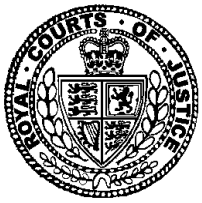

Neutral Citation Number: [2019] EWHC 2756 (Admin)

Case No: CO/2269/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 October 2019

Before:

LORD JUSTICE LEGGATT
and
MR JUSTICE PICKEN

- -

Between:

THE QUEEN (on the application of THE BRITISH BROADCASTING CORPORATION)	**Claimant**
- and -	
NEWCASTLE CROWN COURT	**Defendant**
- and -	
THE CHIEF CONSTABLE OF NORTHUMBRIA POLICE	**Interested Party**

- -

Gavin Millar QC and **Greg Callus** (instructed by **BBC Litigation Department)** for the **Claimant**
The **Defendant** did not appear and was not represented
Andrew Waters (instructed by **Northumbria Police Legal Department)** made written representations for the **Interested Party**

Hearing date: 25 July 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

LORD JUSTICE LEGGATT

Lord Justice Leggatt (giving the judgment of the court):

1. This case raises questions about when an order may be made under section 9(1) and Schedule 1 of the Police and Criminal Evidence Act 1984 (PACE) to compel the production of a journalist's note for potential use at a criminal trial.

Factual background

2. On 22 May 2018 the trial began in Newcastle Crown Court of Mr George Ormond on 38 charges of sexually assaulting boys and young men. The offences were said to have been committed between the 1970s and the 1990s while Mr Ormond was working as a youth football coach in Newcastle. There were 18 complainants. They included Mr David Eatock who was a professional footballer with Newcastle United for three years from 1995 (when he was aged 18) until 1998.

3. In a witness statement taken by the police dated 4 December 2016, Mr Eatock described two incidents of alleged sexual misconduct by Mr Ormond. One was the subject of a charge of indecent assault. The assault was said to have occurred in 1998 when Mr Eatock's contract with Newcastle United was coming to an end. Mr Eatock alleged that, while he was being given a lift in Mr Ormond's car, Mr Ormond took hold of his penis and tried to masturbate it. In his witness statement Mr Eatock also described an earlier incident in which, shortly after the start of his contract in 1995 when he was being put up in a hotel by the club, Mr Ormond allegedly came back to Mr Eatock's room and masturbated himself in front of Mr Eatock. This alleged conduct was not charged as a criminal offence as Mr Eatock was 18 and therefore not a child at the time, but it was relied on by the prosecution at Mr Ormond's trial as evidence of bad character and as background to the later alleged assault.

4. Before he gave a statement to the police, Mr Eatock had already made public allegations against Mr Ormond. On 1 December 2016 Mr Eatock was interviewed live on air by a BBC journalist, Victoria Derbyshire. A recording of the interview was available at Mr Ormond's trial. There were differences between the account of events given by Mr Eatock in the television interview and the account that he gave in his police witness statement (made some two weeks later). In particular, in relation to the earlier incident Mr Eatock did not mention in the television interview, as he did in his witness statement, that Mr Ormond had come back to his hotel room with him to watch a pornographic video which he had told Mr Ormond that he had. In relation to the alleged assault, Mr Eatock said in the television interview that Mr Ormond had put his hand down Mr Eatock's pants on to his genitals for a few seconds and then made a masturbating movement. In his witness statement, however, Mr Eatock stated that he had pulled down the front of his trousers and exposed his penis himself after Mr Ormond asked him about his foreskin and wanted to see it; and it was then that Mr Ormond allegedly took hold of Mr Eatock's penis and tried to masturbate it.

5. Before the live interview, a BBC journalist conducted a mock off-air interview with Mr Eatock to find out what he would say. There was no video or audio recording made of this interview, but the journalist prepared a typed note of her questions and Mr Eatock's answers (the "journalist's note"). It was this journalist's note which was the subject of an application for a production order made by the Northumbria Police at the beginning of the criminal trial.

