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(subject to editorial corrections)

IN THE CROWN COURT AT BELFAST

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THE QUEEN

-v-

MARTIN DOMINIC PATRICK PIUS HUME AND JOHN MARIE HUME

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BILL NO. 401/04

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HART J

Introduction

[1] Applications have been made by both defendants for third party disclosure orders directed to various individuals or organisations seeking disclosure of documents which it is said may assist the defence. While such applications are common, these applications have raised a number of unusual issues. I made some orders, and refused others, on 16 September and said that I would give my reasons later, which I now do.

[2] The accused are brothers and are alleged to have committed various sexual offences against the complainant, whom I shall refer to as A, over a period between 7 January 1966 until 31 December 1974, that is between her sixth and fifteenth birthdays.

[3] These issues have arisen because the complainant has made a statement of 13 November 2003 in which she gave the police permission:

> "To obtain statements, notes and all other relevant documents from Councillors [presumably this should be counsellors] Social Workers, Doctors and other professionals I have had contact with in relation to the allegations I have made against Martin and John Hume. I also give the Police permission to share this

> information with the Department of Public Prosecutions."

[4] As a result the DPP has considered the material which has come into its possession under these various headings and has disclosed certain documents to the defendants.

[5] The solicitors acting on behalf of John Hume lodged a number of applications for the issue of summonses under the provisions of ss. 51A and 51B of the Judicature (Northern Ireland) Act 1978. One of these summonses was directed to Roberta Lennox who counselled the complainant. She replied that she no longer had any notes or records because her counselling of the complainant was carried out through her employment by Nexus, and therefore any notes would be held by Nexus. However, Ms Lennox pointed out that these notes had already been passed to the DPP by Nexus and any request to Nexus would therefore be pointless. In the light of that Mr O'Rourke (on behalf of John Hume) indicated that he was no longer applying for a summons directed to Ms Lennox, neither was he proceeding with the application brought against the Director of Nexus as it appeared that these notes were in the hands of the DPP. However, an application was therefore directed to Mr Glenn Irwin of the Department of the Director of Public Prosecutions for a witness summons requiring him "to make disclosure and deliver up to the Defendant and his legal advisors all counselling notes and records received from the Nexus Institute and relating to [A]." Applications in similar terms were brought for a witness summons directed to the complainant's general practitioner, Dr Mulvenna, seeking disclosure of "all medical notes and records relating to [A]". A witness summons was also sought directed to Maureen Murphy of Armagh Social Services seeking "all notes and records relating to [A]". In each case the notice stated that the summons would require disclosure and delivery of the documents of "to the defendant and his legal advisors".

[6] These applications may well have originated from disclosure which the prosecution made following a letter written on behalf of Martin Hume on 21 April 2005 in which a request was made for a considerable quantity of information and documents relating to contact between the complainant and counsellors, psychiatrists and other professionals, in particular with St Luke's Psychiatric Unit in Armagh, Social Services and St Joseph's Training School at Middleton Convent. In response to that letter Mr Irwin wrote on 28 April 2005. So far as the material relating to the complainant's contact with St Luke's Psychiatric Unit was concerned, he stated that the material was in the possession of that unit. Notes from the Nexus file were disclosed, the letter stating:

> "The Nexus file has been passed to this office for consideration for disclosure. This has been examined

> and I attach herewith copies of notes made by Ms Lennox and communications to her from the injured party. I am satisfied that no duty of disclosure attaches to any other material in the file."

The letter also referred to the Department's continuing duty of disclosure and five documents were disclosed. The letter stated that:

> "The above material [that is the five documents] comprises all relevant material from Middleton Convent (St Joseph's) and Social Services in the possession of the prosecution. Investigating police have confirmed to me that Social Services cannot trace any notes in connection with the injured party."

[7] Martin Hume applied for witness summonses to be issued directly against St Luke's Hospital, St Joseph's Training School and the Eastern Health and Social Services Board seeking disclosure of various documents. The notices were in similar terms and indicated that applications would be made for orders directing the notice party "to make disclosure to the Defendant of all notes, reports, assessments and other documentation in your possession relating to [A]".

[8] In relation to John Hume's application Mr Murphy (who appeared on behalf of the Crown) explained that the counselling notes from the Nexus Institute which have been considered by the Department, and some of which have been disclosed, are not the same as the documents which were disclosed to Martin Hume. As I understand his submissions, the prosecution has applied the disclosure test applicable under the Criminal Procedure and Investigations Act 1996 (the 1996 Act) to these notes, and no material has been withheld on the basis of the complainant's rights under Article 8 of the European Convention on Human Rights. If there been any material which the Crown believed would otherwise have been disclosed, had it not been for the implications of the complainant's Article 8 rights, the matter would have been referred to the court.

