Neutral Citation no. [2003] NIQB 64

Ref:	**GILJ3666**

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

Delivered:	**16/9/03**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY:

(1) KIERAN OWEN BUTLER

AND

(2) THE POLICE OMBUDSMAN FOR NORTHERN IRELAND FOR JUDICIAL REVIEW

GILLEN J

[1] There are two applications before the court. The first, ("hereinafter called "Butler's case") is an application by Kieran Owen Butler who seeks judicial review of a decision of the Police Ombudsman for Northern Ireland ("PO"), the first respondent and of a decision by the Director of Public Prosecutions ("the DPP") the second named respondent. The original relief sought was, with the leave of the court, radically amended during the course of the hearing (as evidenced by the amended Order 53 statement) and is now as follows:

(a) The applicant seeks a declaration that the learned resident magistrate is entitled to issue a summons under Article 118 of the Magistrates' Court (Northern Ireland) Order 1981 to the Police Ombudsman, or any third party, to produce the documents in question or any relevant document for consideration by the court as to whether they contain material which may assist the defence or undermine the prosecution and as to what material ought to be disclosed to the defendant.

(b) Such further and other relief as may be appropriate.

The grounds upon which the relief is sought remained the same as for the original application. They are as follows:

"(i) the first respondent erred in concluding and deciding upon adopting a policy of baldly refusing to permit

disclosure of the complaints investigation to the applicant in the circumstances.

(ii) the first respondent erred in asserting that they are prohibited by Section 63 of the Police (Northern Ireland) Act 1998 from disclosing to the applicant the contents of the investigation file where the applicant is the person being prosecuted for alleged offences arising out of matters which are the subject of the complaint.

(iii) the first respondent has erred in deciding that there is no proper method of making such disclosure in cases being dealt with in the Magistrates' Court and that a Magistrates' Court is essentially not competent to make an order for disclosure in the interests of public justice for the proper conduct and disposal of the proceedings before that court.

(iv) the first respondent erred in asserting to the second respondent that it had a right to a defence statement and had a role in deciding what documents, if any, would be disclosed to the second respondent.

(v) that the first respondent has behaved throughout in an arbitrary, unreasonable, unfair and unlawful manner.

(vi) the second respondent has erred in failing to comply with its obligation to obtain materials pursuant to its obligation under the Attorney General's Guidelines on disclosure and its obligation under the Police and Criminal Procedure and Investigation (Northern Ireland) Act 1996.

(vii) the second respondent has erred in accepting the first respondent's assertion that the first respondent, as a third party agency exercising no prosecutorial function and having no duty under the Attorney General's guidelines, has a role in deciding what material, if any, should be made available to the second respondent".

[2] I remain unconvinced that the grounds upon which the relief is sought correlate to the sole relief now sought and to that end therefore I shall make some comment in this judgment on the duties of the second respondent, namely the DPP.

[3] The second application, (hereinafter called "Liddy's case") is an application by the PO for judicial review of a decision of R Watters RM sitting at Magherafelt Magistrate's Court in the case of *DPP v Malachy Liddy*. The PO seeks:

(a) an order of certiorari to bring up and quash a summons directed to the applicant and issued on 25 March 2003 to attend at the said court on 1 April 2003 and to produce statements made by the defendant, Mr Malachy Liddy, and other witnesses in regard to two complaints made by the defendant to the Police Ombudsman arising from the following matters:

(a) an incident on 18 September 2000 when the defendant is alleged to have been guilty of disorderly behaviour and a further incident, several weeks earlier, when the defendant made a formal complaint to the Police Ombudsman about the conduct of a Constable Curley, the main witness in the charge of disorderly behaviour;

(b) a declaration that the said summons is ultra vires, unlawful and of no force or effect.

[4] The grounds on which the relief is sought are that:

(a) the issue of the summons by the Resident Magistrate is an attempt to effect third party disclosure when there is no statutory provision for such disclosure in the Magistrates' Court (NI) Order 1981.

(b) the Resident Magistrate acted in excess of her jurisdiction and erred in law in her interpretation of article 118(1) of the Magistrates' Courts (Northern Ireland) Order 1981 (hereinafter called "the 1981 Order").