The production order

6. Northumbria Police first made a request to see the journalist's note on 23 January 2017 (less than two months after the television interview). The BBC declined the request in accordance with its policy not to disclose such material without a court order. The request was renewed over a year later on 12 February 2018. By this time Mr Ormond had been charged and his case sent for trial. The request was again declined but the BBC asked, before any application was made to the court for a production order, to be sent a draft order and witness evidence to enable the BBC to decide whether or not actively to oppose the application.

7. A draft production order with supporting evidence was finally sent to the BBC on 11 May 2018, only 10 days before the trial of Mr Ormond was due to start. The BBC responded on 21 May 2018, giving reasons for opposing the application. The jury was sworn the next day. The application for a production order was served on the BBC on 25 May 2018. It was heard by the trial judge, HHJ Bindloss, at a contested hearing on 30 May 2018. Judgment was reserved and was given in writing on 4 June 2018. The judge granted the order, which required the BBC to produce the journalist's note within 7 days (the minimum period prescribed by statute).

These proceedings

8. On 8 June 2018 the BBC commenced these proceedings for judicial review of the judge's decision and requested an expedited hearing. Turner J directed that a rolled-up hearing should take place by 15 June 2018. However, the BBC was informed that Mr Eatock was scheduled to give evidence on 13 June 2018. In these circumstances, to avoid disrupting the trial, the BBC decided to comply with the production order under protest before its claim for judicial review had been determined, upon the Crown Prosecution Service and the Northumbria Police agreeing that they would not subsequently seek to argue that the claim had become academic.

9. At the conclusion of the criminal trial, Mr Ormond was convicted of 36 of the 38 offences charged and was sentenced to 20 years' imprisonment. One of the two counts on which he was acquitted was that relating to Mr Eatock. Accordingly, the outcome of this judicial review has no consequences for the safety of any conviction.

10. At the hearing before us the BBC was represented by Mr Gavin Millar QC and Mr Greg Callus, for whose expert written and oral submissions we are most grateful. The Northumbria Police did not attend the hearing but provided a note to the court which indicated that an authoritative judgment on the use of production orders would be of assistance to police forces and prosecutors, as well as media organisations such as the BBC.

11. At the start of the hearing we granted permission to proceed with the claim.

The statutory scheme

12. Part II of PACE confers and regulates powers of entry, search and seizure by the police. Its provisions are designed to strike a balance between the public interest in the effective investigation of crime and the rights of individuals not to have their premises entered and searched and their documents and other property seized against

their will. As Bingham LJ observed in *R v Lewes Crown Court, ex parte Hill* (1991) 93 Cr App R 60, 66, there is an obvious tension between these two interests "because crime could be most effectively investigated and prosecuted if the personal and property rights of citizens could be freely overridden and total protection of the personal and property rights of citizens would make investigation and prosecution of many crimes impossible or virtually so."

13. Section 8(1) of PACE empowers a justice of the peace, on an application made by a constable, to issue a warrant authorising the police to enter and search premises and seize material found on the premises if satisfied that there are reasonable grounds for believing —

> "(a) that an indictable offence has been committed; and
>
> (b) that there is material on premises … which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence; and
>
> (c) that the material is likely to be relevant evidence; and
>
> (d) that it does not consist of or include items subject to legal privilege, excluded material or special procedure material; and
>
> (e) that any of the conditions specified in subsection (3) below applies"

The conditions specified in subsection (3) are that it is not practicable to communicate with any person entitled to grant entry to the premises or to the evidence, or that entry will not be granted unless a warrant is produced, or that the purpose of a search may be frustrated or seriously prejudiced unless immediate entry to the premises can be secured.

14. As can be seen from section 8(1)(d) quoted above, a search warrant cannot be issued under this provision where the material sought by the police consists of or includes "excluded material" or "special procedure material". In broad terms, these categories comprise material acquired or created in the course of a trade, business, profession or other occupation and held in confidence. Access to such material is governed by special provisions. Section 9(1) of PACE provides:

> "A constable may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 1 below and in accordance with that Schedule."

15. Unlike an application for a warrant under section 8, an application under Schedule 1 of PACE must be made on notice to the person believed to be in possession of the material and is heard by a judge rather than a justice of the peace. Although the judge has power to issue a search warrant if necessary, the standard order made if the application succeeds is for the person in possession of the material to produce it to a

constable. Such a production order may be made if one or other of two sets of access conditions is fulfilled.