[9] It will therefore be apparent from this description of the disclosure to date that some of the documents sought by the defence are in the hands of the prosecution and have been considered by them, and some disclosure has been made. Other material may exist which has not been seen by the prosecution and may be in the hands of St Luke's Psychiatric Unit, and possibly (although this seems unlikely in light of the reference in the letter from the prosecution from 8 April 2005 to the inability of Social Services to trace any notes in connection with the complainant) in the possession of the EHSSB.

[10] Mr O'Rourke submitted that the application for a witness summons directed to Mr Irwin was appropriate as the prosecution were subject to a different duty under the provisions of s. 51A, a duty which required the prosecution to adopt a wider and more generous approach to disclosure than that imposed by the 1996 Act. Mr Murphy argued that, on the contrary, the prosecution was subject only to its duty to carry out disclosure under the 1996 Act, and therefore no application under s. 51A should be made against Mr Irwin, rather the proper way to proceed was to make an application under s. 8(2) of the 1996 Act.

The issues.

[11] The issues in this case may be stated as follows.

(1) When material has been obtained by the prosecution from third parties where there are allegations of sexual abuse, is the prosecution's duty of disclosure limited to that under the 1996 Act, or, if not, what is the nature of that duty?

(2) In the circumstances of this particular case, in the event that the prosecution is subject to any further obligation to make disclosure, how is that to be enforced? Is it by witness summons directed to Mr Irwin under ss. 51A and 51B, or should the application be brought under s. 8(2) of the 1996 Act?

(3) If material is produced by a third party on foot of a summons brought under ss. 51A and 51B, is it for the court or the prosecution to decide whether disclosure should be made?

The first question

[12] So far as the medical and other records obtained by the DPP on foot of the complainant's authorisation are concerned, the prosecution is subject to the obligation to consider disclosure imposed upon it by the 1996 Act because the material is in its possession. S. 3(2) of the 1996 Act states:

> "(2) For the purposes of this section prosecution material is material –
>
> (a) which is in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the accused."

In those circumstances, the prosecution's duty is to make disclosure of any material which would weaken the prosecution case or assist the defence case. See R v H [2004] 1 All ER 1269 per Lord Bingham at [17] and [35]. However,

can it be argued that the obligation imposed by s. 51A is greater than that imposed upon the prosecution by the 1996 Act?

[13] Third party disclosure is governed by the provisions of s. 51A and following of the Judicature (Northern Ireland) Act 1978, which were inserted by para. 28 of sch. 4 of the 1996 Act. These provisions are identical to the procedure which applies in England and Wales because s. 66(2) of the 1996 Act substituted identically-worded provisions for s. 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965. S. 51A (1) provides:

> "This section applies where the Crown Court is satisfied that:
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> (a) a person is likely to be able to give evidence likely to be material evidence, or produce any document or thing likely to be material evidence, for the purpose of any criminal proceedings before the Crown Court, and
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> (b) the person will not voluntarily attend as a witness or will not voluntarily produce the document or thing."

In R v O'N [2001] NI 136 Girvan J reviewed the relevant authorities and concluded that "material evidence" was evidence "which was likely to be admissible evidence. In this context material which is likely to assist the defence in defending the proceedings would constitute relevant evidence". See p. 155h. At p. 152c he said:

> "Putting the legislation in its full context and reading it in the light of the Convention I conclude that the defendants are entitled to rely on ss 51A et seq to persuade the court to direct the issue of a witness summons to third parties who are likely to be able to produce documents which are likely to contain relevant evidence in the sense of relevant material of potential use to the defendants in the defence of the charge."

[14] It might be argued that the reference by Girvan J to "potential use to the defendant" implies a broader concept of relevance than that inherent in the duty on the prosecution laid down by Lord Bingham in R v H. However, I do not so interpret this passage in that way. In any discussion of the concept of disclosure it is essential to remember that the defendant does not have a general right of disclosure against the prosecution in a criminal case, nor, as Girvan J makes clear in R v O'N, is there a right to general disclosure against

third parties in cases which allege that the complainant has been the victim of sexual abuse. I believe that what Girvan J was saying was that material which was relevant and which could potentially assist the defendants in the defence of the charge could be subject to a duty of disclosure. Normally this would be limited to admissible evidence, but the category is not necessarily confined to evidence which would be admissible. It may be that in certain circumstances disclosure of material is required even though it would not be admissible in evidence because it could lead to a line of enquiry, as can be seen from the comments of Buxton LJ at p. 13 of R v Brushett in the passage which I set out at [36] below. However, it is clear from the context in which those remarks of Buxton LJ were made that he envisaged that the line of enquiry would be confined to an enquiry of an identifiable witness, and he was not suggesting that this justified general disclosure.