(c) no opportunity was given to the Police Ombudsman to address the Resident Magistrate either in writing or at a hearing as would be afforded under the Crown Court (Amendment) Rules (Northern Ireland) 2000 for a third party disclosure as provided for in respect of Crown Court Procedure.

(d) disclosure of information which has been obtained for the purpose of an ongoing criminal investigation against the police officer could cause prejudice to the investigation and the officer concerned. It could also undermine the Police Ombudsman in performing her statutory function to investigate complaints and to "secure the efficiency, effectiveness and independence of the police complaints system; and the confidence of the public and

of members of the police force in that system": section 51(5) of the Police (Northern Ireland) Act 1998.

(e) furthermore the defendant and his legal representative would not be permitted at his criminal trial to question a police officer about any complaint made against him which had not yet been adjudicated upon.

(f) if the defendant were to be refused disclosure of the material sought, being material which is not likely to be admissible at his trial, his Convention rights would not be infringed and such refusal would be in accordance with an attempt to balance the interests and rights of a party seeking disclosure with the rights of an officer against whom a complaint had been made but not yet adjudicated upon.

[5] Having considered the matter, and at the request of the parties, I was persuaded to hear these two applications sequentially and at the one sitting. It was clear that certain fundamental issues were common to both cases and therefore it was appropriate that the same judge should hear both applications at the one sitting in order to save time costs and avoid duplication.

Background

1. The application of Kieran Owen Butler

1. On the 3rd August 2001 Kieran Owen Butler ("the applicant") was involved in an incident in Ballymena with Sergeant Colin Audley of the PSNI. Arising therefrom the applicant was charged with disorderly behaviour, assault on the police and criminal damage to a police vehicle.

2. A further incident occurred on the 31st August 2001 again involving the applicant and Sergeant Audley and as a consequence thereof the applicant was further charged with breach of the peace, resisting arrest and assault on the police.

3. Arising out of both incidents the applicant made a complaint to the PO in each case specifying ill treatment by police officers. The PO undertook to investigate these matters and thereafter carried out various investigations and obtained statements from police officers and civilians.

[6] Prior to the hearing of the criminal charges against the applicant, his solicitor sought disclosure from the PO of all relevant material. On the 3rd December 2001 the PO stated it was not the policy to release witness statements during the course of

investigation. I am satisfied that this was an incorrect statement on the part of the PO and Mr Larkin QC who appeared on behalf of the PO in this application has indicated unequivocally that the policy of the PO is to disclose material which will assist the defendant in the defence of criminal proceedings or which may undermine the prosecution case.

[7] In any event the PO then wrote to the DPP advising them that they were in possession of material that may be relevant to the case.

[8] Thereafter on 7th March 2002 the applicant's solicitor wrote to the DPP referring to the Attorney General's recent guidelines on disclosure and asking him to obtain the relevant documentation from the PO's office. On 1st May 2002 the DPP responded that the PO had undertaken to provide material that might assist the defendant or undermine a prosecution case but that it held no such material in this instance.

[9] The applicant therefore makes the case that he is facing criminal charges and that both the DPP and PO, as public authorities within the meaning of Section 6 of the Human Rights Act 1998, are acting in a way which is incompatible with his right to a fair trial. An order is sought in the terms set out. It should be noted that originally the application by the applicant had sought an order to quash the refusal to disclose material from the complaints investigation to the applicant. Wisely I believe Mr Lavery QC who appeared on behalf of the applicant abandoned this avenue of relief and concentrated on the matters that I have referred to.

