Neutral Citation no. (2003) NICC 11

Ref: *2003nicc11*

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: *22.08.03*

IN THE CROWN COURT IN NORTHERN IRELAND

In the matter of an application by Detective Constable Colin Robert Morris, PSNI, under para. 5, Sch. 5 of the Terrorism Act 2000

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Judgment of
His Honour Judge Hart QC
Recorder of Belfast

22 August 2003

Appearances: Mr Ritchie of counsel, instructed by the Legal Adviser to the PSNI, for the applicant

Mr McKee of counsel, instructed by C&J Black, solicitors, for the BBC.

[1] On 1 August2003 Detective Constable Morris appeared before me sitting as a Crown Court judge to make an application under para. 5. Sch. 5 of the Terrorism Act, 2000 for a production order directed to the BBC. The BBC had been informed by the PSNI, unofficially according to Mr McKee, that the application was to be made and Mr McKee, his instructing solicitor and a representative of the BBC were present to oppose the application. At the outset of the hearing I raised with Mr McKee whether the BBC had a right to appear and be heard, and the matter was then adjourned to allow Mr McKee to consider this, and to enable Detective Constable Morris to be legally represented. On 8 August 2003 I heard submissions from Mr Ritchie, on behalf of the police, and Mr McKee on the preliminary issue whether the BBC, or any other person against whom an order is sought, has the right to appear before the judge to object to the making of the order, and, if there is such a right, at what stage and in what circumstances should such a person be heard.

[2] I should also record that, as is customary in such applications, Detective Constable Morris has lodged a statement in support of his application in which he sets out the basis for the application, together with the formal application and a draft order. These have not been disclosed to the BBC pending the resolution of this preliminary point, although I have read them. The BBC do not therefore know exactly what it is that the application seeks, although Mr McKee surmises that it concerns material relating to a programme broadcast by the BBC. It is unnecessary to say anything about the material in question for the purposes of this judgment.

[3] The issue I have to decide arises because of a difference between the provisions of the Terrorism Act 2000 (the 2000 Act) and its predecessor, the Prevention of Terrorism (Temporary Provisions) Act, 1989 (the 1989 Act), governing such applications. Under the 1989 Act, applications of this type were first made ex parte to a county court judge, and the person against whom such an order was made was then entitled to apply to the judge to discharge or vary the order, see Re Moloney's Application [2000] NIJB at 199 and R -v- Crown Court at Middlesex Guildhall, ex p. Salinger and another [1993] 2 AER 310 at 315. However, there is a significant omission from the relevant provisions of the 2000 Act as it does not expressly provide for an application to discharge or vary an order, and it is therefore necessary to examine the relevant provisions of the 1989 Act and the 2000 Act in some detail, but before doing so I should say something about the nature of these proceedings in general.

[4] Commencing with the Police and Criminal Evidence Act, 1984 (the 1984 Act), Parliament has enacted several measures which enable the police, Customs and Excise and Inland Revenue to apply to a judge for orders (or search warrants in some circumstances) that the individual or organisation to whom the order is directed produce to the applicant documents and other material of a confidential nature. In Northern Ireland these powers are to be found in Sch 1 of the Police and Criminal Evidence (NI) Order, 1989, (the 1989 Order); Part 8 of the Proceeds of Crime Act 2002 (the 2002 Act); S. 20 BA and Sch. 1AA of the Taxes Management Act (TMA) 1970 (as amended), and in the 2000 Act. Although there are important differences between some of these powers, they share certain common features, notably that before such an order is made, a judge has to be satisfied that the material sought "is likely to be of substantial value" to the particular investigation, and that "it is in the public interest for the material to be obtained, having regard to the benefit likely to accrue to the investigation if the material is obtained". Many of the later statutes expressly incorporate definitions contained in the 1989 Order (and the 1984 Act), such as "items subject to legal privilege" in Art. 12, "excluded material" in Art. 13 and "special procedure material" in Art. 16. These provisions may therefore be regarded as comprising a code of

substantive and procedural law which is both of recent origin and great importance.

[5] The description by Bingham LJ of some of the powers contained in The 1984 Act in R -v- Crown Court at Lewes (1991) 93 Cr. App. R at p.65 and 66 is equally applicable to the powers and procedures under the other statutes to which I have referred, including the 2000 Act.