[15] It is perhaps helpful to consider at this stage the type of material which should be disclosed applied when documents are being considered for disclosure in cases of alleged sexual abuse. In R v Hewitt and Anderson [2002] NICC 12 at [20] and [21] McCollum LJ identified seven categories which were potentially relevant.

> "[20] Matters should not be disclosed merely to provide material for cross-examination or to throw doubt on the general credibility of any of the complainants.
>
> [21] However if there is evidence
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> (i) of false accusations of any significance (not restricted to a sexual connotation) having been made against any person by any of the complainants; or
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> (ii) that any other person is alleged to have indulged in sexual activity with any complainant; or
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> (iii) that any significant criminal conviction has been recorded against any complainant; or
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> (iv) of matters directly related to the allegations made; or
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> (v) which demonstrates the attitude of any of the complainants to either defendant, or
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> (vi) medical notes or reports which might reveal a medical condition affecting the reliability of any

> complainant or contain information relevant to the complaints,
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> then those matters should be disclosed to the defence."

I would add to these a further heading; namely

> (vii) if there has been any inconsistency in the accounts given by the complainant of the alleged offences or the circumstances relating to them.

[16] Whether the question of disclosure is being considered by the prosecution in the event that the documents are in its hands under the 1996 Act, or disclosure is being considered by the court, what has to be identified is material that should be disclosed to the defendant because it might assist his defence in order to ensure that he receives a fair trial. A defence can be assisted by material which has the effect of weakening the prosecution case, or by making the defence case more credible. This can be done in many ways, but in cases of alleged sexual abuse, (or indeed physical abuse or, as Mr O'Rourke pointed out, where the credibility of a witness other than the complainant is in issue) the most common categories of material evidence are those identified by McCollum LJ in R v Hewitt and Anderson. These are equally relevant whether disclosure is being considered under the 1996 Act or by the court where the documents have been produced in answer to a summons under s. 51A. Unless there is clear justification for interpreting the concept of materiality under s. 51A as imposing a more generous test of what requires to be disclosed than that which applies when the prosecution is considering its obligations under the 1996 Act, I see no reason why the test should be different if the prosecution has obtained the documents with, as here, the consent of the complainant. The objective remains the same in either event, namely whether the material being considered might assist the defendant by undermining the prosecution case or strengthening the defence case. That is exactly the same concept as underlies the concept of "material evidence" under s. 51A. Were it the case that the prosecution had to apply a different and more generous test of disclosure because the defence could serve a s. 51A summons on in respect of documents which it had obtained with the consent of the complainant, the effect would be to enable the defence to circumvent the provisions of s. 8(2) of the 1996 Act. I see no justification for such a course. It would also require the prosecution to apply two different disclosure tests to the same documents, which would be difficult to do in practice.

[17] I can see no justification for distinguishing between the two situations, and I therefore conclude that there is no difference between the duty which the prosecution is under in the present case in relation to the

documents which it already has within its hands by virtue of the authority given by the complainant, and the duty which would arise if Mr Irwin were the subject of a witness summons under Section 51A. In such circumstances, the proper route for the defendant to follow is not to issue a summons under s. 51A, but to seek secondary disclosure under s. 8(2) of the 1996 Act. I therefore refused to issue the summons sought against Mr Irwin.

The wording of third party disclosure applications.

[18] At this point I should say something about the way in which third party disclosure applications are often worded. I have already referred to the fact that the applications by both defendants sought that the documents be disclosed to the defence, although Mr Brolly informed me that the covering letters sent with the notices to the parties in respect of whom his client sought disclosure made it clear that, in the event that disclosure was ordered, the documents were to be provided to the court and not directly to the defence. It is common to find in applications of this sort that the notice served on the proposed third party seeks that the documents be delivered to the defendant. This is appropriate in cases where issues of public interest immunity or confidentiality are not expected to arise. However, such cases are rare, because in practice applications for third party disclosure are almost invariably made in cases where there are allegations of sexual or physical abuse, and where questions of public interest immunity and/or confidentiality will inevitably arise.

[19] In cases involving sexual abuse where issues of public interest immunity and/or confidentiality will inevitably have to be considered, for disclosure to be sought from a third party in terms which suggest that the third party is to make disclosure direct to the party applying for the notice is incorrect. The proper procedure in such cases is for the solicitor on behalf of a party seeking such an order to write in the first instance to the third party indicating as precisely as possible the category of documents sought and the reasons why disclosure is being sought, and asking for confirmation that the proposed third party holds such documents. The letter should then state that, as it is anticipated that questions of public interest immunity and/or confidentiality may arise, application will be made to the Crown Court for an order directing the production of the documents to the court, and not to the solicitor for the defendant, and that the court will decide whether any documents require to be disclosed in the light of any representations may be made to it. The notice party should also be informed that they are entitled to appear and make such representations to the court whether disclosure should be permitted.

