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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

BEFORE A DIVISIONAL COURT

IN THE MATTER OF AN APPLICATION BY JAMIE BRYSON FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

POLICE SERVICE OF NORTHERN IRELAND

and, as interested parties

THE SECURITY INDUSTRY AUTHORITY and A LAY MAGISTRATE

Before: McCloskey J and McAlinden J

McCloskey J (delivering the judgment of the court)

The Challenge

[1] The target of the challenge of James Bryson, the Applicant, who describes himself as a journalist by occupation, is formulated thus:

> "*The application by the PSNI for search warrants and the subsequent decision by a Lay Magistrate to grant the search warrants.*"

There were three police applications to the Lay Magistrate to obtain a warrant to enter and search identified (or "*specified*") premises, all made on 14 August 2018. The Lay Magistrate acceded to each application. The warrants thereby authorised were executed two days later by police officers at the three addresses in question.

This entailed the search of two residential properties and one business premises, each having some connection with the Applicant.

[2] These proceedings were commenced on 15 November 2018. By an interim injunctive order of this court dated 16 November 2018 the status quo was preserved by a prohibition on the Police Service of Northern Ireland (the "Police Service", the Respondent) and the Security Industry Authority ("SIA"), an interested party in these proceedings, from examining, interrogating or otherwise inspecting any of the materials seized, which were detailed in an accompanying schedule: in brief several telephonic devices, a laptop and a "*computer tower*".

[3] All of the acts and activities under scrutiny were the product of a joint criminal investigation operation involving both the PSNI and the SIA. The Lay Magistrate concerned, who has been granted anonymity, has the status of an interested party and has been represented throughout.

Statutory framework

[4] The applications to the Lay Magistrate were made under **Article 10** of the Police and Criminal Evidence (NI) Order 1989 ("PACE"). This provides:

> "Power of justice of the peace to authorise entry and search of premises
>
> *10. - (1) If on an application made by a constable a justice of the peace [now lay magistrate] is satisfied that there are reasonable grounds for believing-*
>
> *(a) that an indictable offence has been committed; and*
>
> *(b) that there is material on premises mentioned in paragraph (1A) which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence; and*
>
> *(c) that the material is likely to be relevant evidence; and*
>
> *(d) that it does not consist of or include items subject to legal privilege, excluded material or special procedure material; and*
>
> *(e) that any of the conditions specified in paragraph (3) applies in relation to each set of premises specified in the application,*
>
> *he may issue a warrant authorising a constable to enter and search the premises.*

(1A) The premises referred to in paragraph (1)(b) are –

(a) one or more sets of premises specified in the application (in which case the application is for a "specific premises warrant"); or

(b) any premises occupied or controlled by a person specified in the application, including such sets of premises as are so specified (in which case the application is for an "all premises warrant").

(1B) If the application is for an all premises warrant, the lay magistrate must also be satisfied –

(a) that because of the particulars of the offence referred to in sub-paragraph (a) of paragraph (1), there are reasonable grounds for believing that it is necessary to search premises occupied or controlled by the person in question which are not specified in the application in order to find the material referred to in sub-paragraph (b) of that paragraph; and

(b) that it is not reasonably practicable to specify in the application all the premises which he occupies or controls and which might need to be searched.

(1C) The warrant may authorise entry to and search of premises on more than one occasion if, on the application, the lay magistrate is satisfied that it is necessary to authorise multiple entries in order to achieve the purpose for which he issues the warrant.

(1D) If it authorises multiple entries, the number of entries authorised may be unlimited, or limited to a maximum.

(2) A constable may seize and retain anything for which a search has been authorised under paragraph (1).

(3) The conditions mentioned in paragraph (1)(e) are-

(a) that it is not practicable to communicate with any person entitled to grant entry to the premises;

(b) that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the evidence;

(c) that entry to the premises will not be granted unless a warrant is produced;

(d) that the purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them.

(4) In this Order "relevant evidence", in relation to an offence, means anything that would be admissible in evidence at a trial for the offence.

(5) The power to issue a warrant conferred by this Article is in addition to any such power otherwise conferred."

[5] Given the Applicant's contention that both the Police Service and the Lay Magistrate should have been operating under **Article 11** of PACE, it is convenient to insert same at this juncture:

"Special provisions as to access

11. - (1) A constable may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 1 [$ A.Sch.1] and in accordance with that Schedule.

(2) Subject to paragraph (3), any statutory provision passed or made before the making of this Order under which a search of premises for the purposes of a criminal investigation could be authorised by the issue of a warrant to a constable shall cease to have effect so far as it relates to the authorisation of searches-

(a) for items subject to legal privilege; or

(b) for excluded material; or

(c) for special procedure material consisting of documents or records other than documents."

[6] The phrase "*Items subject to legal privilege"* is defined in **Article 12** of PACE:

"Meaning of "items subject to legal privilege"

12. - (1) Subject to paragraph (2), in this Order "items subject to legal privilege" means-

(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;

(b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and

(c) items enclosed with or referred to in such communications and made-

(i) in connection with the giving of legal advice; or

(ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings,

when they are in the possession of a person who is entitled to possession of them.

(2) Items held with the intention of furthering a criminal purpose are not items subject to legal privilege."

[7] "*Excluded material*" is defined by **Article 13**:

"Meaning of "excluded material"

13. - (1) Subject to the following provisions of this Article, in this Order "excluded material" means-

(a) personal records which a person has acquired or created in the course of any trade, business, profession or other occupation or for the purposes of any paid or unpaid office and which he holds in confidence;

(b) human tissue or tissue fluid which has been taken for the purposes of diagnosis or medical treatment and which a person holds in confidence;

(c) journalistic material which a person holds in confidence and which consists-

(i) of documents; or

(ii) of records other than documents.