2. <u>The application by the Police Ombudsman In the matter of Malachy Liddy</u>

The salient background facts in this matter are well addressed in the affidavit of William A McNally solicitor acting on behalf of Mr Liddy contained in the book of pleadings at EMcCM1. Mr McNally deposed as follows where relevant:

> "(2) Mr Liddy is charged with disorderly behaviour contrary to Article 18(1)(a) of the Public Order (Northern Ireland) Order 1987. It is alleged that Mr Liddy behaved in an disorderly manner at or about Rainey Street, Magherafelt in the County of Londonderry between 8 pm and 8.15 pm on the 18th September 2000. Mr Liddy is alleged to have shouted abuse at two police officers namely Sergeant Curley and Reserve Constable Tennant. When Mr Liddy was approached and asked to moderate his behaviour, it is alleged that he refused to do so and swore at the police officers before being arrested. During the course of the arrest, Sergeant Kevin Curley pushed Mr Liddy, allegedly in self-defence, causing him to fall to the

ground and sustain an injury. Mr Liddy instructs that he was not in any way disorderly, he did not shout abuse at the police, he was not spoken to about his behaviour and he did not swear at the police. Mr Liddy instructs that he was walking in the vicinity of Rainey Street, Magherafelt … with two other men when he was approached and challenged by Sergeant Curley. Mr Liddy instructs that he was a victim of an unprovoked assault by Sergeant Kevin Curley before being arrested for the offence for which he is charged.

…

(3) Mr Liddy instructs me that he knew Sergeant Kevin Curley prior to this incident. Mr Liddy instructs that there is currently a complaint against police pending in relation to a previous assault on him by Sergeant Kevin Curley. The complaint against him in relation to Mr Liddy's previous encounter with Sergeant Kevin Curley was pending at the time the current alleged offences took place. A complaint against police has also been made by Mr Liddy in respect of the manner in which he was arrested on the 18th September 2000.

(4) … By way of clarification and in the light of issues arising in a subsequent judicial review hearing I confirm that the defendant does not ask for disclosure of ancillary correspondence or documents containing comments and analysis. Mr Liddy seeks disclosure of all statements made by him and other witnesses in regard to the two complaints made by him arising from the behaviour of Sergeant Curley".

[10] The charge of disorderly behaviour against Mr Liddy arising out of the incident on the 18th September 2000 then came before the learned resident magistrate sitting at Magherafelt Magistrates' Court. After a serious of submissions had been addressed to her on the matter, the learned resident magistrate concluded that it was appropriate to issue a summons under Article 118 of the Magistrate's Courts (NI) Order 1980 ("MCO") commanding the PO to appear as a witness before the Magistrate's Court on the grounds that she was "able to give material evidence on behalf of the defendant" and "to produce statements made by the defendant and

other witnesses in regard to two complains made by the defendant to the Police Ombudsman arising from the following matters":

> "(a) An incident on the 18th September 2000 when the defendant was alleged to having been guilty of disorderly behaviour; and
>
> (b) An incident approximately two weeks earlier [it is common case that this was a mistaken date] when the defendant made a formal complaint to the Police Ombudsman about the conduct of Sergeant Curley, the main prosecution witness in charge of disorderly behaviour".

[11] The Resident Magistrate in the course of a careful and reasoned judgment made clear that the disclosure was to be confined to each of Mr Liddy's complaints to the court on the 5th March 2002 and that the request for disclosure of other complaints in relation to Sergeant Curley were not to be granted as there was nothing to suggest that they would contain relevant or admissible evidence.

[12] In the course of that judgment the learned resident magistrate criticised the PO for causing delay in this matter and drew attention to some rather ambiguous and prima facie conflicting correspondence which had issued from the PO in the course of exchanges of correspondence with the defendant's solicitors. Whilst I understand the frustration experienced by the learned resident magistrate, for the purpose of this judgment I do not find it necessary to comment on the approach adopted in the course of the correspondence other than to address directly the net issues that arise in this case. The PO therefore seeks an order of certiorari to bring up and quash the summons as hereinbefore outlined.

Statutory Background

[13] It may be of assistance if I set out the statutory background against which the submissions in this case are set:

1. The Police (Northern Ireland) Act 1998 ("the 1998 Act"). This Act created the Office of the PO and set out the duties, powers and responsibilities. Where relevant to this case, the Act provides as follows:-

> "51-(1) For the purposes of this Part there shall be a Police Ombudsman for Northern Ireland
>
> …
>
> (4) The Ombudsman shall exercise his powers under this Part in such manner and to such extent as appears to him to be best calculated to secure –

(a) the efficiency, effectiveness and independence of the police complaints system; and

(b) the confidence of the public and of members of the police force in that system.

