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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY FINE POINT FILMS AND TREVOR BIRNEY FOR JUDICIAL REVIEW

AND IN THE MATTER OF AN APPLICATION BY BARRY McCAFFREY

AND IN THE MATTER OF AN APPLICATION BY PSNI AND DURHAM CONSTABULARY FOR SEARCH WARRANTS

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Before: Morgan LCJ, Treacy LJ and Keegan J

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MORGAN LCJ delivering the judgment of the court)

[1] This case is concerned with the circumstances in which police can use the *ex parte* procedure contained in the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE") to obtain a search warrant in respect of journalistic material. The applicants seek orders quashing warrants issued to Detective Sgt Henderson of the serious crime branch of the PSNI on 10 August 2018 by His Honour Judge Rafferty QC authorising the search of the homes of the second and third applicants and the business premises of each of them in connection with the investigation by Durham Constabulary of offences of theft, handling stolen goods, unlawful disclosure of information entrusted in confidence and unlawfully obtaining personal data. Mr Macdonald QC appeared with Mr Toal for the first and second applicants, Mr Miller QC and Mr Girvan appeared for the third applicant, Mr Coll QC and Mr Thompson appeared for Durham Constabulary and the PSNI and Mr Sands appeared to assist the court on behalf of the judge. We also had the benefit of written submissions from a number of interveners. We are grateful to all counsel for their helpful oral and written submissions. At the end of the hearing we made an order

quashing the warrants but reserving our reasons which are contained in this judgment.

Background

[2] Fine Point Films is a successful documentary film producer. The majority of the funding for its films comes from broadcasters such as Netflix, CNN, ESPN and Amazon with whom the company retains a close working relationship. A recent film has been nominated in the Outstanding Investigative Documentary category in the 39th News and Documentary Emmy Awards. The company produces films in Honduras, Colombia and Gaza and is recognised throughout the world of investigative journalism and beyond as one of the top film production companies in the UK and Ireland.

[3] The second applicant, Mr Birney, is the chief executive officer of Fine Point Films. He has previously worked as the editor of current affairs at UTV but in 2005 established with others a company called Below the Radar with the aim of creating an independent television production company. That company has produced over 100 documentaries and achieved various awards for its work. It has been commissioned by all of the Public Service Broadcasters in the UK and Ireland. The company is owned by the second applicant, his wife and his wife's brother and as a result of the success of that enterprise the same ownership established Fine Point Films in November 2012.

[4] The third applicant, Mr McCaffrey, has worked as a journalist in Northern Ireland for the last 20 years for both local and national newspapers. He has been a regular contributor and commentator on various television and radio outlets including the BBC and UTV. The majority of his career has been as an investigative journalist focusing on stories which raised matters of considerable public concern. In 2013 he was awarded the Overall Justice Media Award in the Attorney General for Northern Ireland's Justice Media Awards. That was in respect of an investigation he had carried out into the use of solitary confinement in Northern Ireland's prisons. In the same year he was named CIPR Digital Journalist of the Year. He is employed by the Detail.tv which is an online investigative news and analysis platform developed by Below the Radar. He is a member of the National Union of Journalists and abides by its Code of Conduct.

The Investigation

[5] In January 2012 the families of the six men murdered by the UVF at Loughinisland in June 1994 approached Mr Birney to examine the prospect of making a documentary about their experience. The Detail began an investigation under the direction of Mr McCaffrey. Mr Birney approached Alex Gibney about a proposed documentary in the spring of 2012 and he agreed to become involved.

Mr Gibney is a film producer based in the United States with whom Mr Birney had previously collaborated.

[6] In 2015 production finance was secured and research with relevant police officers, families and others continued. The Police Ombudsman, Dr Michael Maguire, was in the process of conducting an investigation into a complaint made by the families in respect of the conduct of the police investigation of the murders. He met with the investigative team on a number of occasions. Dr Maguire agreed to be interviewed by Alex Gibney in connection with the production. It was agreed that he would not talk about his ongoing investigation into Loughinisland and the interview would not be broadcast until after he had delivered his report which was published in June 2016.