16. The present case is concerned with "journalistic material", defined by section 13 of PACE as material acquired or created for the purposes of journalism. Pursuant to sections 11 and 14, journalistic material is classified as "excluded material" if it is held in confidence; otherwise it is "special procedure material". Mr Eatock gave his consent to the police obtaining the journalist's note, with the result that it was not held by the BBC in confidence. The note was therefore "special procedure material" for the purposes of PACE.

17. In applying for a production order, the Northumbria Police relied only on the first set of access conditions set out in Schedule 1. As provided in Schedule 1, para 2, these conditions are that:

> "(a) there are reasonable grounds for believing –
>
> (i) that an indictable offence has been committed;
>
> (ii) that there is material which consists of special procedure material or includes special procedure material and does not also include excluded material on premises specified in the application, or on premises occupied or controlled by a person specified in the application …;
>
> (iii) that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made; and
>
> (iv) that the material is likely to be relevant evidence;
>
> (b) other methods of obtaining the material –
>
> (i) have been tried without success; or
>
> (ii) have not been tried because it appeared that they were bound to fail; and
>
> (c) it is in the public interest, having regard –
>
> (i) to the benefit likely to accrue to the investigation if the material is obtained; and
>
> (ii) to the circumstances under which the person in possession of the material holds it,
>
> that the material should be produced or that access to it should be given."

The issues

18. At the hearing of the application it was common ground that three of the six access conditions set out in Schedule 1, para 2 of PACE were fulfilled: that is, there were reasonable grounds for believing that an indictable offence had been committed and that the BBC had on its premises special procedure material which did not also include excluded material; furthermore, the Northumbria Police had sought to obtain the material voluntarily from the BBC without success. However, the BBC disputed that the other three access conditions were met. In particular, the BBC disputed that there were reasonable grounds for believing that the journalist's note was likely to be of substantial value to the investigation or was likely to be relevant evidence. The BBC also disputed that it was in the public interest that the material should be produced and argued that ordering its production would constitute a disproportionate and unlawful interference with the right to freedom of expression protected by article 10 of the European Convention on Human Rights. In addition, the BBC argued that there was no power to make a production order under Schedule 1 of PACE because access to the material was not sought "for the purpose of a criminal investigation" as required by section 9(1).

19. The Crown Court judge decided all four contested issues against the BBC and was satisfied that all the access conditions specified in Schedule 1, para 2 of PACE were fulfilled. In these proceedings the BBC contends that the judge erred in law in deciding each of the four disputed issues as he did.

(1) Purpose of the application

20. The BBC puts as its first ground of judicial review the argument that the application for production of the journalist's note was not within the scope of Schedule 1 of PACE because, so it is submitted, in making the application the Northumbria Police were not seeking to obtain access to the material "for the purposes of a criminal investigation" as required by section 9(1).

21. On the authority of *R (Bowles) v Southwark Crown Court* [1998] AC 641, 650-652, counsel for the BBC submitted, and we accept, that if it appears that an application for a production order has been brought for more than one purpose, the test that must be applied is whether the statutory purpose (here the conduct of a criminal investigation) was the dominant purpose of the application.

22. The phrase "criminal investigation" is not described in PACE, but as stated in section 22(1) of the Criminal Procedure and Investigations Act 1996 (the CPIA):

> "… a criminal investigation is an investigation conducted by police officers with a view to it being ascertained –
>
> (a) whether a person should be charged with an offence, or
>
> (b) whether a person charged with an offence is guilty of it."

Under the code of practice made in accordance with section 23(1) of the CPIA, in conducting a criminal investigation there is a duty to pursue all reasonable lines of enquiry, whether these point towards or away from a suspect. As noted in the CPS

Disclosure Manual, chapter 5, such reasonable lines of enquiry may include enquiries as to the existence of relevant material in the possession of a third party, albeit that a third party has no obligation under the CPIA to reveal material to the investigator.