> "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.
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> 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.
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> 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. In the present field, the primary duty to give effect to the parliamentary scheme rests on circuit judges. It seems plain that they are required to exercise those powers with great care and caution. I would refer to the observation of Lloyd LJ in

Maidstone Crown court, ex p. Watt [1988] Crim. L.R. 384 where he said:

> "The special procedure under section 9 and Schedule 1 is a serious inroad upon the liberty of the subject. The responsibility for ensuring that procedure is not abused lies with circuit judges. It is of cardinal importance that circuit judges should be scrupulous in discharging that responsibility."

[6] One area of the code where there are different procedures concerns whether applications are on notice or ex parte. Para 7, Sch 1 of the 1989 Order states "An application under paragraph 4 shall be made inter partes", but S.35(i) of the 2002 Act states "An application for a production order or an order to grant entry may be made ex parte to a judge in chambers". However, S.351(3) also provides that an application may be made to "discharge or vary a production order or an order to grant entry".

[7] As I have already indicated, under the 1989 Act an application such as the present one was initially made ex parte, but it could subsequently be challenged by the person to whom it was directed by way of an application to the judge who made the order. The material provisions for present purposes were portions of paras 3 and 4 of Sch. 7 to the 1989 Act (as amended).

> "3. – (1) A constable may, for the purposes of a terrorist investigation, apply to a Circuit Judge for an order under sub-paragraph (2) below in relation to particular material or material of a particular description, being material consisting of or including excluded material or special procedure material.
>
> (2) If on such an application the judge is satisfied that the material consists of or includes such material as is mentioned in sub-paragraph (1) above, that it does not include items subject to legal privilege and that the conditions in sub-paragraph (5) below are fulfilled he may order a person who appears to him to have in his possession, custody or power any of the material to which the application relates, to –

(a) produce it to a constable for him to take away, or

(b) give a constable access to it,

within such period as the order may specify and if the material is not in that person's possession, custody or power (and will not come into his possession, custody or power within that period) to state to the best of his knowledge and belief where it is.

(7) In Northern Ireland the power to make an order under this paragraph shall be exercised by a county court judge.

4. – (1) Provision may be made by Crown Court Rules as to –

(a) the discharge and variation of orders under paragraph 3 above;

and

(b) proceedings relating to such orders.

(2) The following provisions shall have effect pending the coming into force of Crown Court Rules under sub-paragraph (1) above –

(a) an order under paragraph 3 above may be discharged or varied by a Circuit judge on a written application made to the appropriate officer of the Crown Court by any person subject to the order;

(b) unless a Circuit judge otherwise directs on grounds of urgency, the applicant shall, not less than forty-eight hours before making the application, send a copy of it and a notice in writing of the time and place where the application is to be made to the constable on whose application the order to be discharged or varied was made or on any other constable serving in the same police station.

(3) An order of a Circuit judge under paragraph 3 above shall have effect as it is were an order of the Crown Court.

(7) In the application of this paragraph to Northern Ireland for references to a Circuit judge there shall be substituted references to a county court judge and for references to a government department or authorised government department there shall be substituted references to a Northern Ireland department or authorised Northern Ireland department."

[8] The 1989 Act has been repealed by the 2000 Act, and the material provisions of the 2000 Act are to be found in Sch. 5, paras 5 and 10.

Para 5(1) provides

"A constable may apply to a Circuit judge for an order under this paragraph for the purposes of a terrorist investigation."

Para 10 provides

"(1) An order of a Circuit judge under paragraph 5 shall have effect as if it were an order of the Crown Court.

(2) Crown Court Rules may make provision about proceedings relating to an order under paragraph 5.

(3) In particular, the rules may make provision about the variation or discharge of an order."

[9] As is apparent from a comparison of the 1989 Act with the 2000 Act, whilst both contain powers enabling Crown Court Rules to be made providing for the discharge and variation of such orders, the 2000 Act does not contain what one might term "the interim procedure" for such applications contained in para. 4(2) of the 1989 Act. Crown Court Rules have not been made under para 10 of the 2000 Act (and no such rules were made under the 1989 Act) in Northern

Ireland. Counsel were agreed, I believe correctly, that the effect of the absence of such rules and an "interim procedure" similar to that contained in the 1989 Act has the effect of preventing a person against whom an order is made challenging such an order by applying to the judge for the discharge or variation of the order.