[7] The investigation carried out by Mr McCaffrey established that in February 1995 an SDLP councillor had received a letter identifying persons allegedly responsible for the murders. The production team decided that they would name three suspects in the documentary. Initially, the production team advised the Ombudsman's office that it was intended to name a fourth person who was a police informant or CHIS, a covert human intelligence source, as well as the three suspects. The Ombudsman's office briefed the Deputy Chief Constable of the PSNI, Mr Harris, accordingly.

[8] In order to explore this issue the second applicant requested a meeting with the PSNI to discuss the naming of suspects. The second applicant and his colleagues met with ACC Martin on 6 April 2017 and advised that it was intended to name four suspects who were identified by the RUC after the attack and whose names had been passed to an SDLP councillor. ACC Martin indicated that he was unable to help in respect of the contemporary risk to the suspects. In any event even if he did know he would be unable to share the information.

[9] The second applicant indicated that the team had concluded that there was no risk to any of the suspects since their names had been in the public domain since February 1995. ACC Martin asked if the suspects were to be informed that it was the intention to name them in the film and the second applicant confirmed that was the case. Letters advising the suspects were sent prior to the release of the film but no response was received. There was a discussion about the intention to name an informer and ultimately the second applicant and his team decided not to name that person. No action was taken by the PSNI to prevent the production team from naming the suspects.

"No Stone Unturned"

[10] The film was screened for the first time at the New York Film Festival on 30 September 2017. The title was taken from the comments of a senior police officer who stated shortly after the murders that no stone would be left unturned in seeking

to bring the killers to justice. The UK premiere of the film was on 7 October 2017 at the London Film Festival and in accordance with an agreement made with the Ombudsman, Dr Maguire and some of his staff had an opportunity to see the film at a private viewing on 3 October 2017 ahead of its UK premiere. The film was then issued on general release on 10 November 2017.

[11] Paul Holmes is the director of current investigations for the Ombudsman. He attended the private screening of the film on 3 October 2017 at the Ombudsman's offices. It became apparent during the screening that the film's production team had acquired sensitive documentary material relating to the Ombudsman's investigation of the Loughinisland complaints. The documents were an undated seven page executive summary and a 55 page investigation report dated 3 June 2008 marked "Secret". In the film Mr McCaffrey said that he had received the material from an anonymous source in 2011.

[12] The executive summary shown in the documentary differed in format to the corresponding document held by the Ombudsman and had the date June 3, 2008 added but because of the identical content Mr Holmes was satisfied that Mr McCaffrey and/or other members of the documentary team must have had access to, or a copy of, the Ombudsman's executive summary or a substantial part of the document. Other printed material shown in the film was identical to extracts from the Ombudsman's 55 page investigation report dated 3 June 2008.

[13] On 4 October 2017 Mr Holmes attended a meeting at PSNI headquarters with the PSNI's ACC Crime Operations and other senior police officers and alerted them to the disclosure of the material in the documentary. Thereafter, a criminal investigation by Durham Police was commissioned with the objective of establishing the means by which the film's production team had secured access to the material, whether by theft or other unauthorised disclosure. The investigation was given the name Operation Yurta and the senior investigation officer was Peter Darren Ellis, a recently retired Detective Superintendent with a wealth of experience in the investigation of serious crime.

Statutory scheme

[14] Statutory protection for journalistic sources was introduced by section 10 of the Contempt of Court Act 1981 which provides:

> "10. No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

[15] Part III of PACE provides a detailed regime governing powers of entry, search and seizure of materials for the purposes of a criminal investigation. Special provisions for access are established in respect of journalistic material which is defined in Article 15. Excluded material is defined in Article 13 as including journalistic material which a person holds in confidence and which consists of documents or records other than documents. Journalistic material is held in confidence if it is held subject to an express or implied undertaking to hold it in confidence. It can be argued that the executive summary and the investigation report could not be held in confidence since it was intended that the content should be published but the details relating to the source of the information plainly was held in confidence as that source did not want to be identified.