23. The BBC accepts that, when a request was first made for the journalist's note in February 2017, this could be characterised as a reasonable line of enquiry. However, it maintains that, by the time notice was given of the intention to apply for a production order shortly before the start of the trial, this was no longer the case.

24. It is clear that the purpose, or at least the dominant purpose, of seeking access to the journalist's note at that stage was to enable the CPS to consider whether the note ought to be disclosed to the defence pursuant to the prosecutor's duty of disclosure. Thus, in an email sent to the BBC on 11 May 2018 Mr Gary Buckley of the CPS explained the delay in applying for an order on the basis that "it is only recently that the defence solicitors have made a formal request for disclosure." In a further email sent on 22 May 2018, Mr Buckley said:

> "I can confirm that I am under an obligation to view these notes in order to discharge my disclosure obligations, and therefore the application will be formally lodged before the Judge today."

The information sworn by DC Hodgson in support of the application stated that:

> "… the prosecution are under a duty to pursue all reasonable lines of enquiry, whether these point towards or away from the accused. The prosecution must establish whether or not the accounts given by the complainants to the media are consistent with the accounts given to the police in order to discharge their duty of disclosure."

25. The prosecutor's duty of disclosure arises under sections 3 and 7A of the CPIA. Section 3(1) provides that the prosecutor must:

> "(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, …"

Section 7A makes it clear that the duty is a continuing one which applies throughout the proceedings until the accused is acquitted or convicted or the prosecutor decides not to proceed with the case.

26. It can be inferred that Mr Ormond's legal representatives planned to challenge the credibility or reliability of Mr Eatock's evidence at the trial by highlighting the differences mentioned earlier between the accounts of the two alleged incidents of sexual misconduct given by Mr Eatock in his witness statement and in the broadcast television interview. They presumably anticipated that the journalist's note was likely to show that Mr Eatock had given a similar account of events off-air to that which he gave in the broadcast interview, which would further assist the defence case and tend to undermine the case for the prosecution by casting doubt on Mr Eatock's

reliability as a witness. If that was so, the note would fall within the prosecutor's duty of disclosure. If, on the other hand, the account recorded in the journalist's note was consistent with Mr Eatock's witness statement, the prosecution would wish to rely on it to rebut the attack on his credibility and reliability. In these circumstances, seeking access to the journalist's note was properly regarded as a line of enquiry which the investigator had a duty to pursue.

27. The point is made by the BBC that the duty of disclosure applies only to "prosecution material", which is defined in sections 3(2) and 7A(6) of the CPIA as 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, or
>
> (b) which, in pursuance of a code operative under Part II, he has inspected in connection with the case for the prosecution against the accused."

It follows that where, as here, the journalist's note had not come into the prosecutor's possession and had not been inspected by the prosecutor, there was no obligation on the prosecutor under the CPIA to disclose it.

28. The fact, however, that the duty to disclose material arises only once it is in the prosecutor's possession (or has been inspected) does not mean that no attempt need be made to obtain the material. We agree with the observation of the Crown Court judge (at para 32 of his judgment on the application) that:

> "the duties lying on the shoulders of the prosecutor to obtain relevant material and then assess whether to serve or disclose the material [are] at the heart of a criminal investigation."

Thus, if the prosecutor and the police have reason to believe that a third party possesses material which might reasonably be considered capable of undermining the case for the prosecution or of assisting the defence case, they should not simply sit on their hands. It is incumbent on the investigator, in such circumstances, to take reasonable steps to obtain access to the material. Those steps may, in an appropriate case, include applying to the court under section 8(1) of PACE for a search warrant or under section 9(1) and Schedule 1 for a production order.

29. That was the position in this case. As we have indicated, the dominant purpose of applying for a production order was to pursue a reasonable line of enquiry by attempting to obtain material which might assist the defence case (whilst also having the potential to assist the prosecution). Whether or not the access conditions contained in Schedule 1, para 2 of PACE were fulfilled such that the BBC could properly be ordered to produce the material is a further and separate question. There can, however, in our view be no doubt that the purposes for which the Northumbria Police were seeking to obtain access to the journalist's note were purposes of a criminal investigation.