Form of third party disclosure orders

[20] When an order is made against a third party it appears that there are differences between Crown Court offices as to the practice adopted in drawing up orders for disclosure. In Belfast it has been the practice to require the applicant to submit a draft order to the court. In other courts I understand that the order is drawn up by the court. The latter course is preferable, as the former all too often leads to delay on the part of the applicant's solicitor in submitting the draft order, and henceforth in every case that will be heard by a High Court judge the order will be drawn up by the court and approved by the judge where necessary. It is then for the party applying to obtain a copy of the order from the Crown Court office and serve it on the notice party. The order will normally be in a standard form, an example of which is attached as Annex A to this judgment. In order to ensure that the material sought is produced expeditiously to the court for consideration the order will direct that the material be lodged with the court by a specific date and time. In the present case the orders made on 16 September required the papers to be delivered to the court by 4.30pm on Friday 23 September. As applications are almost invariably directed to doctors, hospitals, heath and social services trusts, or voluntary organisations such as Nexus, complying with such orders places an additional burden on individuals or bodies who are not involved in the proceedings. It is therefore appropriate that, unless there are exceptional circumstances that justify a different course, the order require the solicitor for the party applying for the order to collect the documents in a sealed envelope and deliver them to the court by the time specified in the order.

[21] I now turn to consider the remaining applications. I granted the application in relation to Dr Mulvenna and made an order that he deliver "all medical notes and records" relating to the complainant to a representative of the defendants' solicitors for delivery to the court. In the normal way it is preferable that the originals of medical notes and records are not supplied to the court but photocopies are. This ensures that should the court require the records to be kept pending the outcome of the trial the originals will be available to the doctor concerned in the event that the complainant or witness concerned needs any further medical treatment. However, in some cases it may be necessary for the original documents to be produced, as for example, where it is necessary for a defence expert to examine X-rays or items which contain the results of medical tests. In such cases the order should make it clear what is required to be produced. I refuse the application directed to Armagh Social Services for the same reason that I refused the application directed to Mr Irwin as it appears that these documents are in the possession of the prosecution. Should this not be the case, I will reconsider the position.

[22] So far as Martin Hume is concerned, although the letter from the prosecution of 28 April states that Social Services cannot trace any notes in connection with the injured party, the disclosed letter from the Eastern Health

and Social Services Board of 27 October 1976 suggests that there may have been such other documents in existence at one stage. I therefore made an order directed to the Eastern Health and Social Services Board requiring production to the court of all social services records in relation to the complainant.

[23] The disclosed material from St Joseph's Training School suggests that there may be material in its possession which would have to be considered for disclosure and I therefore made an order directed to the principal/trustees of Middleton Convent/St Joseph's Training School requiring the production to the court of al notes, reports, assessments and other documentation in the possession of the training school relating to the complainant.

[24] Finally, the letter from St Luke's Hospital to the complainant's then general practitioner, Dr Kellett, dated 4 November 1998 indicates that there may be other documents in the possession of St Luke's Hospital which would have to be considered for disclosure. I therefore made an order directed to the Medical Records Department, St Luke's Hospital/Psychiatric Unit, Armagh requiring disclosure of "copies of all notes, reports, assessments and other documentation" in the possession of the hospital relating to the complainant.

The third question.

[25] I now turn to the third question, namely whether the documents to be produced should be produced to the court or to the prosecution in order to decide whether disclosure should be made. Prior to the decision of McCollum LJ in R v Hewitt and Anderson the practice of judges in the Crown Court had been to follow the procedure prescribed by Girvan J in R v O'N, namely that it was for the judge to consider any documents where issues of public interest immunity and/or confidentiality might arise.

[26] In R v O'N at p. 152g, Girvan J concluded that it is for the judge to determine whether documents are to be disclosed for the following reasons.

> "The legislation and Crown Court Rules strike a fair balance between the interests of the accused person and the rights and interests of third parties who have no involvement in the legal proceedings to which they are not privy. It is right that the court must have regard to ensuring that the proper protection of their interests which the specified procedure seek to protect. In addition the court must be live to the protection of the rights and interests of other parties

> such as the complainant or complainants whose rights or interests, particularly their privacy rights under article 8, might be affected by the disclosure of the contents of documents in the possession of third parties. The court must also have regard to the wider public interest. Bearing in mind those duties the court may in appropriate cases be called on to examine documentation before authorising its release to the defence for inspection. Furthermore a third party directed to produce a specified document or category of document may have legitimate doubts as to its materiality or admissibility or its disclosability in the light of the other party's rights to privacy under article 8 or in the public interest. They may wish to be safeguarded by the court's ruling on the disclosure of the document. Furthermore the court in satisfying itself as the likelihood of materiality of a particular document may have to peruse the document itself to determine relevance, admissibility and disclosability."