[16] Where, as here, the application is for a warrant to include excluded material Article 11(1) provides that the requirements of Schedule 1 of PACE must be satisfied. Article 11(2) states that any statutory provision passed or made before the making of PACE under which the search of premises for the purposes of a criminal investigation could be authorised by the issue of a warrant to a constable shall cease to have effect so far as it relates to the authorisation of searches for excluded material. An exception is made for offences under the Terrorism Act 2000 which is not material here.

[17] The second set of access conditions set out at paragraph 3 of Schedule 1 must be satisfied where the material consists of or includes excluded material:

> "(a) there are reasonable grounds for believing that there is material which consists of or includes excluded material or special procedure material on premises specified in the application, or on premises occupied or controlled by a person specified in the application (including all such premises on which there are reasonable grounds for believing that there is such material as it is reasonably practicable so to specify);
>
> (b) but for Article 11(2) a search of such premises for that material could have been authorised by the issue of a warrant to a constable under a statutory provision other than this Schedule; and
>
> (c) the issue of such a warrant would have been appropriate."

Since as will be clear an object of the search was to obtain material relating to the identity of the source these were the conditions that had to be satisfied.

[18] Where a set of access conditions is fulfilled an application can be made by virtue of paragraph 4 of Schedule 1 to a County Court judge for an order requiring a

person to produce material to a constable within seven days of the making of the order. The application must be made *inter partes* and once such an application has been served on a person that person may not conceal, destroy, alter or dispose of the material to which the application relates except with the leave of the judge or the written permission of a constable until the proceedings have completed. That procedure was not used in this case.

[19] The warrant in this case was made under paragraph 9 of the Schedule:

> "If on an application made by a constable a county court judge-
>
> (a) is satisfied-
>
> (i) that either set of access conditions is fulfilled; and
>
> (ii) that any of the further conditions set out in paragraph 11 is also fulfilled in relation to each set of premises specified in the application…
>
> he may issue a warrant authorising a constable to enter and search the premises."

Paragraph 11 provides:

> "The further conditions mentioned in paragraph 9(a)(ii) are-
>
> (a) that it is not practicable to communicate with any person entitled to grant entry to the premises;
>
> (b) that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the material;
>
> (c) that the material contains information which-
>
> (i) is subject to a restriction or obligation such as is mentioned in Article 13(2)(b); and
>
> (ii) is likely to be disclosed in breach of it if a warrant is not issued;
>
> (d) that service of notice of an application for an order under paragraph 4 may seriously prejudice the

> investigation for the purpose of which the application is sought, or other investigations."

In substance paragraph 11(d) was the relevant provision in this case.

Relevant case law

[20] Goodwin v United Kingdom (1996) 22 EHRR 123 arose from the decision to fine a journalist £5000 for contempt of court in refusing to disclose the source of sensitive information regarding the financial status of a company. That decision was upheld by the House of Lords but by a majority the ECtHR concluded that there had been a violation of the journalist's right to freedom of expression under Article 10 of the Convention. The essence of the decision was set out at paragraphs [39]-[40]:

> "39. The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance.
>
> Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.
>
> These considerations are to be taken into account in applying to the facts of the present case the test of necessity in a democratic society under Article 10(2).
>
> 40. As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in

> making their assessment, they enjoy a certain margin of appreciation. In the present context, however, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under Article 10(2), whether the restriction was proportionate to the legitimate aim pursued. In sum, limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court**...**"

[21] Roeman and Schmidt v Luxembourg (2003) ECtHR 51772/99 was a case in which a journalist had reported how a government minister had been fined for tax fraud. The investigating judge issued warrants for searches of the journalist's home and the offices of the newspaper. In finding that there had been a breach of Article 10 the court noted in particular the intrusive nature of a search warrant:

> "57. In the Court's opinion, there is a fundamental difference between this case and *Goodwin*. In the latter case, an order for discovery was served on the journalist requiring him to reveal the identity of his informant, whereas in the instant case searches were carried out at the first applicant's home and workplace. The Court considers that, even if unproductive, a search conducted with a view to uncover a journalist's source is a more drastic measure than an order to divulge the source's identity. This is because investigators who raid a journalist's workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist. The Court reiterates that "limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court" (see *Goodwin*, cited above, pp. 500-01, § 40). It thus considers that the searches of the first applicant's home and workplace undermined the protection of sources to an even greater extent than the measures in issue in *Goodwin*."