(2) A person holds material other than journalistic material in confidence for the purposes of this Article if he holds it subject-

(a) to an express or implied undertaking to hold it in confidence; or

(b) to a restriction on disclosure or an obligation of secrecy contained in any statutory provision, including a statutory provision passed or made after the making of this Order.

(3) A person holds journalistic material in confidence for the purposes of this Article if-

(a) he holds it subject to such an undertaking, restriction or obligation; and

(b) it has been continuously held (by one or more persons) subject to such an undertaking, restriction or obligation since it was first acquired or created for the purposes of journalism."

Article 14 provides the definition of "personal records":

"... documentary and other records concerning an individual (whether living or dead) who can be identified from relating:

(a) To his physical or mental health;

(b) To spiritual counselling or assistance given or to be given to him; or

(c) To counselling or assistance given or to be given to him, for the purposes of his personal welfare, by any voluntary organisation or by any individual who –

(i) by reason of his office or occupation has responsibilities for his personal welfare, or

(ii) by reason of an order of a court has responsibilities for his supervision."

[8] The subject matter of Schedule 1 to PACE is "*Special Procedure – making of orders by County Court Judge*". In general terms the main feature of this regime is that

it prescribes a process which, from the perspective of the Police Service, is more onerous. A series of exacting "*access conditions*" must be satisfied and the procedure is *inter-partes* on notice to the subject concerned. Given its volume Schedule 1 is reproduced in the Appendix to this judgment.

The Security Industry Authority

[9] The SIA is a statutory entity established by section 1 of the Private Security Industry Act 2001 (the "*2001 Act*"). It has a series of functions and responsibilities belonging to the realm of the "*security industry services*". The SIA is, in essence, a regulator. Under this statutory regime security industry services must, *inter alia*, be licenced. Certain powers of entry and inspection are conferred on the SIA by **Section 19** which provides:

> "Entry, inspection and information [ss.19-20 in force 1 Dec 2009]
>
> 19 *Powers of entry and inspection*
>
> *(1) Subject to subsections (3) and (4), a person authorised in writing for the purpose by the Authority may enter any premises owned or occupied by any person appearing to him to be a regulated person other than premises occupied exclusively for residential purposes as a private dwelling.*
>
> *(2) A person authorised in writing for the purpose by the Authority may require any person appearing to him to be a regulated person to produce to him any documents or other information relating to any matter connected with –*
>
> *(a) any licensable conduct which has been or may be engaged in by the person so appearing;*
>
> *(b) the provision by the person so appearing of any security industry services;*
>
> *(c) any matters in respect of which conditions are imposed on the person so appearing by virtue of a licence or of an approval granted in accordance with arrangements under section 15.*
>
> *(3) A person exercising the power conferred by subsection (1) shall do so only at a reasonable hour.*
>
> *(4) A person exercising such a power shall –*

(a) comply with any reasonable request made (whether before or after entry is gained to the premises) by any person present on the premises to do any one or more of the following –

(i) state the purpose for which the power is being exercised;

(ii) show the authorisation by the Authority for his exercise of the power;

(iii) produce evidence of his identity;

(b) make a record of the date and time of his entry, the period for which he remained there and his conduct while there; and

(c) if requested to do so by any person present on the premises at the time of the entry, provide that person with a copy of that record.

(5) A person is guilty of an offence if –

(a) he intentionally obstructs any person in the exercise of any power conferred by subsection (1);

(b) he fails, without reasonable excuse, to comply with any requirement imposed by subsection (2); or

(c) he makes an unauthorised disclosure of any information obtained by him in the exercise of any power conferred by this section, or as a consequence of the exercise of any such power by another.

(6) For the purposes of this section a disclosure of information obtained by any person as mentioned in subsection (5)(c) is authorised if, and only if, it is made –

(a) for the purposes of the carrying out by the Authority of any of its functions under this Act; or

(b) for the purposes of any criminal proceedings.

(7) A person guilty of an offence under this section shall be liable, on summary conviction, to a term of imprisonment not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.

(8) In this section "regulated person" means –

> *(a) the holder of any licence granted under this Act;*
>
> *(b) any person who engages in licensable conduct without being the holder of a licence under this Act;*
>
> *(c) any person who is for the time being approved in accordance with arrangements under section 15 in respect of any services which regulations under section 17 prohibit him from providing unless so approved; or*
>
> *(d) any person who is not so approved but provides security industry services which he is prohibited by any such regulations from providing."*

As the text makes clear, this power does not extend to residential premises and does not permit search, seizure or retention of any materials or goods.

The Search Warrant Applications

[10] The applications for and grant of the impugned search warrants were preceded by certain written communications between the SIA and the Applicant. By letter dated 04 June 2018 a SIA Investigations Officer made a formal request of the Applicant for information under Section 9(2) of the 2001 Act, describing the Applicant as the "*director of a security company*". The Applicant was requested to provide specific items of documentary information spanning the period from the incorporation of JJ Security Services Limited (hereinafter "*the company*") on 21 June 2017 to 11 June 2018. The Applicant replied by an email of 06 June 2018:

> "*JJ Security Services has not* [sic], *and is not, trading. The company name was registered for the purposes of holding the name, but has never traded in any shape or form. Therefore, we do not hold any of the information which you request. If you require any more information, then please direct all queries to* …. [an identified solicitor]."