And at page 155 j :

> "Where disclosure of the documentary evidence by a third party to a defence (sic) may infringe the privacy rights of the third party or other parties such as sexual complainants the court, in order to fulfil its duty to protect the Convention rights of interested persons, would have to consider the documents and decide whether, balancing the interests of a fair trial for the defendant against the privacy and other interests of the third parties affected by the disclosure, disclosure to the defence is necessary and appropriate."

[27] However, in R v Hewitt and Anderson McCollum LJ, having considered R v O'N, held at [15] that:

> "..Nevertheless there is no reason why a prosecutor should not if required by the Court carry out the exercise of considering potentially sensitive material in the possession of a third party with a view to deciding what parts of it should be disclosed."

[28] As the prosecution have already considered some material in the circumstances that I have earlier described I have to consider whether I should follow the procedure in R v Hewitt and Anderson or that in R v O'N.

In the course of preparing this judgment over the Long Vacation I was able to obtain copies of transcripts of two authorities on which McCollum LJ relied and which are briefly reported in the Criminal Law Review, namely R v B [2000] Crim. L.R. 50 and R v Brushett [2001] Crim. L.R. 471. I therefore re-listed the matter for further argument from counsel and I am grateful to Mr Murphy and Mr O'Rourke for their very comprehensive and helpful skeleton arguments and written submissions on this issue. The thrust of their submissions is that it is for the judge, and not for the prosecution, to consider material which may give rise to public interest immunity and/or confidentiality issues to see whether any disclosure requires to be made to the parties requesting production of the documents.

[29] In such cases, the party from whom disclosure is sought may be able to argue that public interest immunity attaches to the documents in its possession, as for instance where there is a document which may disclose the identity of an informer, see D v NSPCC [1978] AC 171, or social work and analogous records, see Butler-Sloss LJ in Re M (a minor) [1990] 2 FLR 36 at 42F. Even in cases which might not be said to fall within the sphere of public interest immunity, such as medical or counselling records, these are plainly subject to a duty of confidentiality on the part of the person or body holding the records, and the person to whom they relate, whether the complainant or a witness, is a person who has a right to privacy in relation to those records under Article 8(2) of the European Convention.

[30] In such cases the application is made by way of a witness summon issued under s. 51A of the Judicature (Northern Ireland) Act 1978, and s. 51B is relevant because it deals with the position where the request is for advance production of the documents, almost always prior to the start of the trial.

> "51B A witness summons which is issued under section 51A and which requires a person to produce a document or thing as mentioned in section 51A(2) may also require him to produce the document or thing -
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> (a) at a place stated in the summons, and
> (b) at a time which is so stated and precedes that stated under section 51A(2), for inspection by the person applying for the summons."

[31] It is therefore apparent that the order which the court makes, if it grants the witness summons, provides for advance production to be made to the person applying for the summons because it is that person who is empowered to inspect the documents under section 51B, and not to anyone else. If the documents are not documents which give rise to issues of public interest immunity and/or confidentiality, then the order requires the

documents to be produced for "inspection by the person applying for the summons." Unlike a simple witness summons under s. 51A, this necessarily implies that the person in whose favour the order has been made is entitled to inspect the documents, whereas in the case of a summons which requires a person to give evidence the party applying for the summons does not have any power to compel the witness to speak to his representatives. If the moving party therefore wishes to obtain the evidence from the person summoned they have to call them as a witness and invite the court to compel the witness to testify or be held in contempt of court.

[32] Girvan J pointed out in R v O'N that by enacting s. 51B Parliament provided a statutory equivalent to the common law Khanna subpoena whereby a party may be required to produce documents for inspection in advance of the hearing. It would be surprising if Parliament intended to go further than that and create a procedure which empowered the court to direct that the documents should be produced for inspection by a party other than the person applying for the summons when s. 51B expressly provides that the material is to be produced "for inspection by the party applying for the summons" (my emphasis). S. 51(B), in my opinion, does not have this effect, and therefore does not permit the court to direct the party to whom the summons is directed to produce documents to the prosecution for consideration where the defence has applied for the issue of the summons. There is, of course, no reason why the prosecution cannot apply for a s. 51A summons, if for example it wishes to obtain such material in accordance with the provisions of paras. 30 and 31 of the Attorney General's Guidelines. (See the supplement to Archbold), as was pointed out by the Court of Appeal in R v Alibhai and Others [2004] EWCA Crim. 681 at paras. [34] and [35]. Longmore LJ stated at [34]:

> "Formally, material in the hands of a third party, if it is not volunteered, can only be brought to the attention of a criminal court pursuant to the Criminal Procedure (Attendance of Witnesses) Act 1965 Section 2."