[22] Elias LJ set out a useful summary of the general principles relating to applications for search warrants in R (Application of Mills) v Sussex Police, Southwark Crown Court [2014] EWHC 2523 (Admin):

"26. The legal principles relating to the grant of warrants are not in dispute and… they can be summarised as follows:

(1) The courts have frequently emphasised that search warrants confer a "draconian power": *R (Faisaltex Ltd) v Crown Court at Preston [2009] 1 WLR 1687*, para 29, per Keene LJ. They were even described as a "nuclear weapon" in the court's armoury which, unless properly justified, involve a gross infringement of civil liberties: see *R (Mercury Tax Group) v Revenue and Customs Comrs [2009] STC 743*, para 71, per Underhill J. It does not perhaps need the use of such hyperbolic language to emphasise they should only be sought as a last resort and should not be employed where other less draconian powers can achieve the relevant objective.

(2) Given that the warrant permits the interference with private property and is obtained *ex parte*, it is incumbent on the applicant to make full and frank disclosure to the court and to ensure in particular that any material which is potentially adverse to the application is brought to the attention of the judge: see, for example the observations of Bingham LJ in *R v Lewes Crown Court, Ex p Hill (1990) 93 Cr App R 60*, 69. As Hughes LJ put it in *In re Stanford International Bank Ltd [2011] Ch 33*, para 191, the applicant must "put on his defence hat and ask himself, what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge".

(3) This obligation of full and frank disclosure necessarily includes a duty not to mislead the judge in any material way: see the Mercury Tax Group case, para 48.

(4) The power to grant the warrant is conferred on a judge. He or she must bring a "rigorous and critical analysis" to the application and satisfy himself or herself that the material provided justifies the grant of the warrant: see *R (Rawlinson & Hunter Trustees) v Central Criminal Court [2013] 1 WLR 1634*, paras 83–84, per Sir John Thomas P, where earlier authorities are cited. The judge has the obligation to protect the subject of an application (who, of course, is not before the court) against speculative or unsubstantiated assertion: R

(British Sky Broadcasting Ltd) v Chelmsford Crown Court [2012] 2 Cr App R 454, paras 33–34, per Moses LJ. It is critical, therefore, that the judge is provided with the information necessary to enable him to comply with that obligation and is given the time properly to discharge it: see the Rawlinson & Hunter case, paras 83–90.

(5) The judge ought to give reasons for his decision. They need not be elaborate but they ought to be sufficient to enable the subject of the warrant to understand why the judge was satisfied that the evidence justified issuing it: see R v Lewes Crown Court, Ex p Weller (unreported) 12 May 1999 , para 6, per Kennedy LJ; and more recently *R (Wood) v North Avon Magistrates' Court (2009) 174 JP 157* , para 26 and the *Rawlinson & Hunter case [2013] 1 WLR 1634* , para 89."

The application for the warrant

[23] It is clear from the exhibited entries in the Policy Book made by Mr Ellis that he has given detailed and prolonged consideration to how he should proceed in this case. He was careful to obtain legal advice about how he should implement the application for the search warrant he believed he needed but it is not clear how much advice he sought on whether that was the appropriate way in which to proceed.

[24] He clearly took issue with the content of the NSU film as he wrote in the Policy Book that the misreporting and sensational hypotheses reached were being broadcast with impunity and continued unchecked. He was so exercised by this that he had asked PSNI to reflect on the decision not to seek an injunction to prevent further broadcasting. He noted:

> "The process appears unfair with a pseudo-type journalistic murder investigation intent on embarrassing the authorities."

[25] On 22 March 2013 Mr Ellis addressed in the Policy Book the balance to be struck in the pursuit of his investigation:

> "I understand that the balance between public interest driven by freedom of speech and a press/media community who are "free" to provide educational and informative product around topics which can help hold to account state organisations. That said one must also respect the need for public/national safety; the ability of state organisations, particularly law

> enforcement/military, to tactically operate within often high-risk situations. Clearly the well-being of those with whom state agencies engage and indeed those whom they serve is uppermost in thought.
>
> Transparency, fairness, proportionality and clear/unambiguous information which respects the needs of all concerned is key. From my personal perspective the product of what is in the "NUS" documentary does not provide balance. It is sensational documentary making which often leads the uneducated viewer to reach inaccurate conclusions."