[10] Mr McKee argued that a subsequent amendment to the 2000 Act by S.121 of the Anti-Terrorism, Crime and Security Act 2001 has also had the effect of removing the right of the person against whom the article is directed to challenge the order by way of judicial review. In order to appreciate how it is suggested that this has come about it is necessary to look at certain other provisions of Sch. 5 of the 2000 Act. Para. 18 as originally enacted was in the following terms.

> "18. In the application of this Part to Northern Ireland –
>
> (a) the reference in paragraph 4(a) to section 11 of the Police and Criminal Evidence Act 1984 shall be taken as a reference to Article 13 of the Police and Criminal Evidence (Northern Ireland) Order 1989,
>
> (b) the reference in paragraph 4(b) to section 10 of that Act shall be taken as a reference to Article 12 of that Order,
>
> (c) the reference in paragraph 4(c) to section 14 of that Act shall be taken as a reference to Article 16 of that Order,
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> (d) the references in paragraph 9(1) and (2) to 'government department' shall be taken as including references to an authorised Northern Ireland department for the purposes of the Crown Proceedings Act 1947,

(e) the reference in paragraph 10(2) to "Crown Court Rules" shall be taken as a reference to county court rules,

(f) the reference in paragraph 17 to sections 21 and 22 of the Police and Criminal Evidence Act 1984 shall be taken as a reference to Articles 23 and 24 of the Police and Criminal Evidence (Northern Ireland) Order 1989, and

(g) references to "a Circuit judge" shall be taken as references to a county court judge."

[11] However, para. 18 has been amended by S.121 of the Anti-Terrorism, Crime and Security Act 2001, which is as follows.

"121 **Crown Court judges: Northern Ireland**

(1) The Terrorism Act 2000 (c.11) is amended as follows.

(2) In paragraph 18 of Schedule 5 (terrorist investigations: application to Northern Ireland) –

(a) omit paragraph (e);
(b) in paragraph (g) for "county court judge" substitute "Crown Court judge".

(3) In paragraph 20 of that Schedule (powers of Secretary of State), in sub-paragraphs (2) and (3)(a) for "county court judge" substitute "Crown Court judge".

(4) In paragraph 3(c) of Schedule 6 (persons by whom financial information orders may be made) for "county court judge" substitute "Crown Court judge".

[12] Mr McKee argued, and Mr Ritchie agreed, that the effect of substituting "Crown Court judge" (which includes a judge of the Supreme Court of

Judicature as well as a judge of the county court), and deleting the reference to "county court rules", has been to remove the right to apply for a judicial review of a para 5 order. This may well be correct because, as the Lord Chief Justice observed in Moloney's application at p.197 e/f "the Northern Ireland High Court does not have the power to grant judicial review of the proceedings of the Crown Court, unlike the position in England under s.29(3) of the Supreme Court Act, 1987". See also re Weir & Higgins application [1988] NI per Lord Lowry LCJ at p.353C. It is not for me to decide whether judicial review lies in these circumstances, but in view of the clear authorities to which Mr McKee referred I will assume for the present case that the effect of the amendments of para. 18 of Sch. 5 of the 2000 Act has been to remove the right to apply for judicial review in Northern Ireland, unlike England and Wales.

[13] The combined effect of the absence of Crown Court Rules; of an 'interim procedure' found in the 1989 Act; together with the removal of the right to apply for judicial review; has been, so Mr McKee argues, to remove completely any avenue by which his client could challenge an order made under para. 5 of Sch. 5 of the 2000 Act. I accept that this would appear to be the position. Whatever may have been the reason for amending para. 18 of Sch. 5, it is difficult to account for the absence of an interim procedure of the type contained in the 1989 Act other than it was an accidental omission, given that in para. 10(3) Parliament clearly contemplated that it would be open to the Crown Court Rules Committee to make provision for the variation or discharge of an order, which would surely include a right for the person against whom an order is directed to challenge the basis on which it is made as was the position under the 1989 Act, as can be seen from Salinger's case and Moloney's case.

[14] That Parliament intended to remove such a right is certainly possible given the particularly sensitive nature of matters covered by the Terrorism Act. However, there are two reasons why I consider that is unlikely. The first is that were that Parliament's intention, it would not have given the Crown Court Rules Committee the power to confer such a right under paras. 10(2) and

10(3). The second reason, which to my mind is conclusive, is that the interim procedure provision has been preserved in Scotland, as can be seen from the terms of para. 27 of Sch. 5 of the 2000 Act.