[11] Next, by a further email to the SIA, dated 26 July 2018, the Applicant stated:

> "*A number of further letters have been sent to my home address …* [specified]*… from yourself. These letters have been unfortunately misplaced in error. Could you perhaps send me an electronic copy of same to this email address and I will, of course, attempt to provide you* [sic] *as much assistance as I possibly can.*"

The SIA replied by email on 08 August 2018:

> "*I have only sent you one letter. This was dated 04 June 2018 which I posted to you at* [premises] *on a first class letter and special delivery basis on 05 June 2018 …*
>
> *You replied … by email ….*
>
> *Please find attached scanned copy of the letter I sent to you and also the email response from yourself.*"

There was no further communication from the Applicant and the three applications to the Lay Magistrate ensued, on 14 August 2018.

[12] Brief reference to a formal memorandum of understanding between the Association of Chief Police Officers ("*ACPO*") and the SIA is appropriate at this juncture. This dates from early 2014. It regulates the relationship and arrangements between the SIA and the various police agencies in the United Kingdom. It contemplates, *inter alia*, the sharing of information. It also makes provision for so-called "*combined operations*". These are described as "*occasions where a partner's assistance is sought in respect of the investigation of a crime or in future planned targeted action*". This envisages that "*where possible*" there will be a formal written arrangement identifying the "*lead agency*" and certain associated and incidental matters.

[13] Elaboration of the background to the issue of the impugned warrants is provided in affidavits sworn by deponents on behalf of the two agencies concerned. These disclose *inter alia* that the SIA had been investigating the company during a period approaching one year. The company had three directors, only one of whom had a valid SIA licence. Thus there was, potentially, an offence on the part of the Applicant and a second director contrary to section 3 of the 2001 Act. A Detective Constable deposes specifically to having received information that the Applicant was "*supplying door staff*" to named licensed premises. It is further averred that a later search of such premises, conducted some days following receipt of the Applicant's first email (*supra*), yielded certain documentation which "*supported the belief*" that the Applicant was involved in the unlicensed supply of door staff. The communications between the Applicant and the SIA noted above followed. Following a review of the available evidence in the context of deliberations between the two Respondents a strategic decision was made to apply to a Lay Magistrate for search warrants under Article 10 of PACE.

[14] The Detective Constable who formulated the three written applications, each formally entitled "Complaint to obtain warrant to enter and search", and then attended personally upon the Lay Magistrate concerned deposes, with reference to Article 10(3) of PACE:

> "*The grounds for the access conditions were based on the fact that Mr Bryson had demonstrated a prolonged and high level of obstruction to* [sic] *police during 2013. I was aware that*

> *Mr Bryson, knowing police sought him in relation to various offences, went 'on the run' hiding in a friend's attic. Not only did Mr Bryson actively frustrate the police investigation but he recorded a video of himself whilst in hiding which he distributed to the public at large via a social media platform. I was also aware that police had attended Mr Bryson's address* [specified] *on 16 March 2018 in order to execute a money warrant. Mr Bryson told police to leave his premises unless they had a warrant. I considered both pieces of this information when applying for the warrants. I was of firm belief that to request Mr Bryson to co-operate with police and SIA voluntarily would risk relevant evidence being concealed, lost, altered, damaged or destroyed. This would pose a substantial risk to public safety given the offence suspected was directly linked to the provision of unlicensed door staff."*

The deponent further avers:

> "*I was not applying to search for any excluded or special procedure material. I had no knowledge of Mr Bryson being a journalist and it was not in my contemplation when applying for, obtaining, nor* [sic] *executing the warrants."*

The Detective Constable then describes her personal interaction with the Lay Magistrate in making the applications.

[15] Each of the search warrant applications:

(i) Described the subject matter of the investigation as "*supply of unlicensed door staff contrary to section 5 of the* [2001 Act]."

(ii) Stated that as a result of "*inspections at the* [identified licensed] *premises and enquiries carried out to date*" police suspected that "*… unlicensed door staff are being supplied to* [the named premises]."

(iii) Described the materials pursued by the applications as "*records relating to the provision and arrangement of security door staff and supply of persons performing licensable conduct as per the* [2001 Act], *invoices, electronic correspondence and any device capable of storing or printing such records or invoices. Bank account details.*"

(iv) Asserted that the material sought was "*… likely to prove the offence and determine the scale of the offending* [and] *will also identify further suspects and witnesses*".

(v) Intimated that there was no reason for thinking that the search would encompass "*items subject to legal privilege, excluded material or special procedural material*".

(vi) Identified the "*specified premises*".

(vii) Explained the connection between the Applicant and each of the identified premises.

(viii) Represented that the first, third and fourth of the Article 10(3) PACE "*access conditions*" applied, elaborating thus: "*By trying to gain entry without a warrant or advising the premises prior to the search may result in material being destroyed or disposed of*".

(ix) Stated that the proposed searches would be carried out by police officers and SIA investigators.

[16] In all three applications the Detective Constable made the following signed declaration:

> "*To the best of my knowledge and belief:*
>
> *(a) This application discloses all the information that is material to what the court must decide, including anything that might reasonably be considered capable of undermining any of the grounds of the application, and*
>
> *(b) The content of this application is true.*"

[17] The insertion of a brief analytical observation at this stage is convenient. It is apparent from all the evidence that both the formal applications to the Lay Magistrate and the associated oral explanation and presentation by the Detective Constable contained did not identify or include the exchange of written communications noted in [10]-[11] above. Thus, the Lay Magistrate was not apprised of either (i) the Applicant's assertion that he possessed none of the information requested by the SIA as the company was "*... registered for the purposes of holding the name, but never traded in any shape or form*" or (ii) his written representation that he would "*… attempt to provide you* [sic] *as much assistance as I possibly can*".