54-(1) If:

(a) it appears to the Ombudsman that a complaint is not suitable for informal resolution; or

(b) a complaint is referred to the Ombudsman under Section 53(6), the complaint shall be formally investigated as provided in sub-section (2) or (3).

63-(1) No information received by a person to whom this sub-section applies in connection with any of the functions of the Ombudsman under this Part shall be disclosed by any person who is or has been a person to whom this sub-section applies except –

(a) to a person to whom this sub-section applies;

(b) to the Secretary of State;

(c) to other persons in or in connection with the exercise of any function of the Ombudsman;

(d) for the purposes of any criminal, civil or disciplinary proceedings; or

(e) in the form of a summary or other general statement made by the Ombudsman which

(i) does not identify the person from whom the information was received; and

(ii) does not, except to such extent as the Ombudsman thinks necessary in the

public interest, identify any person to whom the information relates".

(2) Sub-section (1) applies to –

"(a) the Ombudsman; and

(b) an officer of the Ombudsman;

(3) any person who discloses information in contravention of this section shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

65-(1) The Secretary of State may issue guidance to the Police Authority and the police officers concerning a discharge of their functions

….

(4) In discharging his functions under Section 59, the Ombudsman shall have regard -

(a) to any guidance given to him by the Secretary of State with respect to such matters as are for the time being the subject of guidance under sub-section (1); and

(b) in particular, but without prejudice to the generality of paragraph (a), to any such guidance as to the principles to be applied in cases that involve any question of criminal proceedings.

(5) In discharging his functions under this Part the Ombudsman shall have regard to any guidance given to him by the Secretary of State with respect to matters the disclosure of which may be prejudicial to the public interest".

[14] It was common case that guidance has been issued by the Secretary of State in "Northern Ireland Office Guidance on Police Unsatisfactory Performance, Complaints and Misconduct Procedures" (hereafter called the "NIO Guidance"). Where relevant, Section 2.82 provides as follows:

> "Criminal proceedings
>
> 2.82 Where in the course of an investigation material comes to light which is likely to be of assistance to the complainant or any other person in defending pending criminal proceedings, or which suggests that such proceedings are unsafe or ill-founded, the Ombudsman should immediately bring it to the notice of the Director of Public Prosecutions. This also applies for any appeal as yet to be disposed of. Where the information calls into question the safety of a conviction in a case where the proceedings, including any appeal, have been completed, the Ombudsman should report the relevant information to the Criminal Cases Review Commission … where a complaint has been referred to the Chief Constable to investigate, such material should be brought to the attention of the Ombudsman immediately …".

[15] Mr Larkin QC in the course of a well marshalled skeleton argument which he augmented in submissions before me, argued that the PO follows this policy as set out in the guidelines and that it is lawful, reasonable and in accordance with her statutory obligations, powers and duties. In terms therefore the policy of the PO, which is to disclose material in her possession which is likely to be of assistance to the complainant or any other person defending any criminal proceedings or which suggests that such proceedings are safe or ill-founded, is an appropriate stance to adopt and that it has been honoured in both cases which are the subject of this application.

[16] **<u>The Magistrates' Courts (Northern Ireland) Order 1981 ("the 1981 Order")</u>**

Article 118 of this Order reads as follows:

> "(1) Where a Justice of the Peace is satisfied that any person is able to give material evidence or produce any document or thing before a Magistrates' Court, he may issue a summons directed to such person requiring him to attend before the court at the time and place appointed in the summons to give evidence or to produce the document or thing".

[17] **The Criminal Procedure and Investigation Act 1996**

In the case of Criminal Proceedings Sections 51(a) to Section 51(h) were inserted into the Judicature (Northern Ireland) Act 1978 under Section 66 of the 1996 Act as applied to Northern Ireland by Paragraph 28 of Schedule 4. Sections 51(a) et seq contain a statutory code dealing with the attendance of third parties as witnesses at the trial and the production of documents at or in advance of trial. Under Section 51(a)(1) it is provided:

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

Under sub-section (2) it is provided that in such a case the Crown Court shall, subject to the subsequent provisions of the section, issue a summons called "a witness summons" directed to the person concerned and requiring him to attend before the Crown Court at the time and place stated in the summons and give the evidence or produce the document or thing. A witness summons may only be issued under the section on an application and the Crown Court may refuse to issue the summons if any requirement relating to the application is not fulfilled.