30. We therefore reject the first ground of judicial review.

(2) "Substantial value"

31. The judge found that the journalist's note was likely to be of "substantial value" to the investigation on the grounds that it would either assist the defence case by casting doubt on Mr Eatock's credibility or reliability or would be consistent with his witness statement and hence would assist the prosecution case by helping to rebut an attack on the veracity of his evidence based on his failure to mention in the broadcast interview matters recounted in his witness statement. Counsel for the BBC described this as "a classic Morton's fork" and argued that the statutory requirement could not be satisfied in this way. They submitted that if the answers to the journalist's questions recorded in the note were merely consistent with another account that Mr Eatock had given at around that time, then this would add no value to the investigation at all: the only basis on which the journalist's note might be of substantial value would be if there was a material inconsistency between the accounts given.

32. Counsel for the BBC further emphasised that, to satisfy this access condition, the applicant must evidence a reasonable belief that the material sought "is likely to be" of substantial value and not merely speculation that it "might" prove to have such value: see *R (BSkyB) v Chelmsford Crown Court* [2012] EWHC 1295 (Admin); [2012] 2 Cr App R 53, paras 18 and 22. They submitted that the information of DC Hodgson did not evidence such a reasonable belief, as it merely suggested a possibility that the journalist's note might reveal a material inconsistency with the account given by Mr Eatock to the police and contained no positive averment that it was likely to do so.

33. We do not agree with the premise that a prior consistent statement could have no value to the investigation and that the only way in which material of the kind sought in this case could be of substantial value would be by indicating a material inconsistency between different accounts given by the witness so as to cast doubt on his credibility or reliability. It seems to us that if the journalist's note had revealed that Mr Eatock had mentioned off-air facts alleged in his statement to the police which he did not mention in the live television interview, that would plainly assist the prosecution case. It would do so by providing material with which to rebut a suggestion that Mr Eatock's evidence had been fabricated. Nor do we see anything wrong in law with the judge's analysis that the material was likely to be of substantial value to the investigation because it was likely either to show that Mr Eatock had given an account to the BBC before as well as in his live interview which was materially different from that given to the police, and thus assist the defence, or to aid the prosecution in rebutting that suggestion. Approaching the matter on the basis that a criminal investigation is not confined to seeking material which would assist the prosecution but embraces also the pursuit of a reasonable line of enquiry by attempting to obtain material which might assist the defence, it follows that the judge was entitled to conclude that, on the facts, the access condition was satisfied. There was no error of law in his assessment.

(3) "Relevant evidence"

34. The next ground of judicial review raises a question of law about the meaning of the access condition contained in Schedule 1, para 2(a)(iv) of PACE that there are reasonable grounds for believing that "the material is likely to be relevant evidence". A similar condition applies where an application is made for a search warrant under

section 8(1) of PACE. The phrase "relevant evidence" is defined in section 8(4) to mean, in relation to an offence, "anything that would be admissible in evidence at a trial for the offence."

35. The Crown Court judge was satisfied that, by one route or another, the journalist's note was likely to be admitted in evidence at the trial of Mr Ormond in relation to the offence allegedly committed against Mr Eatock. In particular, if any statement recorded by the journalist was inconsistent with the account given by Mr Eatock in evidence, Mr Eatock could be cross-examined as to that statement. Under sections 4 and 5 of the Criminal Procedure Act 1865 (Lord Denman's Act), if under cross-examination Mr Eatock did not admit making the statement or maintained an account inconsistent with it, the journalist's note could then be put in evidence by the defence. Alternatively, if the answers recorded in the journalist's note were consistent with Mr Eatock's oral evidence, the prosecution would potentially be able to put the note in evidence to rebut a suggestion that his oral evidence had been fabricated.

36. Each of these ways in which the journalist's note could become admissible evidence, however, was contingent on what would happen when Mr Eatock gave evidence at the trial. It is the BBC's case that, to fulfil the access condition, it is not enough that material should merely be contingently admissible in this way; and that to constitute "relevant evidence" the material must be immediately admissible in evidence without more.