(The 1965 Act was amended by s. 66(2) of the Criminal Procedure Investigations Act 1996 and contains identical provisions to ss. 51(A) and following.)

[33] However, does this prevent the court from directing another party to consider the material? In R v O'N Girvan J concluded that it was for the judge to consider the document. As he pointed out at p. 154:

> "An order for disclosure must accordingly be necessary for the protection of the rights of freedom

> of the defendant (which will include his rights to liberty and a fair trial). In order to be satisfied that disclosure is necessary for the protection of the rights of the defendant there would have to be in place some mechanism for the weighing up of the completing interests of the third party to privacy and the defendant's right to disclosure for a fair trial. In the absence of some proscribed and workable alternative only the court itself can carry out that balancing exercise. Accordingly the court must consider the documentation itself and determine whether it should be disclosed. There is nothing in the provisions of ss. 51(A) et seq which requires the court to act in any other way." (My emphasis).

And at p. 155j.

> "Where disclosure of the documentary evidence by the third party to a defence may infringe the privacy rights of the third party or other parties such as sexual complainants the court, in order to fulfil its duty to protect the Convention rights of interested persons, would have to consider the documents and decide whether, balancing the interests of a fair trial for the defendant against the privacy and other interests of the third parties affected by the disclosure, disclosure to the defence is necessary and appropriate."

[34] However, in R v Hewitt and Anderson McCollum LJ took the view that these remarks were obiter. He relied upon the decisions in R v B and R v Brushett to which I have already referred and it is necessary therefore to consider them in some detail.

[35] The facts of R v B were unusual and complex, but the following summary is sufficient for present purposes. The complainant gave evidence in care proceedings and the judge who dealt with those proceedings found that she had not been sexually abused by the defendant as she had alleged. The same allegations were also the subject of criminal charges against the defendant. Amongst the documents which emerged in the course of the care proceedings was a document referred to as "the orange book" and, as will become apparent, the Court of Appeal considered that this should have been disclosed to the defendant in the criminal proceedings. The defendant sought copies of all of the care proceedings documents from the court prior to the criminal trial, and the judge in those proceedings permitted disclosure of some documents, including the orange book, to prosecution counsel only, who then, quite properly, informed the defence that this had occurred. At the

criminal trial prosecution counsel felt that he needed to consider whether disclosure of the care proceedings documents, including the orange book, should be made to the defence. At the commencement of the trial he therefore made an inter parties application to the trial judge who agreed to read the documents. Defence counsel was present but was not shown the documents. In the Court of Appeal at p. 8 Buxton LJ described the judge's ruling in the following terms:

> "..Although he thought there was matter in them that might assist the defence by way of background, there was nothing to undermined (sic) the prosecution case and certainly nothing about which the defence were not already on notice. He therefore stated that the document should not be disclosed. He pointed out that if the defence wanted, nonetheless, to see them they could make an application to the Reading Crown Court [where the care proceedings had been heard] for them to be released."

The trial then proceeded without the orange book being disclosed to the defendant who was convicted. On appeal leading counsel for the prosecution (who could not see the documents as they had been disclosed only to junior counsel) took the view that the position which had arisen was wholly artificial. The prosecution therefore obtained leave from the care proceedings court to release all the documents to both prosecution counsel, to defence counsel, and to the Court of Appeal. On appeal the prosecution argued, (a) that the orange book was not disclosable or only small parts thereof were disclosable; and (b) the rest of the orange book would not have assisted, or materially assisted, the defence in conduct of its case. In effect that was the view taken by the trial judge in his ruling to which reference has already been made.

[36] It is against that background that the following passage from the judgment of Buxton LJ, which forms the basis for the report in the Criminal Law Review upon which McCollum LJ relied, must be viewed.

> "We have to say two things about that. The first is that we do not think that, with respect to all concerned, the course the prosecution adopted at the beginning of the trial in respect of this material was the correct one. Questions of disclosure of this sort have, in our view, to be decided by the prosecution. They should only seek the assistance of the judge if the questions can be properly decided by him, most obviously where questions of public interest immunity are involved. We appreciate that the judge