[18] Section 51(b) introduces for the first time the concept of a witness summons which could be issued under Section 51(a) requiring a person to produce a document or thing as mentioned in Section 51(a)(2) and also requiring him to produce a document or thing at a place stated in the summons and at a time which is so stated and to produce that stated under Section 51(a)(2) for inspection by the person applying for the summons. This seems to equate to the formal witness summons in the Khanna subpoena procedure which is now issued on the civil side and which requires a witness to produce material documents to a party in advance of the trial. A party served with a witness summons may apply to the court to set aside a summons if he satisfies the court that he cannot give any evidence likely to be material evidence or, as the case may be, produce any document or thing likely to be material evidence.

[19] **<u>The Crown Court (Amendment) Rules (Northern Ireland) 2000 ("The 2000 Rules")</u>**

These rules were made to give effective provision to the 1996 Act relating to witness summonses. It sets out the appropriate procedure to be followed and is set out in Part X of the Crown Court Rules as inserted by Rule 4(2) of the 2000 Rules.

<u>The Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled to the Human Rights Act 1998 ("The Convention")</u>

In these cases it has been alleged that there is a danger of violation of the rights under Articles 6(1) and (3)(b) and (d) of the Convention which state, where relevant:

> "1. In the determination of …. any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law
>
> …
>
> 3. Everyone charged with a criminal offence has the following minimum rights: …
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> …
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him …".

[20] In interpreting an Act of Parliament, a court must have regard to the Convention, for it is required to reach an interpretation which is compatible with the Convention if this can be achieved. Accordingly in the light of the Human Rights Act 1998, in some instances courts may be required to revisit decisions previously regarded as binding. (*see R (H) v Secretary of State for the Home Department and Anor* (2002) 3 WLR 967).

<u>Relevant Jurisprudence</u>.

Before turning to my conclusions in this case, it may be helpful to summarise briefly the effect of two decisions which have formed the corner stone of the arguments in these cases.

(1) <u>*R v Derby Magistrates' Court ex parte D* (1995) 4 AER 526 ("Derby's case")</u>.

In this case the House of Lords considered the provisions of Section 90 of the Magistrates' Courts Act 1980 which empowered a magistrate to require any person "likely to be able to give material evidence or produce any document or thing likely to be material evidence" to attend as a witness or to produce the document or thing, (wording obviously similar to the 1981 Order). The House of Lords approved Simon Brown LJ's statement of principle in *R v Reading Justices ex parte Berkshire County Council* (unreported) where he stated:

> "The central principles to be derived from the authorities are as follows:
>
> (i) to be material evidence documents must be not only relevant to the issues arising in the criminal proceedings but also documents admissible as such in evidence;
>
> (ii) documents which are desired merely for the purpose of possible cross-examination are not admissible in evidence and thus are not material for the purposes of Section 97… counsel contends that the jurisprudence under Section 97 should be re-examined in the light of the general law governing disclosure in criminal cases, and that a less exacting test of materiality should be applied in the future. That is not a submission that I can accept. It seems to me that quite different considerations arise with regard for the production of documents by third parties …. however I regard the principles established under Section 97 as untouched by other developments in the criminal law".

[21] This approach follows *R v Cheltenham Justices ex parte Secretary of State for Trade* (1997) 1 AER 460 where the court made clear that it was not open to the defence to obtain a witness summons in a Magistrates' Court to secure discovery of documents for use in cross-examination. Lord Taylor CJ in *Derby's* case indicated that the lower court in that case had erred when it concluded that the documents sought were material in the sense of being generally useful and helpful to the defence rather than whether they were likely to be material evidence within the meaning of the Act. In substance therefore the effect of the House of Lord's decision in *Derby's* case was that a summons can be directed to a person only in circumstances where admissible evidence could be given.