[26] The papers disclose that there was a difference of view between Mr Ellis and the Ombudsman's office about whether the two documents at issue had been leaked or stolen. The papers record that having initially accepted that the executive summary may have been leaked and the investigator's report was likely to have been leaked the Ombudsman's office took the position that they remained unconvinced that the full reports have been leaked preferring to consider small extracts of each had been obtained. It is also of some significance that apart from reporting the matter to the PSNI the Ombudsman's office did not make any formal complaint in relation to the matter nor did it suggest that the events had given rise to any damage. Mr Ellis relied, therefore, on a statement from Detective Supt McNally that the marking "Secret" was appropriate, that the naming of the suspects could directly threaten an individual's life or safety and that the loss of such information could see a loss of confidence in the wider criminal justice system.

[27] Mr Ellis was clear about the purpose of the searches. This was not only to recover stolen material but also to identify and recover evidence of contact or communication between individuals from the Office of the Police Ombudsman for Northern Ireland ("PONI") and the applicants. That was to identify possible suspects or corroborate evidence that may already exist.

[28] The rationale for preparing an *ex parte* search warrant rather than issuing a production order is best set out in the document dealing with the justification for the arrest of the second and third applicants at the time of the search:

> "Aligned to the warrant vis-a-vis production order route I find it incompatible to move towards a "production order process" whilst at the same [time] caution the suspect and inform them of the consequences of failing to answer questions. The decision to arrest allied to the warrant procedure it is argued prevents such incompatibility and reduces the risk of the suspect becoming compromised by

> one process or another. So, in effect, the framework of both provides for a clear and transparent pathway.
>
> I am aware of their reluctance, following invite, to engage with investigators who sought an explanation of events similar to the events which I am investigating. It appears a reliance upon the National Union of Journalists – Code of Practice was preferred. My investigation, as articulated by my terms of reference is challenging, serious and will inevitably complicated. I am to be clear, open and transparent in all that I do with the opportunity for ambiguity reduced wherever possible.
>
> I have experience of KRW as a firm of solicitors. I find them to lack objectivity; provide legal advice to a client which I thought was not in his interest; a firm who seem to disproportionately challenge every detail of an investigation with loud, verbose and often aggressive style to represent the suspects. I consider their involvement will be, as it always seems to be, not to engage or be seen to engage with investigators."

[29] The reference to the NUJ concerns an investigation carried out by the Metropolitan Police Service ("MPS") at the request of the PSNI in respect of an excerpt of a draft report by the Criminal Justice Inspectorate appearing on a bulletin of the Detail website dated 14 August 2011 which had been authored by Mr McCaffrey. On 6 June 2012 MPS wrote to Mr McCaffrey asking who provided him with a copy of the draft report and the circumstances under which it came into his possession. Mr McCaffrey consulted his solicitors and on 15 June 2012 they replied to say that he and his colleagues were employed by Below the Radar Limited, abided by the professional principles set forth in the NUJ Code of Conduct and were bound by journalistic privilege. It was pointed out that it was the solicitor's understanding that copies of the draft were widely disseminated before it was published. No further action was taken in respect of that.

[30] The papers also included an affidavit from ACC Martin in which he indicated that he was not aware that the applicants had access to the executive summary or the investigator's report at the time of his meeting with the second applicant in April 2017. He was, therefore, unaware that those documents had been used for the purpose of identifying the alleged role of the suspects.

The hearing

[31] On 8 August 2018 the respondent provided the judge with a set of papers to ground the application. The appendix to the warrant indicated that the articles

sought included journalistic material consisting of all broadcast material together with unedited and un-broadcast footage relating to the documentary film "No Stone Unturned". There was specific reference to the two documents referred to in the film, the need to include all discussions, interviews, communications and correspondence held on any media storage device, digital recording or other form of mechanical or electronic data, any material supporting a person's involvement in obtaining, possessing or disseminating any such document and any computer, electronic device digital media device including mobile phone in which it is believed such material may be stored.