The *Derby Magistrates* case

37. In support of this contention, the BBC relies on the decision of the House of Lords in *R v Derby Magistrates' Court, ex parte B* [1996] AC 487. In that case the applicant for judicial review (B) had been prosecuted for the murder of a 16-year old girl on the basis of a confession that he had made to the police. Shortly before his trial B retracted his confession and alleged that, although he had been present at the scene of the crime, his stepfather had killed the girl. At the trial B was acquitted. The stepfather was then prosecuted for the murder. His representatives applied under section 97 of the Magistrates' Courts Act 1980 for the issue of witness summonses requiring B and his solicitor to produce attendance notes and proofs of evidence recording the initial account of events which B had given to his solicitor. The stepfather anticipated that these documents would be consistent with B's admission to the police that he had killed the girl and inconsistent with his subsequent evidence that the stepfather was responsible, and would therefore assist the stepfather's case. The magistrates' court issued the witness summonses but on B's claim for judicial review it was ultimately held by the House of Lords that the decisions to do so were unlawful and should be quashed.

38. The House of Lords reached this conclusion for two separate reasons. One reason was that the documents sought were protected by legal professional privilege. The other, independent reason was that the documents did not satisfy the requirement of section 97 of the 1980 Act that they were "likely to be material evidence". Lord Taylor of Gosforth CJ, with whose judgment all the other law lords agreed on this issue, held that, to constitute "material evidence" for the purpose of section 97, the documents sought must be "immediately admissible *per se* and without more": see [1996] AC 487, 500. That requirement was not satisfied because documents recording a previous statement made by B in which he admitted sole responsibility for

the killing would not be immediately admissible at the stepfather's trial. They would only become admissible under Lord Denman's Act if B gave evidence inconsistent with the previous statement and, when cross-examined about this, either denied making the previous statement or adhered to evidence inconsistent with it.

39. Lord Taylor observed that it might seem that the stepfather was defeated by a technical obstacle, but underscored that the objection taken was "entirely in accordance with the principle that section 97 cannot be used to obtain discovery": see [1996] AC 487, 500. Lord Taylor also emphasised the distinction between the breadth of the duty on the prosecution to disclose material in its possession and the more restrictive regime that applies in seeking to get hold of documents which are in the possession not of the prosecution but of a third party.

40. In the present case the Crown Court judge considered that the test formulated by Lord Taylor in the *Derby Magistrates* case does not govern the interpretation of Schedule 1, para 2(a)(iv) of PACE. The judge sought to distinguish the decision of the House of Lords on the grounds that: (i) section 9(1) and Schedule 1 of PACE are in different terms (and serve different purposes) from section 97 of the 1980 Act; (ii) the *Derby Magistrates* case pre-dates the Criminal Justice Act 2003, which changed the evidential status of prior inconsistent statements; (iii) the applications in the *Derby Magistrates* case for the production of documents were made by the defence and not by the prosecution; and (iv) the material sought in that case was protected by legal professional privilege.

41. In our opinion, none of these differences is a relevant difference or provides a valid ground for distinguishing the *Derby Magistrates* case.

Statutory interpretation

42. Even in the absence of authority and considering the question simply as one of statutory interpretation, we would interpret the words "is likely to be relevant evidence", read with the definition of "relevant evidence" in section 8(4) of PACE, in the same way as the House of Lords interpreted the corresponding requirement in section 97 of the 1980 Act: that is, as a requirement that the material is likely to be such that, if produced, it would be immediately admissible in evidence at a trial without more.

43. It is true that the words "is likely to be" contemplate an element of contingency or uncertainty. But that is sufficiently explained by the fact that, when a judge is considering an application for a production order, it is often not known what the exact content of any material ordered to be produced will turn out to be. A test of likelihood is therefore appropriate, both to the question whether the material will be of substantial value to the investigation and to the question whether it will be "relevant evidence". We do not consider that the statutory language is reasonably construed as requiring the judge further to assess the likelihood that material which would not fall within the definition of "relevant evidence" when produced might nevertheless subsequently become admissible in evidence at a trial if some further event occurs or some further procedure is followed in the future.