The Lay Magistrate's Decisions

[18] Each of the "Complaint" applications (Form PACE5A) is designed in such a way that where the judge or Lay Magistrate concerned accedes to a search warrant application certain formal sections are completed in manuscript by the authorising agency. The relevant sections of the three pro-formae were not completed by the Lay Magistrate in identical terms. However, considered in tandem, they disclose that the Lay Magistrate was satisfied via the formal written applications and

associated presentation by the Detective Constable that there was a sufficient basis for making the search and seizure authorisations requested. This included specific confirmation of the provision of "*additional information*" through the medium of the officer's briefing. This consisted of "*information gathered during ongoing investigation*" and information confirming that the business premises specified in the third of the three applications was the Applicant's "*place of work*". It is uncontroversial that the separate addresses specified in the other two applications are residential premises directly connected to the Applicant.

The Applicant's Grounds

[19] During the case management phase of these proceedings and following an initial listing and uncompleted substantive hearing, revised incarnations of the Applicant's formal pleading via the Order 53 Statement materialised. Ultimately, there are, in substance, three grounds of challenge.

[20] The essence of the first ground is that the Police Service was not empowered to apply for the impugned search warrants in aid of a third party agency, ie the SIA or, having done so, to execute the warrants for the same purpose and to provide the materials seized to the aforementioned agency. The Respondent's succinct riposte to this ground in the argument of Mr Tony McGleenan QC, with Mr Mark Robinson (of counsel), is centred on section 32 of the Police (NI) Act 2000. This, under the rubric "General Functions of the Police" provides, in subsection (1):

> "*It shall be the general duty of police officers –*
>
> *(a) To protect life and property;*
>
> *(b) To preserve order;*
>
> *(c) To prevent the commission of offences;*
>
> *(d) Where an offence has been committed, to take measures to bring the offender to justice.*"

This statutory provision is of the now familiar umbrella, or "macro", species. Its breadth is self-evident. It falls to be considered in conjunction with section 1(3) of the 2001 Act which, as regards the SIA, provides:

> "*The Authority may do anything that it considers is calculated to facilitate, or is incidental or conducive to, the carrying out of any of its functions.*"

[21] On behalf of the Applicant Mr Ronan Lavery QC, with Mr Richard McConkey (of counsel), agreed with the court, correctly, that this ground entails a *vires* challenge. It quickly became clear that, properly analysed, the real complaint is that in this particular instance the memorandum of understanding (*supra*) ought to have

worked better and that had it done so this, in consequence, could have averted the elements of illegality which, in the court's estimation, form the centrepiece of the Applicant's challenge as reflected in the two other grounds (*infra*).

[22] We dispose of this ground swiftly. Of the two agencies concerned, only the Police Service was equipped with the statutory powers to apply to the Lay Magistrate for the search warrants. The statutory powers conferred on the SIA in the realm of investigating suspected criminality are demonstrably more limited. Any suggestion that the manifest breadth of section 32 of the 2000 Act did not encompass the readily identifiable twin pillars of the Police Service conduct in this case, namely the investigation on behalf of the State of suspected criminal offences and the identification and, if appropriate, prosecution and punishment of offenders, is in our view manifestly unsustainable. We consider this ground to challenge to be unarguable in consequence.

[23] The Applicant's second ground of challenge contends in substance, that the impugned search warrants were unlawful as the Article 11 PACE procedure, rather than its Article 10 counterpart, should have been applied. This ground is focused on two elements of the statutory definition of "*excluded material*": see Article 13(1) of PACE reproduced in [7] above. It is formulated in these terms:

> "*The decision to apply for the search warrants under Article 10 … was unlawful. The PSNI were aware that the Applicant is a journalist and would have been in possession of items which would fall under 'excluded material'. The excluded material also relates to material as part of his business, profession or trade as per Article 13(1)(a) ….*"

The first part of this ground invokes the definition of "*journalistic material*" in Article 13(1)(c). The second, invoking the definition of (in substance) business records, was introduced via the latest amendment of the Applicant's Order 53 Statement.

The Cooperation Issue

[24] It is convenient at this juncture to dispose of one discrete issue. In the considerably more simplified original incarnation of the Applicant's case, it was contended that the Respondents had no reason to believe that the Applicant would not voluntarily provide whatever documentation and information they were seeking. This contention was founded on the evidence summarised in paragraphs 10-11 above. We consider that this issue plainly belongs to the realm of evaluative judgment on the part of the officers and officials concerned and, as such, engages the public law standard of irrationality. This court cannot lay claim to the expertise, experience or insights of those concerned. In this context we refer particularly to the evidence outlined in [14] above. This issue belonging to the domain of irrationality, we consider that there was ample justification for the evaluative judgement that voluntary disclosure by, and cooperation from, the Applicant of the documentation

and information pursued could not reasonably be expected. This discrete aspect of the Applicant's challenge has no merit accordingly.

The Journalistic Material Issue

[25] From the substantial quantity of evidence ultimately assembled two indelible facts emerge. First, the Applicant's claim (in these proceedings) that he is a journalist by occupation did not feature at any stage of the applications to the Lay Magistrate or their determination. Second, neither of the Respondents had the slightest interest in securing "journalistic material" as defined by Article 14 of PACE. We accept Mr McGleenan's submission that the focus of the investigation stimulating the applications for search warrants to the Lay Magistrates was the suspected supply by the Applicant of unlicensed door staff at licensed premises in Newtownards in contravention of the legislation.