> "27. – (1) Provision may be made by Act of Adjournal as to –
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> (a) the recall and variation of orders under paragraph 22; and
> (b) proceedings relating to such orders.
> (2) The following provisions shall have effect pending the coming into force of an Act of Adjournal under sub-paragraph (1) –
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> (a) an order under paragraph 22 may be recalled or varied by the sheriff on a written application made to him by any person subject to the order;
> (b) unless the sheriff otherwise directs on grounds of urgency, the applicant shall, not less than 48 hours before making the application, send a copy of it and a notice in writing of the time and place where the application is to be made to the procurator fiscal on whose application the order was made."

As the sheriff is the equivalent judicial officer of a Crown Court judge in Northern Ireland for the purposes of applications under para. 5 (by virtue of para. 22(1) of Sch. 5), it is difficult to see why, for example, the BBC could apply to a sheriff for the variation or discharge of an order made in Scotland but could not apply for such relief in Northern Ireland. It cannot be suggested that the problems created by terrorism are different in nature in Scotland than elsewhere in the United Kingdom.

[15] I am therefore satisfied that there is no reason why Parliament should be taken to have intended that a person against whom an order under para. 5 has been made in Northern Ireland should not have the opportunity to challenge it by applying for a discharge or variation of that order. How then can such an opportunity be provided in the absence of Crown Court Rules? It is open to

the courts to supplement the procedure laid down in legislation in certain circumstances. In Wiseman –v- Borneman [1969] 3AER at 277 H Lord Reid stated

> "Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard and fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."

[16] It is striking that in Scotland the initial hearing of an application for an order under para. 22(1) is without notice being given to the person to whom the order is directed. That would appear to be the effect of Chapter 43(2) of the Criminal Procedure Rules 1996 (inserted by the Act of Adjournal(Criminal Procedure Rules of Amendment No 2) (Terrorism Act 2000 and Anti-Terrorism, Crime and Security Act 2001) 2001). This provides that

> "(2) The sheriff may make the order sought in an application under paragraph 22(1) of Schedule 5 to the Act of 2000 before intimation of the application to the person who appears to him to be in possession of the material to which the application relates."

[17] Therefore, were the procedure prescribed for Scotland by para. 27 to be applied by a court in Northern Ireland, the effect would be that there would again be a two stage process as existed under the 1989 Act and as presently exists in Scotland. The initial application would be ex parte, with the second stage being the right of the person against whom the order is made to apply to the court to discharge or vary the order.

[18] I am satisfied that were the court to apply the provisions of para. 27(2) of Sch. 5 to an application to discharge or vary an order made as a result of an application under para. 5 this would not frustrate the apparent purpose of Sch. 5, and is necessary to achieve justice. Were it otherwise then a person against whom an order is made in Northern Ireland under para. 5 would be in a significantly worse position than in either Scotland or England, because they would be unable to challenge an order as they could in Scotland, or even challenge it by way of judicial review as in England. I therefore conclude that in Northern Ireland a person who wishes to challenge an order made following a para. 5 application may apply to the judge to discharge or vary the order, notwithstanding the absence of a specific rule to that effect. I say apply to 'the judge' as such an application in the first place should be placed before the judge who made the original order, and in the usual course that judge would deal with the application as in Moloney's case and Salinger's case, and as para. 27 appears to contemplate in Scotland.

[19] However, such a two stage process would not give the BBC a right to be heard at the first stage when the initial application is made, which is what it seeks, and it is therefore necessary to consider whether the first stage should be ex parte or whether it is possible, and if so in what circumstances, for the person against whom an order is sought to be heard when the initial application is heard.

[20] The practical significance of this issue in that the right to apply to have an order made ex parte discharged or varied does not mean that the person against whom the order has been made is entitled to have access to all of the information placed before the judge at the ex parte hearing, even though the application is in the nature of a rehearing and there is no onus on the applicant to satisfy the judge that the ex parte order was wrongly made. In Salinger's case the court accepted that there may be occasions when it is not appropriate or necessary to disclose certain information to the recipient of the order, as can be seen from the following extracts from the judgment of Stuart-Smith LJ at pages 318 and 319.