[22] It is pertinent at this stage to refer to *R v H (L)* (1997) 1 Cr. App. R. 176 where the court gave guidance to judges as to the production of social service files in the context of a criminal trial. Sedley J said in this case:

> "… the only legitimate purpose of a summons under Section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 as under Section 97 of the Magistrates' Courts Act 1980 is to procure the production of 'any document … likely to be material evidence' – that is, documents which are themselves admissible in evidence, not merely documents likely to afford or assist a relevant line of inquiry or challenge. It thus stands aside from the broad stream of modern authority and practice on the disclosure of material in the hands of the prosecution. It means in particular that material which may simply be useful in cross-examination cannot be extracted from third parties by the use of witness summonses".

The judge concluded as follows:

> "I would add, however, that the entire argument was conducted not only between the parties but before me on the footing that it was legitimate to require production from the social services files of anything that might assist the conduct of the defence case. For reasons which I have given, this is a false premise: the grounds of production by third parties are limited to their possession or control of documents which are themselves admissible in evidence".

[23] It is my view that if the House of Lords decision in *Derby* is to be followed, then it would inevitably lead to this court quashing the Order of the learned resident magistrate in *Liddy's* case where the applicant is the Police Ombudsman and would greatly influence a decision to refuse the applicant Butler in his application.

[24](2) **R v PJO'N and MO'N (2001) NIEHC 25, Belfast Crown Court, 14 March 2001.**

Counsel on behalf of Mr Butler, Mr Liddy and the learned resident magistrate made this case a key component in their submissions. In this case Girvan J dealt with the issue of disclosure by third parties in a case where the defendants were charged with serious sexual offences. He considered two issues. First, whether the provisions of Section 51(a) of the 1996 Act, where they refer to the likelihood of a person being able to give material evidence or produce any document or thing likely to be material evidence fall to be interpreted and applied differently from the way in

which those terms were interpreted in the case law before 1996 either as a result of the provisions of the Convention or as a result of the changed context of the legislation construed as a whole. Secondly, he considered whether the provisions of Sections 51(a) et seq of the 1996 Act were exhaustive of the parties rights to gain access to third party documentation or whether the court had an inherent residual power to direct third parties to disclose material which might be of assistance to a party to the criminal litigation but which the defendant could not establish as being likely to be material evidence. Girvan J concluded that taking the legislation as a whole and having regard to the provisions of the Convention the court on an application made by a party does have power by a witness summons to require a third party to attend court either at the trial or at a specified time and place before trial to produce documents and things likely to be admissible evidence. In this context he found that material which is likely to assist the defence in defending the proceedings would constitute relevant evidence. He concluded that the court retained a power of its own motion in the interests of justice and a fair trial to order the production of documents and things likely to be admissible evidence (as construed by him). Of *Derby's* case he said at paragraph 45:

> "The approach adopted by the House of Lords in *R v Derby Magistrates' Court* can have potentially unfair and unjust consequences for a defendant. In a case of alleged sexual abuse the Crown case may often be based largely or solely on the allegations of one or more complainant whose evidence may require serious investigation and testing cross-examination. Without the defendant having a full opportunity to do so fully and fairly the jury may put too much weight on the evidence of the complainant. As already noted often highly relevant material and information … may be in the hands of third parties such as social workers, health and social services bodies and agencies, medical practitioners and psychiatrists. … Giving the provisions of Section 51(a) et seq the restrictive interpretation which would follow from an application of the approach in *R v Derby Magistrates' Court*, a defendant would be unable to establish that the third party is 'likely' to produce a document 'likely to be material evidence' admissible as evidence as such at the trial. What the defendant may well be able to establish is that an identified third party is likely to have possession of documentary material likely to be material to the defence in their preparation of his defence of the charges".

[25] The learned judge found some authority for his approach in *Jespers v Belgium* (1981) 27 DR 61 where the Commission emphasised that the "facilities" which everyone charged with a criminal offence should enjoy under Article 6(3)(b) of the

Convention included "the opportunity to acquaint himself for the purposes of preparing his defence with the results of investigations carried out throughout the proceedings". At paragraph 52 the judge said:

> "While there is no Convention law decision that directly deals with the point in issue in the present case, the width of the approach in *Jespers v Belgium* points in favour of construing Section 51(a) et seq as benevolently and favourably as possible in favour of the defence. The legislation must be construed and applied compatibly with the defendant's Convention rights under Section 3 of the Human Rights Act 1998. The restrictive and narrow approach adopted under the old legislation would deprive the defendants of access to material that justice would appear to demand that he should see in order to prepare his defence … The court is thus called on to construe Section 51(a) widely".