[26] The Applicant's complaint that the Respondents ought to have been aware that he would have been in possession of journalistic materials falling within the embrace of the statutory definition of "excluded material" is properly characterised an assertion. The court has traced this assertion through the multiplicity of affidavits generated in the course of the organic growth of these proceedings. This exercise yields the following analysis:

(a) In his first affidavit the Applicant avers that the Police Service was "well aware" that he is a journalist by occupation and that he would have been in possession of "journalist material" in consequence. This resolves to bare and unparticularised assertion with no supporting evidential foundation.

(b) The Applicant's second affidavit does not address this issue.

(c) The Applicant's third affidavit, his most detailed by some measure (consisting of 89 paragraphs and 19 pages of small font), is strikingly meagre on the issue of his asserted occupation of journalists and the related issue of "journalistic material". This affidavit mainly contains an elaborate exposition of the Applicant's trading in the spheres of social security advocacy, employment law representation, administrative services, PR services, training in media and community development and the provision of administrative, financial management and human resource assistance to the holder of a SIA licence, together with the provision of consultancy services to "Door Supervisors Association NI". Most of the affidavit is devoted to this subject. However, we have noted the brief references in a couple of the later paragraphs to the journalism issue, together with an exhibited letter from the Applicant to a Police Service detective superintendent in December 2016 touching *inter alia* on this issue. The timing of all this voluminous evidence we consider quite unsatisfactory. We have also taken into account the Twitter account evidence.

(d) The fourth and fifth of the Applicant's affidavits relate to alleged ex post facto events and, thus, contribute little of substance to this issue.

[27] The aforementioned Detective Constable avers as follows in the first of her three affidavits:

> "To my knowledge it has not been established or confirmed that journalistic material was seized by police either in paper or electronic format. No PSNI officer searching and seizing items highlighted to me neither during, nor after, terminating the searches that they may have seized excluded material at any of the three locations. …
>
> Mr Bryson has been requested, on numerous occasions, to identify what is LPP or journalistic material. He has failed to do so despite the correspondence from the SIA … the applicant has failed to engage. There are no reasons to maintain the interim relief as there are safeguards in place to address the issues of LPP and journalistic privilege."

In this context it is appropriate to refer also to the averment reproduced in paragraph [14] above that the Detective Constable had no knowledge that the Applicant was a journalist and this was not in her contemplation at any material time.

[28] The affidavit evidence on behalf of the SIA includes an affidavit sworn by its Head of Legal Services. This has, inter alia, two features of note. First, it discloses an abject failure on the part of applicant and his solicitors to respond to requests that they identify anything contained or stored in what was seized said to be privileged or protected. Second, there is a description of the protections available to the applicant via the mechanism of instructing independent counsel for the purpose of identifying any material of the aforementioned kind. Each of these themes is encapsulated in the following averments, which refer to one of many electronic communications from the SIA to the applicant's solicitors:

> "I confirmed that they had been invited on several occasions to engage with the review being undertaken by independent counsel. I confirm that I wrote to them yesterday following a review by independent counsel of the hard copy documentary items to request further information so that the review may be concluded. I confirmed that unless they were willing to provide further information to support the claim that these items are privileged by 5pm on 16 November 2018 then

> independent counsel has confirmed that based upon the current analysis of the material, it is his opinion that these items are not covered by privilege."

This communication is dated 15 November 2018, on which date a similar communication was transmitted to the Applicant who, at that stage, was self-representing in Magistrates Court proceedings brought by him to recover the materials seized. This evidence belongs to a phase of approximately three months duration beginning with the execution of the impugned warrants and ending with the initiation of these proceedings.

[29] During this phase the Applicant by an elaborate letter dated 8 October 2018 to the SIA formulated a comprehensive complaint relating to the conduct of that agency in the procurement and execution of the impugned search warrants and the applicant's arrest two days later (on 16 August 2018). This letter, notably, contains no suggestion that either Respondent was or ought to have been aware that the applicant is a journalist. There is a bare and unparticularised assertion in the penultimate paragraph, as follows:

> "The SIA currently – unlawfully in my submission – hold items covered by legal and journalistic privilege. These should have been returned as a matter of urgency and have not been. This is clearly outside terms of best practice and in breach of PACE."

This was followed by a communication from the Applicant's solicitors dated 9 October 2018 to the SIA containing his instructions relating to his assertion of journalistic privilege in respect of certain of the seized items. A replying request for further information elicited no response.

[30] Finally, we note the Applicant's unchallenged averment that at the scene of one of the searches he informed a police officer that there was likely to be "a best range of legally privileged and journalist material" at one of the other subject premises. This oral statement, if correct, was made in a context of previously evasive and un-cooperative conduct on the part of the Applicant. The court would have good reason to have reservations about this averment. It did not emerge until the Applicant swore his third affidavit, his failure to make this averment in earlier affidavits is unexplained and it is unsupported by any other evidence. The warrants being executed by the police benefited from the principle of presumptive regularity (*omnia praesumuntur rite esse acta sunt*) and, thus, absent bad faith or improper motive (of which there is not a scintilla of evidence) they were entitled as a matter of law to continue with the searches.

[31] Overall, we find the Applicant's evidence on this discrete issue unsatisfactory. However, we cannot overlook the December 2016 letter. Furthermore, the Police Service is a corporate entity and we should not properly decide this issue by

reference to the subjective knowledge of one of its officers, the detective constable considered above. The warrants sought and obtained related to all premises with which the Applicant has a connection sufficient to found an expectation that his personal laptops *et al* would be recovered in their entirety, without discrimination. On balance, the Applicant has established that the Police Service knew or ought to have known that the materials they were pursuing would, as a realistic possibility, contain journalistic material. While we acknowledge Mr McGleenan's submission that iniquity attracts no privilege or protection, in tandem with a related shadow over certain aspects of the later evidence adduced on behalf of the Applicant, the answer in our view must be that the Applicant's involvement in criminality was at the material merely suspected – and remains so. Furthermore, it is not the function of this court of supervisory superintendence to opine, much less pronounce, on his guilt or innocence.