> "While we recognise that the sensitive and secret nature of the information available to the constable making the application may create difficulties, we do not consider that the mere change from an inter partes application to one made ex parte can bear the significance that Mr Clarke seeks to put upon it. In applications under the 1984 Act the information and its source may be sensitive, though we accept that it is more likely to be so in a case under the 1989 Act. There may indeed be occasions when the nature and identity of the source of information and perhaps also the information itself in the case of a terrorist investigation is of such a nature that it is not appropriate to disclose it even to the judge. But, even if it is disclosed to him, it will rarely be appropriate or necessary to disclose the nature and identity of the source of information to the recipient of the order; and it is equally inappropriate to disclose it to counsel and solicitors even on an undertaking of confidentiality. Nevertheless the recipient of the order should be given as much information as he properly can as to the grounds upon which the application is made, either at the time the order is served upon him or, if he decides to make an application to discharge or vary the order, before or at the time of the hearing of the application."

> "Questions should not be permitted as to the nature or identity of the source of information. If the nature of the information itself is sensitive in the sense that it may compromise the security of the investigation, the judge should not allow the questions. He should tell the respondent, if it be the case, that he has been given information which satisfies him that the conditions are met but that the information cannot be disclosed."

[21] The same view was taken in Moloney's case, where Salinger's case was considered by the Lord Chief Justice in the following passage at p.203.

> "One might readily agree that it would be desirable that the applicant and his advisers should be able to see these documents, in order to

ascertain if they might help their case in setting aside the order for production. It is envisaged, however, that some information may have to be withheld from the person to whom the order is directed, although he should be told of its existence: see *Ex p Salinger* [1993] 2 All ER 310 at 320 per Stuart-Smith LJ. The withholding is therefore not a sufficient ground of itself for setting aside the order. Much may depend on the circumstances and the effect on the fairness of the proceedings of the withholding. As Stuart-Smith LJ recognised, the withheld information may well be decisive, but the fact that it is withheld will not without more invalidate the proceedings."

[22] So far I have considered the position in the light of the common law and the relevant statutory provisions, but in support of his argument that the BBC was entitled to be heard at this first stage of the application Mr McKee argued that a number of rights of the BBC under the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, would otherwise be infringed and it is appropriate to turn to those arguments at this stage. He first of all argued that for the court to hear the application ex parte would contravene the provisions of Article 6(1) of the Convention. Article 6(1) is in the following terms

"*Right to a fair trial*

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of public morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

[23] There is no criminal charge against the BBC and therefore it has to argue that the present proceedings involves a determination of its civil rights. However, Mr McKee very properly drew to my attention the decision of the European Commission of Human Rights in Application No. 25798/94 by the BBC against the United Kingdom. That related to an application brought by the BBC concerning a witness summons made against it to produce filmed material within the context of criminal proceedings which have been brought against two policemen. In that case, as in the present proceedings, the BBC submitted that the proceedings determined its civil obligation to provide access to the film material. However, the Commission held that the obligation of a person to give evidence as to matters witnessed by him is a good example of one of the normal civic duties in a democratic society and it concluded

> "The order requiring the giving of such evidence does not involve the determination of any civil obligations of the witness, however, and the position is not different where, as in the present case, the evidence consists of material which has been filmed rather than an individual's oral testimony as to what he witnessed."

The Commission concluded that the proceedings did not determine the BBC's civil rights or obligations within the meaning of Article 6(1) and I consider that the reasoning in the extract just quoted is equally applicable in the circumstances of the present proceedings. An order made following a para 5 application is analogous to a witness summons in criminal proceedings, the difference being that the material which has to be produced in compliance with the order is to be produced at the investigative rather than the trial stage. I therefore conclude that an ex parte application would not involve a contravention of any Article 6(1) Convention right of the BBC.

[24] Mr McKee also argued that an ex parte application would involve a contravention of Article 8 of the Convention. Article 8 is in the following terms

> "*Right to respect for private and family life*

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

For the purposes of the present application I am prepared to accept that an order to produce the material concerned may involve an interference with the BBC's correspondence. However, Article 8(2) provides that there should be no interference "except such as is in accordance with the law and is necessary in a democratic society" on the grounds specified in Article 8(2). Since I have already held that the BBC has the right to challenge such an order by applying to have it discharged or varied, at which stage the BBC can argue whether it was proper to make the order, I am satisfied that to have an ex parte procedure in the first instance does not involve a contravention of any Article 8 right.

[25] Mr McKee then argued that the ex parte procedure would also involve a violation of Article 10 of the Convention which is in the following terms.