[32] The papers provided to the judge included a summary of the documentary together with various screenshots. There was a reference to a number of companies with which the second applicant was associated and a reference in respect of Mr McCaffrey to the leak of the Criminal Justice Inspectorate report. A statement was included from one of the suspects identified in the documentary complaining about the effect of the disclosure in the film on his life and a statement from a retired police officer living in France who was interviewed in the documentary and was concerned about his location having been disclosed. There was a summary of telephone contact between documentary journalists and staff within PONI. There was nothing to indicate that this was other than appropriate.

[33] The hearing was transcribed and Detective Sgt Henderson gave evidence about the two documents. The judge intervened and asked:

> "Is that the material you seek?"
>
> Mr Robinson representing the respondents answered:
>
> "Yes there are two documents, one is an Executive Summary of the investigation and also a 55 page investigators report into the Loughinisland investigation."

There were then some references to where the documents were referred to in the documentary. There was a further judicial intervention when the judge asked:

> "And it's the actual stolen document you seek?"
>
> Detective Sgt Henderson replied:
>
> "Correct the content of which couldn't have come from anywhere else other than the actual documents themselves"

[34] There then followed a passage in which Mr Robinson made submissions about the sensitivity of the document and stated that the essential assessment was based on the fact that both documents contained information that could directly

threaten an individual's life or safety by either naming them as individuals who were suspected of being involved in the Loughinisland murders or considered to be a witness. There then followed the following exchange:

> "Judge: Well is the application not that this material has either been stolen or illegally disseminated by some person and as part of the investigation we have reasonable belief to believe the persons A or person B are still in possession of the Executive Summary and/or the 55 page document, the investigator's report and we require a warrant in order to further our investigation into that.
>
> Mr Robinson: Yes that's the essence.
>
> Judge: So whatever chilling effect, whatever public policy aspects may or may not be there is that not in its essence the synthesis of the case?
>
> Mr Robinson: Why yes it's the fact that the documentation should not be out and we are simply highlighting in that statement the ramifications for that, sorry the impact of what has happened to demonstrate the need for (a) an investigation and (b) the warrants."

Mr Robinson continued by referring to page 3 of the application setting out a list of materials comprising anything that may assist in any material which supports the person's involvement in obtaining, possessing or disseminating the documents. There was a wide range from paperwork interviews through to electronic storage.

[35] Mr Robinson then turned to the legislative scheme under PACE. The judge intervened to note that the material was marked secret and the respondent's case was that there were reasonable grounds for believing that there was theft or dissemination constituting an indictable offence. Mr Robinson replied "Yes and also section 5 of the Official Secrets Act as well". It does not appear that the Official Secrets Act 1989 was before the learned trial judge at any stage of these proceedings.

[36] Although one object of the warrant was to seek information in relation to the source, requiring compliance with the second set of access conditions, Mr Robinson took the judge through the two sets of access conditions. In this passage he mentioned the source for the first time as being a person who would have been in contact in confidence with the journalists. Dealing with the second set of access conditions under paragraph 3 of Schedule 1 he submitted that both the Theft Act in section 25 and the Official Secrets Act preserved the ability to obtain a warrant.

[37] Next, Mr Robinson turned to the reason for not proceeding under paragraph 4 of Schedule 1 by way of an *inter partes* hearing. He said:

> "Further into the application you will see that previously Mr McCaffrey was invited to cooperate with police regarding a similar leaking case of documentation in the public domain and he refused to do so citing journalistic privilege so it's the view of the police is that if they go for a production order which is what the paragraph essentially means if we serve notice for a production order and have an *inter partes* debate about all this that essentially opportunities within the investigation will be lost because of once they get that notice police do not know what will be done with the information or what steps may be taken to frustrate securing that information and that's why police are of the view that a warrant is, in the circumstances, the most appropriate way forward so that the premises may be searched without any notice."

