts have considered, in a number of authorities relied on by the parties and discussed below, issues arising in circumstances where former members of UKSF or of the intelligence services have disclosed information without authorisation, this case appears to be the first in which a public law challenge to a refusal of authorisation has proceeded to a substantive hearing. (*R (A) v Director of Establishments of the Security Service* [2009] UKSC 12 [2010] 2 AC 1 concerned an analogous claim which was later transferred to the Investigatory Powers Tribunal – which has jurisdiction in connection with the security and intelligence services – but the proceedings were settled.)

4 Insofar as it is possible to do so, without damaging the interests of national security or defeating the object of the proceedings, I address the claim in this OPEN judgment. I am handing down, at the same time, a Confidential Schedule to this judgment containing additional reasoning which cannot be disclosed publicly. Both parties and their representatives have seen the full judgment, including the Confidential Schedule.'

This is a classic Article 10 freedom of expression versus interests of national security balancing act judicial exercise, and as the Judge mentioned the first of its kind where the special forces author has sought permission and clearance for publication.

At paragraph 21 Mrs Justice Steyn explained why secrecy attaches to the identity of serving and past serving special forces operatives and their knowledge of operations: 'In order to fulfil their functions, UKSF must be able to operate covertly, often in extremely dangerous environments. As Eady J observed in *Ministry of Defence v Griffin* [2008] EWHC 1542 (QB) at [4]: "It is clear that much of the work is sensitive and requires that they operate secretly." Successive UK governments have adopted a policy of not commenting on UKSF matters, otherwise known as an NCND (neither confirm nor deny) policy.'

Mr Craighead also signed a confidentiality agreement before joining.

At paragraph 149 the judge explained the MOD as defendant produced 'three witnesses [who] have all given evidence as to the effect of authorisation to publish the memoir on cooperation with other states. I have addressed their evidence on this issue in the Confidential Schedule. Given their roles, expertise and considerable experience of engaging with the authorities and armed forces of friendly foreign states, and the rationality of their evidence on these issues, I consider that the assessments made by the defendant's witnesses as to how other states would be likely to react to publication of the memoir have high evidential value and should be respected: see *Lord Carlile*, [70] (Lord Neuberger PSC). The claimant does not have such expertise or experience and his views as to how foreign states would be likely to react should be accorded little weight.'

In the end Mrs Justice Steyn said she had to judge if the MOD's refusal to allow Christian Craighead to publish this matters turned on proportionality and justification in law:

And at paragraphs 150 to 155 she set out the conclusion of her ruling:

150 In my judgment, the Secretary of State has succeeded in demonstrating that the interference with the claimant's article 10 rights entailed in refusing to authorise publication of his memoir was proportionate and justified. There was a clear rational connection between the decision and the important objectives underlying it. In article 10(2) terms, those objectives were protecting national security and protecting information received in confidence, but the significance of the latter objective in this case is that the purpose is, in essence, to protect lives and to protect national security. It is well established that the court should be slow to differ from the executive's assessment of the importance of the objective pursued in a national security context. The DSF clearly attaches "vital" importance to those objectives. The third criterion, the "least restrictive means" test, requires that "the limitation of the protected right must be one that 'it was reasonable for the legislature to impose'"; it

does not call for a strict application which would permit of only one executive response to an objective that involved limiting a protected right: see *Bank Mellat*, [20] (Lord Sumption JSC), [75] (Lord Reed JSC). In my view, this criterion was clearly met.

151 In considering whether a fair balance has been struck, I have borne in mind the importance to Mr Craighead of being able to tell his story. I have weighed in the balance his understandable wish to provide "*an insider's account of how a young man with a difficult upbringing served his country and saved lives during the Incident*" (CCWS4 §25). Although he acknowledges that his interest is, in part, financial (CCWS4 §27), he wants to be able to tell his story about the Dusit Incident which, as he says, he thinks "*reflects well on the UKSF and well on me*" (CCWS4 §§23-24). He considers it unfair that so many other people (including Mr Ryan, a former member of UKSF who served prior to the introduction of the contract) are able to comment on the footage and the publicly available information about the Dusit Incident, and yet he is prevented from saying anything about it (CCWS4 §24). I have also borne in mind that the claimant is willing to make amendments and that article 10 protects speech that offends. The weight to be given to the claimant's wish to tell his story is, however, reduced by dint of the fact that he voluntarily entered into the contract (see paragraphs 109-112 above).

152 I also agree with Mr Johnston that the article 10 rights of third parties should not be ignored. The interests of the potential publisher, and the interests of members of the public in reading the memoir, should be weighed in the balance, in my view, even though they have not themselves brought claims.