> "*Freedom of expression*
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> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions,

restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Whilst I accept that a production order may well impinge upon the right conferred upon the BBC by Article 10 to "impart information and ideas without interference by public authority", this freedom in not unqualified as can be seen from the provisions of Article 10(2). However, it is not possible at this stage of the proceedings for the court to determine whether or not there would actually be an infringement of the BBC's Article 10 rights and I consider that this is an issue which should be determined in the normal way at the ex parte stage and by an application to discharge or vary any order which might be made. At the ex parte stage, and at the hearing of any application to discharge the order, the court is required to consider whether the requirements of paragraph 6 have been satisfied, and this process necessarily involves a consideration of the freedom of the press, both at common law, as in Moloney's case, and now under the European Convention.

[26] Finally, Mr McKee turned to the provisions of Article 1 of the First Protocol to the Convention which is in the following terms.

"*Protection of Property*

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control

the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[27] The question of deprivation of, or interference with, a persons property in this context gives rise to very difficult issues. Whilst the production of material in compliance with an order under Schedule 5 would certainly involve an interference with the peaceful enjoyment of the BBC's possessions by the state, the ownership of the material in question is not interfered with merely by virtue of being produced as may be seen from the terms of Article 24 of the 1989 Order (which apply by virtue of paras 17 and 18(f) of Sch 5 of the 2000 Act). In any event, it is hard to see why the BBC would have any greater rights under Article 1 of the First Protocol than would be conferred by, for example, Articles 6 or 10 of the Convention itself in the context of criminal proceedings. I do not therefore consider it necessary to consider whether Article 1 prevents an ex parte application being brought.

[28] Finally, Mr McKee referred to the provisions of S.12 of the Human Rights Act 1998 which is in the following terms.

"12. **Freedom of expression**

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied –

(a) that the applicant has taken all practicable steps to notify the respondent;

or

(b) that there are compelling reasons why the respondent should not be notifed.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that the publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to –

(a) the extent to which –

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

(5) In this section –

'court includes a tribunal; and

'relief' includes any remedy or order (other than in criminal proceedings).

[29] He relied upon the provisions of Section 12(2) in support of his argument that the BBC was entitled to be present at what would otherwise be an ex parte application. However, he accepted that if the court concluded that these were "criminal proceedings" within the meaning of Section 12(5) then his argument falls.

[30] The application under para 5 can only be "for the purposes of a terrorist investigation". A "terrorist investigation" is defined in S.32 of the 2000 Act as follows.

"In this Act "terrorist investigation" means an investigation of –

(a) the commission, preparation or investigation of acts of terrorism,

(b) an act which appears to have been done for the purposes of terrorism,

(c) the resources of a prescribed organisation,

(d) the possibility of making an order under section 3(3), or

(e) the commission, preparation or investigation of an offence under this Act."

"Terrorism" is defined in S.1 of the 2000 Act and I am entirely satisfied that an application under para 5 in an application in relation to "criminal proceedings" within the meaning of S.12(5) of the Human Rights Act. It is an application for an order to assist in the investigation of criminal offences, just as a search warrant under para 11 of Sch 5 of the 2000 Act is plainly an order in criminal proceedings. I am therefore satisfied that to hear an application ex parte would not contravene the provisions of S.12 of the Human Rights Act.

[31] In the great majority of applications brought under para. 5 of Sch. 5 of the 2000 Act experience has shown that the information placed before the court contains material of a highly sensitive and secret kind, disclosure of which, or even a general indication of its nature, may have grave repercussions for the lives of individuals, the prevention of crime or for national security. Were an intended recipient of an order entitled to appear at what would otherwise be an ex parte application heard in chambers then questions arise as to whether notice should be given to the intended recipient and whether the recipient is entitled to be given access to all the material to be placed before the judge. Whilst Mr Ritchie for the applicant helpfully indicated that in the particular circumstances of the present case his client has no objection to the BBC being represented at what would otherwise be an ex parte hearing, of itself this cannot confer a jurisdiction on the court if that jurisdiction is otherwise excluded.

[32] Mr Ritchie referred me to R -v- Crown Court at Lewes where Bingham L.J. considered whether a person or defendant who is a defendant in criminal proceedings was entitled to notice of an application under Sch. 1 of the 1984 Act. Whilst reaffirming that he was not (following Leicester Crown Court,

exp DPP [1987] 3 AER 654 and Barclay's Bank -v- Taylor [1989] 3 AER 563, Bingham LJ said at p.67.