[38] The width of what was sought can be seen in an extract from a further submission by Mr Robinson:

> "Only extracts of the stolen documents have been published and police seek to recover the documents in their entirety and in passing… the application also states it may be that collaterally those persons responsible for this leak may retain access to further sensitive secret material as well as identifying offences that may have been committed."

[39] Mr Robinson indicated that the documents to which reference had been made were never distributed outside of PONI and one objective of the search was to help police in identifying that contact within PONI as they would be guilty of serious offences. The applicant referred for the third time to the fact that Mr McCaffrey in 2011 declined to provide details to the MPS. The public interest was asserted to be the benefit to the investigation from the retrieval of the information which would help protect life, prevent and deter crime and restore and maintain public confidence within law enforcement.

[40] The judge intervened to describe this as a serious, serious breach of either theft or dissemination of material that was secret within an investigation which effectively outweighed in terms of proportionality the freedom to investigate. The judge suggested that Article 2 weighed heavily and Mr Robinson agreed. The judge suggested that without access to the material the applicant's case could go no further and Mr Robinson again agreed. The judge indicated that he did not believe that he

was required to give a reasoned ruling. Mr Robinson agreed. The judge expressed himself satisfied that it was proper and proportionate and necessary for him to grant the warrant sought in the application.

Discussion

[41] It is a fundamental principle of any *ex parte* hearing that it also be a fair hearing. That is particularly the case where the object of the application is to significantly intrude into the private and family lives of those affected. No matter how sensitively done the unannounced arrival of several police vehicles and 7 or 8 uniformed officers exercising the power to enter and search one's home while young children were wakening up preparing for school and guests were bemused to see their host being arrested constituted such an intrusion.

[42] It is unsurprising, therefore, that the court should have imposed a heavy onus on those seeking to pursue *ex parte* proceedings to take all reasonable steps to ensure that the proceedings are fair. Part of that obligation is as Hughes LJ put it in In Re Stanford International Bank Ltd to put on a defence hat and ask, what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge. The applicant must, of course, then proceed to tell the judge what those matters are. It is against that standard that we have reviewed the conduct of the application and hearing in this case.

[43] We have set out at paragraphs [20] and [21] above the governing jurisprudence dealing with the right to freedom of expression of journalists under Article 10 of the ECHR and the associated protection for journalistic sources and press freedom in a democratic society. Although there was some acknowledgement of the importance of journalists in a democratic society in the course of the hearing the judge was not advised that Article 10 Convention rights were engaged, nor was he provided with any of the relevant jurisprudence nor was it made clear to him that a warrant such as this sought could only be justified by an overriding requirement in the public interest. This issue was absolutely fundamental to whether or not a warrant should be issued and the failure to address it means that we can have no confidence that the trial judge applied the right test.

[44] Mr Robinson drew the judge's attention to the fact that there was an *inter partes* process for the obtaining of such information under paragraph 4 of Schedule 1 of PACE. He did not, however, discuss its terms and conditions in any detail. In particular he did not draw the judge's attention to the fact that once notice of an application for an order under paragraph 4 had been served on a person that person is prohibited from concealing, destroying, altering or disposing of the material to which the application relates except with the leave of the judge or the permission of a constable. Any failure to observe that requirement would constitute a contempt of court.

[45] The respondent's case in essence was that the service of a notice under paragraph 4 was not practicable or would seriously prejudice their case because any relevant material would be disposed of after service of the notice by the journalists. There was no material whatsoever advanced in relation to Mr Birney or Fine Point Films upon which the respondent relied as justification for that conclusion. We will deal later with submissions based on subsequently obtained evidence.

[46] The justification appears to rely solely upon the fact that Mr McCaffrey, a person of good character, had declined to voluntarily provide the MPS with material about a source in an earlier investigation. He had responded expeditiously to the request through his solicitors and indicated that he was relying upon the National Union of Journalists Code of Practice ("the Code"). It is common case that the Code places an obligation on journalists to protect their sources.

[47] This action on the part of Mr McCaffrey was presented to the judge in support of the proposition that a journalist adhering to the Code was likely to commit contempt of court by destroying relevant material if notice of an application was served upon him. We reject that submission. If correct it would completely undermine the important role that journalistic sources play in our democratic society.