The Delay Issue: Order 53, Rule 4

[32] The parties' representatives co-operated helpfully with the court by preparing a list of five issues to be determined. The first raises the question of whether the court should grant the applicant an extension of time for bringing these proceedings under Order 53 Rule 4 of the Rules of the Court of Judicature. We consider that, in the language of the Rule "the grounds for the application first arose" upon the date of execution of the impugned warrants i.e. 16 August 2018. While the warrants dated from 14 August 2018 they remained unexecuted until 16 August, their existence was unknown to the Applicant and in theory they might never have been executed. Furthermore, if, for example, the warrants had not been executed until 15 November 2018 any suggestion that the grounds for challenging them first arose on the date when they came into existence would appear unsustainable. Our first conclusion, therefore, is that the proceedings have been brought in time.

[33] Our alternative conclusion, based on the premise that the first conclusion is untenable, with the result that the proceedings were commenced one day out of time, is that a sufficient case for extending time has been made out. The unchallenged affidavit of an employee in the firm of solicitors representing solicitors representing the applicant, which we accept, is that the reason for the one day delay was the unknown and unexpected closure of the Judicial Review office for half a day for staff training purposes. This in our view provides a sufficient basis to warrant the exercise of the court's discretion to extend time. In thus concluding we make clear that we attribute no weight to the Applicant's personal excuse namely his pre-occupation with his misconceived application to the Magistrates Court to recover the property seized, coupled with the rationale put forward belatedly in his third affidavit, namely his reaction of disbelief to a claim made on behalf of the Police Service in court on 30 October 2018 that the sole repository of the items seized was the SIA. This disbelief is unexplained and unparticularised. Furthermore, it provides no basis whatsoever for complying with the three month time limit as regards the challenge to the SIA.

[34] The next issue formulated has been addressed and determined in [20]-[22] above. The court has concluded that the Police Service acted lawfully in applying for the impugned search warrants in aid of the SIA investigation.

The Excluded Material Issue

[35] The third issue to be determined involves the Applicant's contention that the impugned warrants should not have been procured under Article 10 of PACE by virtue of the assorted "excluded material" provisions in Articles 10, 11 and 13 of PACE (rehearsed in [4]-[6] above). Given our conclusion in [31] above, the "journalistic material" element of this ground of challenge succeeds.

[36] We turn to consider the "business records" element. From the outset of the period under scrutiny viz 4 June 2018 the Applicant was described as the "Director of a Security Company". Investigations had established that he was one of three Directors of this company and there was evidence of the activity of "supplying door staff" to named licensed premises. Other evidence consisted of invoices issued by the company to the bar in question. The search warrant applications stated specifically that the materials pursued were "records relating to the provision and arrangement of security door staff and supply of persons performing licensable conduct as per the 2001 Act, invoices, electronic correspondence (etc) and bank account details.

[37] As appears from [7] above, "personal records" has a very focussed, specific meaning. The Applicant has manifestly failed to establish that any of the materials pursued by the Respondents via the search warrant applications had any reasonable possibility of satisfying this definition. Furthermore, there is no evidence that they did in the event. This discrete ground of challenge fails in consequence.

The Kebeline Principle

[38] The effect of our above conclusions is to engage the principle in R v DPP ex parte Kebeline [2002] 2 AC 326 to the following extent and in the following way. The progressive magnification of the Applicant's challenge before this court has resulted in a veritable proliferation of affidavit evidence and documentary exhibits, running to several hundreds of pages. The factual detail is both bulky and dense. There has been no cross-examination of any deponent. The conclusion relating to the operation of Article 10, 11 and 13 PACE has been comfortably made, without recourse to much of the aforementioned evidence. The court has formed no final view on whether it should exercise its discretion to grant a remedy. However, we are of the clear view that there should be no interference by this court with the uncompleted Magistrates Court proceedings in which the Applicant is the defendant. The relevance of the dense detail of the evidence assembled before this court and the factual findings to be made will be matters for the District Judge, following appropriate examination in chief and cross-examination of witnesses, in the context of the Applicant's likely resort to Article 76 PACE to exclude such parts

of the evidence seized upon execution of the impugned warrants as form part of the prosecution case against him.

[39] The primary remedy sought by the Applicant is an order quashing the impugned warrants. We consider, subject to any further submissions, that a remedy of this kind would plainly infringe the Kebeline principle, for the reasons given. Article 76 PACE equips the Applicant with a perfectly efficacious remedy which can be pursued in a forum pre-eminently more suitable than that of this court. That exercise will be undertaken in a context where prosecution evidence which has not been provided to this court will be probed and evaluated in an adversarial setting. To accede to the Applicant's quest to secure an order of this court quashing the impugned warrants (the primary remedy pursued) would, in our judgement, clearly infringe the Kebeline principle which (per Lord Steyn) espouses "the desirability of all challenges taking place in the criminal trial or on appeal" (at p 371).

