Hilary Term
[2014] UKSC 17
On appeal from: [2011] EWHC 3451 Admin

JUDGMENT

R (on the application of British Sky Broadcasting Limited) (Respondent) *v* The Commissioner of Police of the Metropolis (Appellant)

before

Lady Hale, Deputy President
Lord Kerr
Lord Reed
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

12 March 2014

Heard on 3 December 2013

Appellant
James Lewis QC
Saba Naqshbandi
(Instructed by Metropolitan Police Directorate of Legal Services)

Respondent
Gavin Millar QC
(Instructed by Goodman Derrick LLP)

Intervener (AB)

Simon McKay
(Instructed by McKay Law Solicitors and Advocates)

Intervener (Media Lawyers Association)
Caoilfhionn Gallagher
(Instructed by Media Lawyers Association)

LORD TOULSON (with whom Lady Hale, Lord Kerr, Lord Reed and Lord Hughes agree)

Introduction

1. The Police and Criminal Evidence Act 1984 ("PACE") consolidated various police powers to obtain evidence for the purposes of a criminal investigation. Generally, a magistrate has power under section 8 to issue a search warrant on an ex parte application by a constable if satisfied, among other things, that there are reasonable grounds for believing that an indictable offence has been committed and that there is material on the relevant premises which is likely to be of substantial value to the investigation. However, that general power does not apply in relation to material which is defined in the Act as "excluded material" (section 11) or "special procedure material" (section 14).

2. "Excluded material" includes "journalistic material" which a person holds in confidence. "Special procedure material" includes journalistic material other than excluded material. "Journalistic material" means material acquired or created for the purposes of journalism, provided that it in the possession of a person who acquired or created it for the purposes of journalism (section 13).

3. There is a special procedure for a constable to apply for access to excluded or special procedure material under section 9 and schedule 1. The application has to be made to a circuit judge and paragraph 7 requires it to be made inter partes.

4. The issue in this appeal is whether on the hearing of such an application the court may have regard to evidence adduced by the applicant which has not been disclosed to the respondent. The Administrative Court held that it was impermissible but certified the question as one of general public importance. In reaching its conclusion the court relied on the statutory wording and on the decision of this court in *Al Rawi v The Security Service* [2011] UKSC 34, [2012] 1 AC 531. The Metropolitan Police Commissioner ["the Commissioner"] appeals against the decision.

Background

5. On 2 March 2011 police arrested two officers serving in the armed forces, AB and CD, on suspicion of offences under section 1(1) or 1(3) of the Official

Secrets Act 1989. The investigation concerned the suspected leaking of top secret information from meetings of the Cabinet security committee known as COBRA (short for Cabinet Office Briefing Room A) by the two officers to B Sky B's security editor, Mr Sam Kiley. In July 2012 (about the same time as permission was given for the present appeal) the investigation was closed and the officers were told that no proceedings would be brought against them. The appeal is therefore now academic as far as they are concerned, but it is pursued by the Commissioner because of the wider importance of the point of law which it raises.

6. Under section 1(1) of the Official Secrets Act 1989 it is an offence for a person who is or has been a member of the security and intelligence services, or who has been notified that he is subject to the provisions of the subsection, to make an unauthorised disclosure of intelligence which is in his possession by reason of his position.

7. Under section 1(3) it is an offence for a present or former Crown servant to make an unauthorised and damaging disclosure of intelligence in his possession by reason of his position, but not within section 1(1).

8. In brief, a disclosure is defined as damaging if it causes damage to the work of any part of the security and intelligence services, or is of information, a document or other article, or within a class of information, document or other article, whose unauthorised disclosure would be likely to have that effect.

9. Sam Kiley is a journalist who has for many years specialised in covering international affairs and homeland security, first in print journalism (becoming the chief foreign correspondent for the London Evening Standard) and more recently in broadcast journalism. In 2008 he was an "embedded" journalist for a period of months within an air assault brigade in Afghanistan, where he was introduced to AB. CD was also serving in Helmand at the same time. Through his work Mr Kiley has established contacts with many senior military personnel.

10. On the day after AB and CD were arrested, the police informed B Sky B that a criminal investigation had begun and asked for disclosure of various documents including copies of all emails between Mr Kiley and the two officers since October 2010. After inconclusive discussions between the two organisations, on 14 April 2011 the police served an application for a production order under schedule 1, paragraph 4, supported by a statement signed by Detective Sergeant Holt. The statement asserted that technical work on the two officers' computers and mobile phones showed that information had been sent by them to Mr Kiley after Cobra meetings which had then appeared almost immediately on the B Sky B ticker; that in interviews after their arrest the officers had admitted passing information to Mr

Kiley; and that if the unauthorised information had become known to hostile forces it was likely to have endangered the lives of military personnel.