> wanted to be as helpful as possible, and understanding the difficulties in which he found himself, and more particularly understanding the difficulties of this case that had already been manifestly apparent to him in the abuse of process proceedings, about which he expressed some views though he did not grant the order, we do sympathise with the step that he took. But it did mean, of course, firstly that he read material and ruled on its admissibility that had not been seen by the defence; and secondly that there was transferred to him, in effect, responsibility for judging the weight and impact of the orange book material in particular. We cannot, with respect, agree with the assessment that he made of it. It is, of course, manifestly easier to say that after the trial has been heard than before it has started, but nonetheless we cannot agree with his assessment. We think that it is clearly the case that defence counsel armed with the specifics of the orange book, and armed with the knowledge that experienced social workers had pursued this matter in detail with Anne-Marie, and not had any response from her, would be in a manifestly stronger position to cross examine Anne-Marie, both on her previous inconsistent statement and also upon the case generally.
>
> The orange book was therefore, in our view, matter that would have materially assisted the defence or led to a line of enquiry, because Miss Brennan says further that if she had it earlier and known about it earlier, recognising that the orange book itself was not evidence, she would have sought, if necessary the necessary permission of the Reading Crown Court, to interview and take statements from, and thereafter possibly subpoena, the social workers who had compiled the report and, more particularly, Sharon North [author of the orange book]."

[37] The comments by Buxton LJ that questions of disclosure have to be decided by the prosecution, who should only seek the assistance of the judge if the questions can properly be decided by him, plainly relate to the particular circumstances of the case and were not intended to suggest that the judge could request the prosecution to perform the judge's function of considering what material should properly be disclosed where the material was sought on foot of a third party summons under s. 51B. Indeed, the

reference to seeking the assistance of the judge where questions of public interest immunity are involved foreshadows the principles enunciated by Lord Bingham in R v H.

[38] R v B was decided on 5 November 1998 and was reported in [2000] Crim. L. R. 50 and therefore preceded R v O'N, although it was not cited in that case.

[39] In R v Hewitt and Anderson McCollum LJ also referred to R v Brushett, in which judgment was given on 21 December 2000. From the transcript of the judgment it is apparent that the police had examined, or been provided with, social services files relating to some 23 witnesses. The prosecution listed each document "flagged for ease of identification" which the prosecution would have disclosed were it not for the question of public interest immunity. I will call these "the prosecution files." These files were placed before the judge on notice to the defendant. Altogether there were some 20 to 30 boxes of documents which the judge examined. The prosecution did not have in their possession, and had not viewed, the social services files relating to any other witness relied upon at the trial. The defence issued third party summonses directed to each relevant social services department "requiring that they produce to the court the files of each witness relied upon by the prosecution including those files viewed by or in possession of the prosecution" (my emphasis). The social services departments concerned then delivered the files to the court and made oral or written representations to the court in response to the summons. The prosecution were not party to such summons, made no representations in respect of them and saw none of these files. I shall refer to these as "the local authority files." The judge then examined all of the local authority files and as a result directed some documents to be disclosed to both the prosecution and the defence. The judge therefore appears to have examined both the prosecution files and the local authority files. Not surprisingly in view of the volume of material involved this took a considerable period of time. In response to a request by the Court of Appeal the trial judge estimated that the whole exercise took four to six court days of his time.

[40] There was no suggestion by the Court of Appeal that the trial judge should have given the local authority files to the prosecution to examine, and indeed the Court of Appeal commended the steps taken by the prosecution to place the prosecution documents before the judge. Otton LJ stated at p. 11.

> "The documents which were the subject of the prosecution application attracted public interest immunity as did the documents identified by the local authorities. We would wish to commend the prosecution on the thoroughness and sensitive

> manner in which they went about their tasks. They must have anticipated that the judge was in danger of being caught on the horns of a dilemma. The steps the Crown took were, in our judgment, a model which others, faced with a similar situation, would be well advised to follow. The prosecution has a heavy burden to discharge in the sense that they have to ensure the privacy or confidentiality of the person whose name is on the file, the need to identify those matters which were subject to PII and, on the other hand, to ensure as far as possible the defence has a fair crack of the whip. We are satisfied that no possible criticism can be levied against the prosecution and that it paved the way for the judge to approach the problem in the manner in which he did."

It does not appear to have been suggested to the Court of Appeal, nor did the Court of Appeal itself suggest, that the trial judge could or should have directed the prosecution to examine all the social security files.

[41] When the decisions in R v B nor R v Brushett are examined against the background of the particular circumstances of those cases, I respectfully consider that they do not provide authority for the approach adopted in R v Hewitt and Anderson. I should say that Mr Murphy, who appeared for the prosecution in R v Hewitt and Anderson, explained that the matter was not fully argued before McCollum LJ and that the Crown accepted the obligation placed upon it on that case in view of the very large volume of documentation which had to be considered. However, it is his experience, and that of Mr O'Rourke, that in most, if not almost all, cases where judges of the Crown Court have had to consider the question of disclosure of documents for which public interest immunity and/or confidentiality have to be addressed, judges follow the approach in R v O'N. I respectfully agree with the views of Girvan J which I have set out earlier and I consider this represents the proper approach which the court should adopt. It is therefore for the court, and not for the prosecution, to examine documents produced to the court on foot of a third party disclosure summons under s. 51A in respect of which it is anticipated that issues of public interest immunity, and/or confidentiality may arise. In the present case the allegations are of sexual abuse, but this will also be the case in every instance where the defence wish to obtain access to medical or social services records, or documents of an analogous type, which relate either to a complainant or a witness, whether in cases of physical or sexual abuse, or where in some other way the defence wish to obtain material which may undermine the credit of a witness.