[48] One of the matters pressed upon the trial judge was the importance of Article 2 of the Convention. The basis for this appears to be the contention that the publication gave rise to a risk to the life of those named. There was, however, no evidence of an assessment having been carried out in relation to that risk. If the respondents had asked for such an assessment to be carried out they would almost certainly have been advised that the journalists, being responsible people, had already asked for a meeting with the PSNI and in April 2017 met ACC Martin. In that meeting they raised the issues in respect of risk with the police in case there was anything of which they were unaware. They were not asked to refrain from identifying the suspects and made the point that in any event this information had been in the public domain since the letter naming the suspects had been received by an SDLP councillor in February 1995. The journalists did, however, refrain from publishing the identity of an alleged informant. All of this was easily accessible by the respondents and if the matter had been investigated by them would have come to light. None of it suggests that there was an Article 2 point of substance.

[49] In order to satisfy the second set of access conditions under Schedule 1 of PACE the respondents had to demonstrate that but for the statutory prohibition in Article 11(2) of PACE a search for the material could have been authorised by the issue of a warrant to a constable under a statutory provision other than the Schedule and the issue of such a warrant would have been appropriate. In order to satisfy that test the respondents relied upon the Theft Act (Northern Ireland) 1969 and the Official Secrets Act 1989.

[50] Section 25 of the Theft Act (Northern Ireland) 1969 provides that a warrant may be issued authorising a search of premises for stolen goods where there is reasonable cause to believe that any person has in his custody or possession or on his premises any stolen goods. The respondent's case was that there was reasonable cause to believe that the two paper documents, the executive summary and the 55 page report, were stolen. Any warrant which was issued could only relate to those paper documents. It could not possibly include the taking of electronic and other digital material. That should have been made absolutely clear to the trial judge and the failure to do so is inexplicable.

[51] The second basis for satisfying the requirement in paragraph 3(b) of Schedule 1 of the second access conditions was section 5 of the Official Secrets Act 1989. Sections 1 to 3 of the 1989 Act deal with disclosures by persons broadly who have been lawfully provided with access to material. Disclosure of the material in the prescribed circumstances constitutes an offence. In the course of the hearing, however, reliance was placed upon section 5 of the Act. That section deals with disclosures of documents obtained by third parties from those subject to sections 1 to 3 of the Act. Section 5(2) provides that the person into whose possession the information, document or article has come is guilty of an offence if he discloses it without lawful authority knowing, or having reasonable cause to believe, that it is protected against disclosure. That provision is subject to section 5(3) which provides that in the case of information or a document or article protected against disclosure by the earlier sections a person does not commit an offence under subsection (2) unless the disclosure by him is damaging and he made it knowing or having reasonable cause to believe that it would be damaging.

[52] The question as to whether a disclosure is damaging is determined for the purpose of the statute as it would be in relation to the earlier sections of the Act. The earlier sections deal with security and intelligence, defence and international relations. It is difficult to see any basis upon which the disclosure of this information could have been damaging in respect of any of those sections. The terms of this legislation were not opened to the judge. Certainly there was not a shred of evidence to suggest that the disclosure represented a danger to PONI. It seems unlikely that this condition was satisfied.

[53] The only other matter we wish to refer to is material obtained by the respondents as a result of the execution of the warrants. The material consists of email traffic in which there is discussion by Mr Birney and Mr McCaffrey about the risk of steps being taken by the police to try to establish the source of the leak. Unsurprisingly both of them were anxious to ensure that they should take all steps to try to protect the identity of the source including the deletion of material.

[54] There is nothing suspicious or inappropriate about this. It is exactly what one would expect a careful, professional investigative journalist to do in anticipation of

any attempt to identify a source. It does not lead to any inference that such a journalist would commit a contempt of court.

Conclusion

[55] For the reasons given we concluded that the conduct of this hearing fell woefully short of the standard required to ensure that the hearing was fair. That was sufficient for our decision to quash the warrant. We wish to make it clear, however, that on the basis of the material that has been provided to us we see no overriding requirement in the public interest which could have justified an interference with the protection of journalistic sources in this case.