The statutory scheme in more detail

11. Section 9 of PACE removes any pre-existing power to authorise a search of premises for excluded or special procedure material, but provides instead for a constable to be able to obtain access to such material for the purposes of a criminal investigation by making an application under schedule 1.

12. Under paragraph 4 of the schedule, if the judge is satisfied that one or other of two sets of access conditions is fulfilled, he may make a production order, that is

> "an order that the person who appears to the circuit judge to be in possession of the material to which the application relates shall
>
> a. produce it to a constable for him to take away; or
>
> b. give a constable access to it,
>
> not later than the end of the period of 7 days from the date of the order or the end of such longer period as the order may specify".

13. The two sets of access conditions are specified in paras 2 and 3. The application was made under both although the first set does not apply to excluded material.

14. The requirements of the first set include that there are reasonable grounds for believing:

> "that an indictable offence has been committed;
>
> that there is special procedure material on the premises specified in the application or on premises occupied or controlled by a person specified in the application;

> that the material is likely to be of substantial value to the investigation in connection with which the application is made;
>
> and that the material is likely to be relevant evidence."

The judge must also be satisfied that a production order is in the public interest, having regard to the benefit likely to accrue to the investigation if the material is obtained and to the circumstances under which the person in possession of the material holds it.

15. The requirements of the second set of access conditions are that:

> "there are reasonable grounds for believing that there is material which consists of or includes excluded material or special procedure material on premises specified in the application, or on premises occupied or controlled by a person specified in the application…..;
>
> but for section 9(2) a search of such premises could have been authorised by the issue of a warrant to a constable under an enactment other than the schedule; and
>
> the issue of such a warrant would have been appropriate."

16. Paragraph 15 provides that if a person fails to comply with an order under paragraph 4, a circuit judge may deal with him as if he had committed a contempt of the Crown Court.

17. The court has a power to issue a search warrant in limited circumstances. These are specified in paragraphs 12 and 14. They include a situation where a circuit judge is satisfied that either set of access conditions is fulfilled but also that service of notice of an application for a production order may seriously prejudice the investigation.

The production order

18. The application was heard on 26 April and 3 May 2011 by His Honour Judge Paget QC at the Central Criminal Court. The judge had been provided with the parties' skeleton arguments, the statement of D Sgt Holt and a statement by the

managing editor of Sky News, Mr Thomas Cole. The Commissioner's skeleton argument indicated that he wished to put further evidence from D Sgt Holt before the judge in the absence of B Sky B's representatives. B Sky B objected to that course and resisted the application for a production order on various grounds. It submitted that nearly all the information sought by the police was excluded material and therefore the second set of access conditions had to be satisfied. It also disputed that either set was fulfilled. It pointed out that there was no evidence that the officers were persons within section 1(1) of the Official Secrets Act. As to section 1(3), it denied that there was any risk of Mr Kiley or B Sky B publishing or disclosing any information which might damage armed forces operations or national security; Mr Kiley had a long journalistic career and there had never been any suggestion of him acting in a way which threatened to damage national security. B Sky B also contended that the making of a production order would be seriously damaging to B Sky B and Mr Kiley reputationally and personally.

19. The judge allowed the Commissioner's application to hear part of D Sgt Holt's evidence ex parte and he made a production order. In his judgment he said:

> "I heard evidence from Detective Sergeant Patrick Holt, an officer of the Metropolitan Police Counter Terrorism Command. I heard his evidence in two parts. I heard him first inter partes, when he swore that the open or disclosed information which he produced was true to the best of his knowledge and belief. I then heard him ex parte, when he produced his secret or undisclosed information and swore that that too was true to the best of his knowledge and belief. It is unnecessary to say more about the secret information, save to record that it amplifies in greater detail the information set out in the open information disclosed to B Sky B."

He added that the evidence which he heard ex parte did "not detract from or assist the arguments put forward by B Sky B".

20. The Administrative Court (Moore-Bick LJ and Bean J) quashed the order. It held that the procedure adopted at the hearing was unlawful, applying the reasoning in *Al Rawi*. It rejected the Commissioner's argument that *Al Rawi* was distinguishable because the present case was concerned only with a procedural application for an order in aid of a police investigation. They were independent proceedings by which the Commissioner was seeking to obtain access to private property of a sensitive kind. The fundamental principle applied that B Sky B should have access to the evidence on which the case against it was based and thus an opportunity to comment on it and, if appropriate, to challenge it. On that ground the court held the order should not be allowed to stand. The question on this appeal is whether it was right.