44. As well as being an unnatural reading of the words used, such a test would potentially give rise to real difficulties in its application. We have noted that the requirement to

show reasonable grounds for believing that (amongst other things) "the material is likely to be relevant evidence" is not confined to cases where the police are seeking access to "special procedure material" under Schedule 1, para 2, of PACE. The same requirement applies where the police seek a warrant under section 8(1) of PACE to enter and search premises for material which does not include special procedure material or excluded material. An application under section 8(1) is made to a justice of the peace. It may need to be decided as a matter of urgency and should be capable of determination by applying a straightforward test. We do not think it reasonable to impute to Parliament the intention that, in order to determine whether the material sought is likely to be relevant evidence, the decision-maker should have to engage in a potentially complex and uncertain exercise of trying to predict and analyse whether material which would not be immediately admissible in evidence might nevertheless become so as a result of how events will unfold in the course of a future criminal trial.

45. But in any case, the question is not free from authority. In our view, there is no justification for placing a different interpretation on section 8(1)(a) and Schedule 1, para 2(a)(iv) of PACE from that authoritatively given by the House of Lords to the similar requirement contained in section 97 of the 1980 Act.

The suggested grounds of distinction

46. In the first place, the language of the "relevant evidence" requirement in PACE is similar to, and would appear deliberately to track, the wording of section 97 of the 1980 Act, which provides for a summons to be issued where a justice of the peace is satisfied that "any person in England or Wales is likely to be able to give material evidence, or produce any document or thing likely to be material evidence," at a hearing in a magistrates' court. (At the time when the *Derby Magistrates* case was decided, this included a committal hearing.) The wording of section 97 in turn follows that of section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965, which makes similar provision for the issue of a witness summons in connection with proceedings in the Crown Court. Pursuant to section 2(1), such a witness summons may be issued where the Crown Court is satisfied that:

> "(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
>
> (b) it is in the interests of justice to issue a summons under this section to secure the attendance of that person to give evidence or to produce the document or thing."

The use in PACE of the phrase "relevant evidence" rather than "material evidence" is a distinction without a difference, which may be explained by the fact that the word "material" is used in PACE in a different sense in place of the phrase "document or thing".

47. Not only is the language similar, but the provisions of Schedule 1 of PACE, like those of the 1965 and 1980 Acts, are concerned with the same basic question of whether a third party can be compelled to produce documents (or other material) for use in

criminal proceedings.[1] It would accordingly make no sense if the access conditions under PACE were less onerous than the test applicable to the issue of an ordinary witness summons. In particular, we agree with the submission of Mr Millar QC that the law in this area would be incoherent if it allowed material to be obtained from a journalist through a production order that could not be obtained from any witness (including someone not a journalist) under a witness summons.

48. It follows, in our view, that Schedule 1, para 2(a)(iv) and section 8(1)(c) of PACE should be given a similar interpretation to section 97 of the 1980 Act.

49. Nor can we accept that the authority of the *Derby Magistrates* case has been affected by the changes made by the Criminal Justice Act 2003 to the admissibility of hearsay evidence. Prior to the 2003 Act, when a previous inconsistent statement was introduced in evidence under Lord Denman's Act, such a statement was admissible only to discredit the witness or undermine the reliability of his evidence on the matter in question and not as evidence that the contents of the statement were true. That limitation was removed by section 119(1) of the 2003 Act, which provides:

> "(1) If in criminal proceedings a person gives oral evidence and—
>
> (a) he admits making a previous inconsistent statement, or
>
> (b) a previous inconsistent statement made by him is proved by virtue of section 3, 4 or 5 of the Criminal Procedure Act 1865 (c. 18),
>
> the statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible."

This change in the law, however, does not affect the reasoning in the *Derby Magistrates* case. That reasoning depends solely on whether the material is immediately admissible and not on the purpose for which material will or will not be admissible in evidence once it has been admitted. Indeed, Lord Taylor expressly rejected an argument that a previous inconsistent statement could not be "material evidence" within the meaning of section 97 of the 1980 Act simply because (as the law stood at that time) it could not be evidence of the truth of its contents. He considered that any admissible documents tending to contradict a principal witness's account must be material evidence: see [1996] AC 487, 499C-E. The fact that the purposes for which such a document is admissible have since been enlarged therefore makes no difference to the analysis.