153 In *Lord Carlile*, the decision impeded political communication with Members of Parliament and so was "*at the top of the hierarchy of free speech*" ([61] (Lord Neuberger PSC)). The speech in this case is not near the top of the hierarchy. Although I have no doubt that many members of the public would be interested to read the memoir, there is not a high public interest in the content of the memoir being imparted to the public. Nor do the interests of the publisher carry much weight in circumstances where they were aware prior to contracting with the claimant that the ability to publish was dependent on obtaining EPAW.

154 Although I give some weight to Mr Craighead's wish to tell his story, I also bear in mind that he has not been prevented from publishing any information about his upbringing or life before he joined the armed forces, or about his service prior to joining UKSF, and he has been able to disclose that he was selected for and served in 22 SAS. During the hearing, the Secretary of State also clarified that the claimant is permitted to state, albeit only in bare terms, that he was involved in responding to the Dusit Incident. He has only been prevented from giving an account of an operation, the Dusit Incident, in which he engaged as a member of UKSF. The decision accords with the clear and consistent policy and practice of UKSF, and the contract he signed.

155 On the other side of the balance are the interests of the community reflected in the defendant's evidence. Those community interests entail the protection of lives, the protection of national security, the maintenance of the morale and efficiency of UKSF and protecting relations with defence partners. On the evidence before me, the interests of the

community substantially outweigh the claimant's interest in publishing a memoir about the Dusit Incident (even when buttressed by the interest of the public in receiving the information he wishes to disclose, and by the interest of his publisher). I conclude that the decision did not breach the claimant's article 10 rights.'

Journalism coverage of this case:

Mail Online 5th October 2023 "Former SAS soldier gagged from releasing his book on how he defeated Kenya's Islamic terrorists because judge thinks it will expose forces' tradecraft."

See: <https://www.dailymail.co.uk/news/article-12596767/former-sas-soldier-book-release-defeated-kenya-islamic-terrorist-judge-expose-forces-tradecraft.html>

Mail Online 5th May 2023 'SAS hero who earned global acclaim for saving hostages from jihadi terrorists in hotel siege fights Ministry of Defence gagging order that bans him talking about it.' See: <https://www.dailymail.co.uk/news/article-12051351/SAS-hero-fights-Ministry-Defence-gagging-order-bans-talking-it.html>

Telegraph 4th October 2023 'Ex-SAS soldier loses court battle to lift ban on Kenyan terror attack book. Christian Craighead was awarded the conspicuous gallantry cross for fighting al-Shabaab terrorists at the Dusit D2 hotel in Nairobi in 2019.' See: <https://www.telegraph.co.uk/world-news/2023/10/04/ex-sas-loses-court-battle-lift-ban-book-kenya-terror-attack/>

BBC News report on 2019 Nairobi hotel siege. 'Kenya terror attack: What happened during the Nairobi hotel siege?' 12 February 2019.

(click on image or link to see BBC filmed report) <https://www.bbc.co.uk/news/av/world-africa-47202313>

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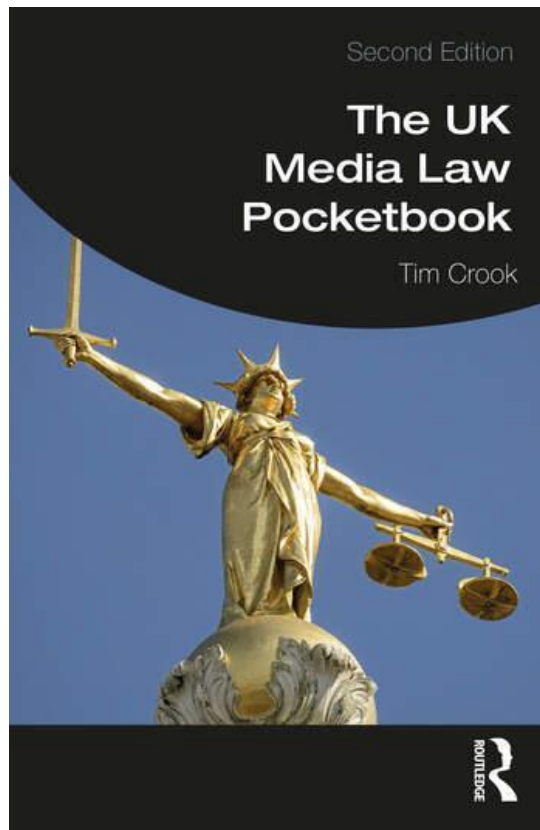
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The UK Media Law Pocketbook is a key reference for journalists and media workers across England, Wales, Scotland, and Northern Ireland. The book's companion website provides downloadable sound files, video summaries, and updates all the developments in one of the most dynamic and rapidly changing fields of law. Visit <https://ukmedialawpocketbook.com>.

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