21. That was enough to determine the outcome, but there was also a second reason for the Administrative Court's decision. The court did not consider that the limited evidence given in the open proceedings showed any basis for suspecting that any disclosures made to Mr Kiley had caused or might cause damage to the security or intelligence services. Although reference had been made in general terms to military operations, no attempt had been made to identify or provide details of any disclosure of information which had been or was likely to be damaging. Since the judge appeared to be of the view that the secret evidence did not make any material difference, it followed that there was insufficient basis for the order.

22. I mention the last point, although no point of law turns on it, because Mr James Lewis, QC (who represented the Commissioner on the hearing of the original application) has told this court that the evidence given in secret did materially strengthen the case for making the order because it went to the nature of the information disclosed by the officers which the police considered to be potentially damaging. There is no suggestion of anybody acting in bad faith, but this does illustrate the difficulty of being sure what led to the making of the order when some of the evidence was kept from one of the parties and the open judgment naturally did not identify what that evidence was. Further, if the secret evidence materially strengthened the case in a way which B Sky B was unable to envisage and therefore address, because it did not know the nature of the evidence, the resulting prejudice to B Sky B speaks for itself.

Discussion

23. In *Al Rawi* the Supreme Court by a majority affirmed the general principle that in a civil trial, just as in a criminal trial (*R v Davis* [2008] AC 1128) the use of a closed material procedure was so alien to the right of a party to know the case advanced by the opposing party and to have a fair opportunity to respond to it as to be permissible only by Act of Parliament. Lord Dyson, who gave the leading judgment, recognised at paragraphs 63 to 65, that there were certain classes of case where a departure from the general rule might be justified for special reasons in the interests of justice. He instanced welfare proceedings whose object of determining what is best for the child or person under a disability may be jeopardised by unqualified disclosure to the litigants of all information provided to the court. Lord Dyson also referred to cases where the whole object is to protect confidentiality, for example intellectual property proceedings, where special measures are sometimes needed in order to prevent the proceedings from being self-destructive, for example by limiting the persons who may see confidential information. In the present case B Sky B offered undertakings to restrict those who would see the Commissioner's evidence to a nominated member of its management who could give instructions to B Sky B's lawyers and to the lawyers, and that the material would be used only for the purposes of the proceedings, but this proposal was not acceptable to the police.

24. The proceedings in this case were not a trial in the ordinary sense but a special form of statutory procedure. Bingham LJ set out the proper approach to the scheme in *R v Lewes Crown Court ex parte Hill* (1991) 93 Cr App R 60, 65-66:

> "The Police and Criminal Evidence Act governs a field in which there are two very obvious public interests. There is, first of all, a public interest in the effective investigation and prosecution of crime. Secondly, there is a public interest in protecting the personal and property rights of citizens against infringement and invasion. There is an obvious tension between these two public interests because crime could be most effectively investigated and prosecuted if the personal and property rights of citizens could be freely overridden and total protection of the personal and property rights of citizens would make investigation and prosecution of many crimes impossible or virtually so.
>
> The 1984 Act seeks to effect a carefully judged balance between these interests and that is why it is a detailed and complex Act. If the scheme intended by Parliament is to be implemented, it is important that the provisions laid down in the Act should be fully and fairly enforced. It would be quite wrong to approach the Act with any preconception as to how these provisions should be operated save in so far as such preconception is derived from the legislation itself.
>
> It is, in my judgment, clear that the courts must try to avoid any interpretation which would distort the parliamentary scheme and so upset the intended balance."

Citing *R v Leicester Crown Court ex parte DPP* [1987] 1 WLR 1371, Bingham LJ referred (at page 67) to a section 9 application as "a lis between the party applying and the party against whom the application was made".

25. Mr Lewis argued that the reasoning in *Al Rawi* should not be applied to a section 9 application. Unlike an ordinary trial, no accusation or case was being made against B Sky B and the court was not being called on to make any determination of its legal rights. It was simply an evidence gathering exercise for the purposes of a criminal investigation. There was no need as a matter of fairness for B Sky B to know full details of the evidence which caused the police to suspect the officers of having committed criminal offences. Ignorance of the full evidence did not prevent B Sky B from saying what it wished about the nature of any relationship between itself and the officers or about the potential harmful effects of a production order. Furthermore, compulsion to disclose full details of the police evidence in an Official

Secrets Act investigation could itself involve the risk of damage to national security and for that reason the Administrative Court's decision had hampered police investigation in other cases.