50. The other two grounds suggested by the Crown Court judge for distinguishing the *Derby Magistrates* case are equally untenable. The judge was in fact wrong to refer to the application in the present case as made on behalf of the prosecution since, although evidently made at the prosecutor's request, the application – as PACE

[1] A search warrant issued under section 8(1) of PACE may authorise the entry and search of premises and seizure of material in the possession of the accused rather than a third party, but the intrusive nature of the power justifies imposing comparable limits on access to those which apply to the production of material by third parties.

requires – was made by the police. But in any case there is nothing in the reasoning of the House of Lords to suggest that, in determining whether the statutory test is satisfied, it would or could make any difference on whose behalf the application to produce documents is made, and there is no reason in principle why it should. We would add that there is equally no justification for reading into the statutory test, as the BBC has sought to do, a requirement that the material must be relevant evidence against the accused. An *obiter dictum* of Maurice Kay J in *R (Bright) v Central Criminal Court* [2001] 1 WLR 662, 690G-H, from which the BBC has attempted to derive this limitation provides no support for it and simply reflects the relevance of the material sought in that particular case; furthermore, it would be unjustifiable in principle to favour the production of material admissible as evidence for the prosecution over material admissible as evidence for the defence.

51. As for the fact that the documents sought in the *Derby Magistrates* case were privileged, we have already noted that this raised a separate issue and furnished an independent ground for the decision. That does not prevent the reasoning of the House of Lords on the meaning of section 97 from forming part of the *ratio* of the case. As Lord Simonds observed in *Jacobs v London County Council* [1950] AC 361, 369:

> "… there is in my opinion no justification for regarding as *obiter dictum* a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be *obiter*, then a case which *ex facie* decided two things would decide nothing."

52. We conclude that the *Derby Magistrates* case remains good law which is binding authority for the proposition that a person cannot be ordered to produce material under section 97 of the Magistrates' Courts Act 1980, and by analogy under Schedule 1, para 2 of PACE, unless it is likely that the material, if produced, will be immediately admissible in evidence without more. It is not enough that the material will become admissible if particular events happen at the trial. This is how the balance has been struck by Parliament between the public interest in the effective investigation and prosecution of crime, which would by itself favour disclosure of any material likely to be of substantial value to the investigation, and the rights of citizens to privacy and freedom from interference with their property, for which this further access condition affords a significant protection.

(4) Public interest balancing test

53. The fourth ground of judicial review is that the judge erred in his evaluation of the public interest, when balancing the benefit likely to accrue to the investigation if the material was obtained against the level of interference if a production order was made with the BBC's article 10 Convention right freely to receive and impart information.

54. A central reason for protecting journalistic material of the kind at issue in this case from disclosure is the risk that ordering its disclosure to the police would discourage people from speaking freely to the media. In particular, we accept the BBC's submission that it is critical that the media are able to speak to sources, including alleged victims of sexual abuse, without those individuals fearing that a record made

of their account by a journalist can be obtained by the police and made available to defence counsel to attack their credibility at a trial. It seems to us, however, that the risk that ordering production of the material might have such a chilling effect is, at the very least, considerably diminished when – as in this case – the individual concerned has (a) chosen to waive anonymity when speaking live on air about his allegations of abuse and (b) given his express written consent to the journalist's record of what he said off-air being provided to the police.

55. In the light of our conclusion, however, that the judge erred in law in finding that reasonable grounds for believing that the journalist's note was likely to be relevant evidence, it is unnecessary for us to express any concluded view on this issue.

Remedy

56. Since the journalist's note has in fact been produced by the BBC, it would serve no purpose to quash the order for its production. The only practical value of this court's decision is to establish the correct approach to follow in future cases. In these circumstances it seems to us that the appropriate remedy is a declaration that the production order made was unlawful because the evidence placed before the judge disclosed no reasonable grounds for believing that the journalist's note was likely to be immediately (rather than merely contingently) admissible in evidence at a trial.