[42] In many cases the prosecution will have obtained such documents because the complainant or witness will have given authority to it to do so, as in the present case. However, this does not happen in every case, and Mr Murphy submitted that in those circumstances, and even where the prosecution have obtained the documents, persons whose privacy rights under Article 8 of the European Convention might be affected by disclosure of documents by third parties gain substantial reassurance from the knowledge that these documents will be considered by the judge for disclosure, and will not be seen by others. At para. 8 of his skeleton argument he dealt with this in the following way:

> "..Individuals are often gravely concerned abut the fact that their private life and personal records may be exposed to others by reasons of applications to the court. It gives some comfort to them, that in the event that disclosure is made it will only be sanctioned by the judge having properly exercised judicial consideration of the interests of the accused and to the interests of the person who records may be disclosed. This is an important reassurance and in practice is desired and appreciated, particularly by complainants in sexual cases. Were it not for this procedure it could result in much greater objection by individuals to the disclosure of such materials. It is felt that a professional officer within the prosecution service could not fulfil this role."

[43] This is a very important consideration and, in so far as disclosure has to be considered by the court, demonstrates the importance of the court performing this task. Nevertheless, there is much to be said for the prosecution following the Attorney General's Guidelines and seeking to obtain this information, thereby removing the need in many instances for the defence to apply for third party disclosure under ss. 51A and 51B. Particularly in a complex case disclosure can therefore be considered against the background of material which may never be placed before the court but which is available to the prosecution. This avoids any risk that the court may not appreciate the possible significance of some documents because it may have a more limited understanding of the possible issues that could arise.

Should documents disclosed to the defence also be disclosed to other parties?

[44] A further issue which Mr O'Rourke raised relates to the common, if not universal, practice of judges providing the prosecution and other defendants with copies of any documents that are disclosed to the defence. Mr O'Rourke's argument was that a defendant "should not be required to effectively put the prosecution on notice of each witness they ask to summons

nor should they be required to share any material derived from such witness unless the defence consent to such disclosure to the prosecution."

[45] Whilst I recognise that it can be argued that disclosure should only be made to the party who has brought the third party disclosure application and that the prosecution is not a party to such an application, nevertheless the common practice has much to commend it. If material appears to undermine the prosecution case all defendants are surely entitled to disclosure of that material in pursuance of the court's duty to ensure that each defendant receives a fair trial, whether at common law or Art. 6 of the European Convention. Disclosure to the prosecution is also in the defendant's interests because the prosecution can thereby consider whether it is appropriate to continue with the prosecution in the light of the disclosed material which has been disclosed. If the prosecution decide that is the proper course, the defendant is thereby spared a trial, something that is in both the defendant's interest and the wider public interest. It is noteworthy that this course was adopted by the trial judge in R v Brushett where documents were disclosed to the defence and prosecution which had come from the local authority files, even though the prosecution were never a party to the applications made in respect of the third party applications, made no representations and saw none of the files. (See p. 4 of the judgment). It does not appear that any issue is taken in relation to this, either at the trial or in the Court of Appeal, and I am satisfied that the practice to which Mr O'Rourke objects is in the interests of justice and does not in any way weaken the defendant's position. If any documents fall to be disclosed in this case they should therefore be disclosed to both the prosecution and the defence.

ANNEX A

IN THE CROWN COURT IN NORTHERN IRELAND

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IN THE MATTER OF THE JUDICATURE (NORTHERN IRELAND) ACT 1978, SECTION 51A and SECTION 51B

_____

THE QUEEN

-v-

(NAME OF DEFENDANT APPLYING FOR THE ORDER)

BILL NO. ( )

_____

To: (Name and address of notice party)

By order of Mr Justice ( ) at Belfast Crown Court on (date) you are ordered to produce to (a representative of the defendant's solicitors (name)) in a sealed envelope marked "Belfast Crown Court Bill No. ( ) for the attention of the judge".

(1) (Eg. copies of all medical notes and records/counselling records/ social services records) relating to (name and date of birth (if known) of person in respect of whom the order is being made).

For delivery to the Crown Court Office, Laganside Courts, 45 Oxford Street, Belfast BT1 3LL, by (time) on (date).

Signed:

Chief Clerk,
Belfast Crown Court
Laganside Courts,
Belfast BT1 3LL.