[40] To the foregoing we would add the following. If the large swathes of evidence ultimately and belatedly presented to the court on behalf of the Applicant had been there from the outset, we consider it highly likely that the full rigours of the Kebeline principle would have been swiftly applied, with leave to apply for judicial review being refused on that ground. However the court has, ultimately, dealt with the reality of the proceedings in their final form. The Applicant assembled his evidence in a highly unsatisfactory, piecemeal and staggered manner, illustrated by the fact that the major part of his evidence did not emerge until he swore a third affidavit, consisting of 89 paragraphs of small font and with documentary exhibits extending to 96 pages almost three months into the life of the proceedings. This prompts one further judicial observation. The duty of candour which every judicial review applicant owes to the court applies with greatest force at the outset of the proceedings. On any reasonable and objective showing there was a manifest failure by the Applicant to discharge this duty at that stage. The Applicant, in contravention of this duty, elected to provide the court and the respondents with the large quantity of material evidence available to him in a manner of his choosing, piecemeal and staggered. This is unacceptable. One of the consequences is that he thereby avoided the rigorous application of the Kebeline principle to his judicial review challenge at the outset.

PSNI Disclosure to the Magistrate

[41] The next issue formulated by the parties is that of whether the Police Service should have provided the Lay Magistrate with a briefing which included the preceding communications between the parties, summarised in [10]-[11] above. We consider that having regard to the terms of the relevant statutory provisions, the engagement of Article 8 ECHR and the associated judicial devised principles – as to which R (S) v Chief Constable of British Transport Police [2014] 1 WLR 1647 at [38]-[45] it would be best police practice to have done so. However, it is our view that this aspect of the Applicant's challenge engages the Wednesbury principle. The police officers concerned formed an evaluative judgement that any attempted

collaborative and consensual approach vis a vis the Applicant would not yield satisfactory co-operation and would entail a real risk of jeopardising the criminal investigation. Based on all of the evidence bearing on this discrete issue we consider that this assessment is unimpeachable in public law terms.

Alternative Remedy?

[42] The final component of the parties' agreed list of issues raises the question of whether Section 59 of the Criminal Justice and Police Act 2001 provides the applicant with a suitable alternative remedy. Section 59 states, in material part:

> "**59 Application to the appropriate judicial authority**
>
> (1) This section applies where anything has been seized in exercise, or purported exercise, of a relevant power of seizure.
>
> (2) Any person with a relevant interest in the seized property may apply to the appropriate judicial authority, on one or more of the grounds mentioned in subsection (3), for the return of the whole or a part of the seized property.
>
> (3) Those grounds are—
>
> (a) that there was no power to make the seizure;
>
> (b) that the seized property is or contains an item subject to legal privilege that is not comprised in property falling within section 54(2);
>
> (c) that the seized property is or contains any excluded material or special procedure material which—
>
> (i) has been seized under a power to which section 55 applies;
>
> (ii) is not comprised in property falling within section 55(2) or (3); and
>
> (iii) is not property the retention of which is authorised by section 56;

(d) that the seized property is or contains something seized under section 50 or 51 which does not fall within section 53(3);

and subsections (5) and (6) of section 55 shall apply for the purposes of paragraph (c) as they apply for the purposes of that section.

(4) Subject to subsection (6), the appropriate judicial authority, on an application under subsection (2), shall—

(a) if satisfied as to any of the matters mentioned in subsection (3), order the return of so much of the seized property as is property in relation to which the authority is so satisfied; and

(b) to the extent that that authority is not so satisfied, dismiss the application.

(5) The appropriate judicial authority—

(a) on an application under subsection (2),

(b) on an application made by the person for the time being having possession of anything in consequence of its seizure under a relevant power of seizure, or

(c) on an application made—

(i) by a person with a relevant interest in anything seized under section 50 or 51, and

(ii) on the grounds that the requirements of section 53(2) have not been or are not being complied with,

may give such directions as the authority thinks fit as to the examination, retention, separation or return of the whole or any part of the seized property."

[43] The Section 59 issue entered the fray at a very late stage of the proceedings, following some probing by the court on the issue of available alternative remedies. It would undoubtedly benefit from deeper research and more comprehensive argument. There was time for neither in the circumstances of this litigation. Taking into account these qualifications, we confine ourselves to observing that *prima facie*

the Section 59 mechanism has the potential to provide an effective alternative remedy in a case of the present kind. Beyond this we do not venture for the reasons given. Furthermore, if engaged at this stage it would have the potential to subject the extant criminal proceedings to still further undesirable delay. And as already explained, we consider that Article 76 of PACE arms the applicant with a weapon which he can efficaciously deploy in the uncompleted criminal proceedings against him.

Omnibus Conclusion

[44] The impugned warrants should, as a matter of law, have been sought and procured under Article 11 PACE rather than Article 10. The court, provisionally, is not minded to quash the warrants, for the reasons given. In passing, we add the observation that a quashing order could not impinge upon the reality that (apparently) some of the fruits of the execution of the warrants form part of the prosecution case against the Applicant and, thus, are being deployed in the forum of the Magistrates Court proceedings. Notwithstanding, a quashing order has the potential to generate confusion in that forum, yet another reason for declining to grant this remedy. We emphasise that the judgment of this court does not call into question the legal validity of the prosecution of the Applicant. Article 76 of PACE arms him with an efficacious weapon to be deployed in the forum of the criminal proceedings.

[45] As regards the final order to be made, the three identifiable options for the court are (a) to grant no remedy, leaving this judgment to speak for itself, (b) to make a declaratory order and (c) to order that the impugned warrants be quashed. The issue of costs is also at large. The parties will have an opportunity to make submissions on these matters.