> "I would only add this. Even though an accused person such as the applicant has no statutory right to be given notice or to be heard, it may sometimes be that in a situation of this kind the judge, to whom application is made, may think it helpful to hear what such a person might wish to say before he decides whether to make an order or not. That would not be an appropriate course where notice to the defendant might impede the process of investigation, but might be appropriate in a case like this where no conduct by the defendant would be at all likely to affect the availability of the bank records. Whether to adopt this course would in any case be very much a matter for the judge's judgment. It would not be something he could be compelled to do but something he might find helpful to do in appropriate circumstances."

[33] Mr Ritchie also referred to my decision in the application by D/Inspector Templeton (unreported, 16 May 2002) where I applied this dictum and heard counsel for the defendant in opposition to an application under Sch. 1 of the 1989 Order. In that case I permitted counsel to take part in the application, and directed that he be provided with the material submitted by the police, for the reasons set out in the following extract from my judgment.

> "In the circumstances of the present case I was satisfied that it was appropriate to permit Mr Weir to take part in the application and to make submissions for three reasons. First of all, the police had given notice of the intention to make this application to the defendant's solicitors, which would suggest that they recognised that the application was an unusual one. Secondly, by doing so they could be taken as recognising that there was no danger that the defendant could interfere with the material sought and thereby frustrate the progress of the investigation. Thirdly, it was apparent that it would be desirable to hear argument on the merits of the application itself. In order that Mr Weir could fully represent his client's interests, and as there was no

suggestion that to do so would in any way impede the investigate, I directed that he be provided with copies of the notice of application, complaint and draft order submitted by the police, and that he be given a copy of D/Inspector Templeton's statement in support of the application, and he was permitted to cross-examine the Inspector when he gave brief evidence to supplement his statement."

[34] Bingham LJ was referring to the procedure under the 1984 Act which provides for the application to be made on notice, and therefore the analogy is not an exact one. Nevertheless, that the statutory procedure could be supplemented in certain circumstances was accepted by Bingham LJ who referred to Wiseman -v- Borneman, and in principle I can see no reason why the same view might not be taken in applications under the 2000 Act, although it is very unlikely that in practice the court would permit such a course to be taken in the great majority of cases because of the danger that the investigation could thereby be impeded. If there is such a danger, then the court should refuse to permit a person against whom such an order is sought to make representations, leaving it to them to apply for the order to be discharged or varied in the fashion I have held is possible. Where a person learns that an ex parte application is to be made and seeks to oppose it, the court should first ascertain from the applicant, if necessary in the absence of the prospective respondent, whether the applicant consents to that party being present whilst the application is being heard, and whether the applicant consents to the material upon which he intends to rely, including the complaint and draft order, being disclosed to that party. If, having explored the applicant's reasons for wishing the application to be heard ex parte, the court is satisfied that the investigation might be impeded were the application not to be ex parte, the court should inform the prospective respondent that it is not prepared to permit him to make representations at this stage, but inform him of his right to apply to have any order discharged or varied, before excluding that person from the hearing.

[35] In the circumstances of the present case I am satisfied that it is appropriate to exercise my discretion in favour of permitting the BBC to appear at and be

heard on the application, which would otherwise be ex parte. I am satisfied that it is appropriate because the BBC have been informed by the police of their intention to apply for such an order. However, Mr Ritchie has formally accepted on behalf of the police that they have no objection to the BBC being present and taking part in the application. Secondly, I am satisfied that in the particular circumstances of the present case this would not involve any impediment to the investigation. Thirdly, cases where orders are sought against the media generally involve consideration of issues of particular difficulty and importance and it can be of particular assistance to the court to have the benefit of submissions, and evidence if necessary, from the media organisation or journalist concerned as to whether an order should be made. Provided always that the progress of the investigation would not be impeded or obstructed, it may be in the interests of justice that such representation should be permitted at what would otherwise be an ex parte hearing.

[36] Whilst it is neither possible nor desirable to say how the court's discretion will be exercised in every case, I emphasise that the circumstances in which the discretion will be exercised in favour of a proposed recipient at the ex parte stage are likely to be rare lest the purpose of the 2000 Act be undermined, and unless the court is satisfied that it will not, the proposed recipient can only avail himself of the right to apply to have an order discharged or varied.

[37] Mr Ritchie indicated that whilst the police have no objection to the BBC being present, they are concerned about the hearing being in public. I will hear further argument from counsel as to whether some or all of the hearing should be in public.