26. That is one viewpoint, but there is another as Bingham LJ said in the *Lewes* case. Mr Gavin Millar QC emphasised that an application for compulsory access to journalistic material held in confidence involves a significant interference with the journalist's legal rights. It is therefore not correct to say that such an application does not involve any determination of rights. It is a possibly unusual feature of the present case that the police knew the journalist's source and the officers had admitted giving information to him, but a section 9 application may well involve an attempt to compel the disclosure of sources, which is always a sensitive and difficult area because of the potential impact on the ability of responsible journalists to gather and analyse information on matters of public interest. In answer to the argument that there was no need as a matter of fairness to know the full extent of the evidence to support the police's suspicion that an offence had been committed person, B Sky B says that it was entitled to a fair opportunity to challenge the Commissioner's assertion that the access conditions were met. In particular, if a suggestion was being made in D Sgt Holt's secret evidence (which had not been made in his open evidence) that there was a risk of future damage to the armed forces or national security, through the publication of further information which Mr Kiley had received but not yet published, B Sky B submits that it should have been given notice and an opportunity to rebut it.

27. Mr Lewis relied on a decision of the Administrative Court in *R (Malik) v Manchester Crown Court* [2008] 4 All ER 403. Dyson LJ gave the judgment of the court which approved in certain circumstances the appointment of a special advocate on an application for a production order under the Terrorism Act 2000. However, as Lord Dyson himself later pointed out in *Al Rawi* at paragraph 56, there was no argument in *Malik* about whether the court had power to order a closed material procedure in the absence of an enactment authorising it to do so.

28. As a general proposition, I would agree with the Commissioner's argument that the court should not apply the *Al Rawi* principle to an application made by a party to litigation (or prospective litigation) to use the procedural powers of the court to obtain evidence for the purposes of the litigation from somebody who is not a party or intended party to the litigation. This is because such an application will not ordinarily involve the court deciding any question of substantive legal rights as between the applicant and the respondent. Rather it is an ancillary procedure designed to facilitate the attempt of one or other party to see that relevant evidence is made available to the court in determining the substantive dispute. Applications of this kind, such as an application for a witness summons in civil or criminal proceedings, are typically made ex parte.

29. However, the present situation is different. Compulsory disclosure of journalistic material is a highly sensitive and potentially difficult area. It is likely to involve questions of the journalist's substantive rights. Parliament has recognised this by establishing the special, indeed unique procedure under section 9 and schedule 1 for resolving such questions.

30. Ultimately the issue in this appeal is a short one. It turns on the meaning and effect of paragraph 7 of schedule 1. Parliament recognised the tension between the conflicting public interests in requiring that an application for a production order shall be made "inter partes". The government had originally proposed that a production order might be made ex parte, but that proposal met opposition and was dropped. When an application for a production order is made, there is a lis between the person making the application and the person against whom it is made, which may later arise between the police and the suspected person through a criminal charge. Equal treatment of the parties requires that each should know what material the other is asking the court to take into account in making its decision and should have a fair opportunity to respond to it. That is inherent in the concept of an "inter partes" hearing.

31. I agree with the Administrative Court's decision that it was not permissible for the judge to adopt the course described in paragraph 19 above and I would dismiss the appeal.

32. For the avoidance of doubt, this ruling does not prevent a court from hearing a public interest immunity (PII) application ex parte, but that is a different matter. On a PII application the question is whether the evidence should be admitted at all. If, however, evidence is to be admitted in support of a production order application under the special procedure created by section 9 and schedule 1, the requirement that the hearing should be inter partes is inconsistent with that evidence being given ex parte.

33. As a footnote, I would add that the court has no way of assessing reliably the extent to which this decision may impede the use of the section 9 procedure, nor of balancing the corresponding ill effect on responsible journalism of a decision the other way. Those are matters for Parliament. However, we were told that the majority of applications under section 9 are made against banks, that most of the remainder are made against accountants or solicitors, and that they are seldom contested. This is unsurprising. A bank or professional adviser will need an order to be made in order to justify revealing the information but is unlikely to have any interest in opposing it. The position of journalists is obviously different, but applications under section 9 against journalists appear to be rare. We have no figures, nor do we know in how many cases the police have refrained from making an application in view of the decision of the Administrative Court. However, even

if we had detailed information, it should not affect the interpretation of the statutory scheme.