Postscript: Final Order

[46] The court has considered the parties' further submissions and arranged a final listing. Having done so, we adhere to our provisional view expressed above that, in the exercise of our discretion, it is inappropriate to grant any specific remedy. In particular, given the intensely fact specific nature of the case, a declaratory order does not commend itself. Independently, an order quashing the impugned warrants has the potential to engender confusion, further delay and disruption in the pending criminal proceedings continuing against the Applicant in another forum. The Applicant will be adequately protected by his fair trial rights, Article 76 of PACE and such appeal rights as may become appropriate. The judgment will speak for itself and, in all the circumstances, particularly the various unsatisfactory features already highlighted and the court's assessment of a significant lack of candour on the part of the Applicant, provides sufficient vindication to him. As stated emphatically in R (Saha) v Secretary of State for the Home Department [2017] UKUT 17 (IAC), the importance of every litigant's duty of candour to the court cannot be over-emphasised.

[47] Taking all of the foregoing into account, adding that the court has ruled in the Applicant's favour on a single issue, finding against him on all else and having considered the suggested courses in 'Judicial Review Cards Face Up' [2016] JR 188, we exercise our discretion relating to costs by making no order *inter – partes*. The Applicant's costs shall be taxed as an assisted person.

APPENDIX

SCHEDULE 1, THE POLICE AND CRIMINAL EVIDENCE (NORTHERN IRELAND) ORDER 1989

SPECIAL PROCEDURE

Making of orders by county court judge

1. If on an application made by a constable a county court judge is satisfied that one or other of the sets of access conditions is fulfilled, he may make an order under paragraph 4.

2. The first set of access conditions is fulfilled if:

(a) there are reasonable grounds for believing-

(i) that an indictable offence has been committed;

(ii) that there is material which consists of special procedure material or includes special procedure material and does not also include excluded material on premises specified in the application, or on premises occupied or controlled by a person specified in the application (including all such premises on which there are reasonable grounds for believing that there is such material as it is reasonably practicable so to specify);

(iii) that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made; and

(iv) that the material is likely to be relevant evidence;

(b) other methods of obtaining the material:

(i) have been tried without success; or

(ii) have not been tried because it appeared that they were bound to fail; and

(c) it is in the public interest, having regard-

(i) to the benefit likely to accrue to the investigation if the material is obtained; and

(ii) to the circumstances under which the person in possession of the material holds it,

that the material should be produced or that access to it should be given.

3. The second set of access conditions is fulfilled if-

(a) 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 (including all such premises on which there are reasonable grounds for believing that there is such material as it is reasonably practicable so to specify);

(b) but for Article 11(2) a search of such premises for that material could have been authorised by the issue of a warrant to a constable under a statutory provision other than this Schedule; and

(c) the issue of such a warrant would have been appropriate.

4. An order under this paragraph is an order that the person who appears to the county court 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 seven days from the date of the order or the end of such longer period as the order may specify.

5. Where the material consists of information stored in any electronic form –

(a) an order under paragraph 4(a) shall have effect as an order to produce the material in a form in which it can be taken away and in which it is visible and legible or from which it can readily be produced in a visible and legible form; and

(b) an order under paragraph 4(b) shall have effect as an order to give a constable access to the material in a form in which it is visible and legible or from which it can readily be produced in a visible and legible form.

6. For the purposes of Articles 23 and 24 material produced in pursuance of an order under paragraph 4(a) shall be treated as if it were material seized by a constable.

Notices of applications for orders

7. An application for an order under paragraph 4 shall be made inter partes.

8. Where notice of an application for an order under paragraph 4 has been served on a person, he shall not conceal, destroy, alter or dispose of the material to which the application relates except-

(a) with the leave of a judge; or

(b) with the written permission of a constable,

until-

(i) the application is dismissed or abandoned; or

(ii) he has complied with an order under paragraph 4 made on the application.

Issue of warrants by county court judge

9. If on an application made by a constable a county court judge-

(a) is satisfied-

(i) that either set of access conditions is fulfilled; and

(ii) that any of the further conditions set out in paragraph 11 is also fulfilled in relation to each set of premises specified in the application; or

(b) is satisfied-

(i) that the second set of access conditions is fulfilled; and

(ii) that an order under paragraph 4 relating to the material has not been complied with,

he may issue a warrant authorising a constable to enter and search the premises or (as the case may be) all premises occupied or controlled by the person referred to in paragraph 2(a)(ii) or 3(a), including such sets of premises as are specified in the application (an "all premises warrant").

9A. The judge may not issue an all premises warrant unless he is satisfied—

(a) that there are reasonable grounds for believing that it is necessary to search premises occupied or controlled by the person in question which are not specified in the application, as well as those which are, in order to find the material in question; and

(b) that it is not reasonably practicable to specify all the premises which he occupies or controls which might need to be searched.

10. A constable may seize and retain anything for which a search has been authorised under paragraph 9.

11. The further conditions mentioned in paragraph 9(a)(ii) are-

(a) that it is not practicable to communicate with any person entitled to grant entry to the premises;

(b) that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the material;

(c) that the material contains information which-

(i) is subject to a restriction or obligation such as is mentioned in Article 13(2)(b); and

(ii) is likely to be disclosed in breach of it if a warrant is not issued;

(d) that service of notice of an application for an order under paragraph 4 may seriously prejudice the investigation for the purpose of which the application is sought, or other investigations.

12. - (1) If a person fails to comply with an order under paragraph 4, a county court judge may deal with him as if he had committed a contempt of the Crown Court.

(2) Any statutory provision relating to contempt of the Crown Court shall have effect in relation to such a failure as if it were such a contempt.

Costs

13. The costs of any application under this Schedule and of anything done or to be done in pursuance of an order made under it shall be in the discretion of the judge.