[26] For the applicant Kieran Butler Mr Lavery QC relied on Girvan J's decision, arguing that the Court should ensure that there is a fail safe procedure to protect a Defendant against an Ombudsman failing to realise the importance of documents which should be disclosed and that it was therefore important for a judge if necessary to carry out the balancing exercise as to whether documents should be disclosed rather than relying on the decision of the PO. Whilst recognising that *PJO'N's* case dealt with Crown Court proceedings, he argued that it would be anomalous and indefensible to operate a different procedure in the Magistrates' Court.

[27] Mr Maguire QC who appeared on behalf of the respondent learned resident magistrate in *Liddy's* case, argued that the learned resident magistrate had correctly relied upon the decision of Girvan J in concluding that Article 118 (1) of the 1981 Order did not preclude advanced disclosure and should be interpreted in the same manner as Girvan J had interpreted Section 51(a) of the 1996 Act. He submitted that Article 6 of the Convention applies to both higher and lower Courts drawing my attention to authority for such a proposition in *R (Director Public Prosecutions) v Acton Youth Court* (2001) 1 WLR 828 and *Foucher v France* 25 EHRR 234. He urged that the learned resident magistrate had essentially the same duties as a Crown Court judge in ensuring that a fair trial was universally applied.

[28] Mr O'Hare QC who appeared on behalf of the notice party Malachy Liddy in the application by the Police Ombudsman, echoed the argument that it would be anomalous to have a procedure for disclosure in the Magistrates' Court essentially different from that in the Crown Court. In a comprehensive skeleton argument he drew attention particularly to the need for full disclosure of the statements made by all police officers in the course of the investigation. His case can be shortly stated. A PO necessarily has an imperfect understanding of the issues in the criminal

proceedings and her approach, unlike legal representatives of the applicant, is not steeped in the nuances and subtleties of the criminal case. Therefore there should be extreme caution before accepting an assertion on behalf of the PO that documents should not be disclosed on the footing that they cannot assist the accused's defence or undermine the prosecution case.

Conclusions

[29] I have determined that I should dismiss the application for judicial review by Kieran Butler and that the Police Ombudsman is entitled to judicial review of the magistrate's decision and that I shall allow an Order of Certiorari quashing the learned resident magistrates Order in Mr Liddy's case. My reasons for so concluding are as follows:

(i) In Butler's case I am satisfied that there is no basis for quashing the decision of the second Respondent, the Director of Public Prosecutions, not to obtain the complaints investigations file pursuant to its obligation under the Criminal Procedure and Investigations Act 1996 and the Attorney General's Guidelines on Disclosure. I reject the suggestion that the 1996 Act is incompatible with the European Convention on Human Rights or that fairness demands more than the present policy of the DPP which is to disclose materials where that might assist a defendant or undermine the prosecution case. The case raised against the DPP is not that it has failed to make primary disclosure but that it failed to obtain the complaints investigation held by the PO. There was no factual dispute in this instance that the DPP had written to the PO asking whether it was intended to submit for consideration any material gathered during the course of the complaint investigation which might be relevant to a decision by the DPP as to the continuance or otherwise of the prosecution or which might fall to be disclosed under the statutory provisions or the Attorney General's Guidelines. The PO had responded to the effect that it would provide such material to the DPP where that might assist a defendant or undermine the prosecution case but that no such material was held by the PO. I am satisfied that that is an appropriate manner for the DPP to discharge his duties.

In *Rowe & Davis v The United Kingdom* (Application Number 28901/95) before the European Court of Human Rights in Strasbourg, the court dealt with the issue of disclosure in criminal proceedings. At paragraph 34 the court stated:

> "At common law, the prosecution has a duty to disclose any earlier written or oral statement of a prosecution witness which is inconsistent with evidence given by that witness at the trial. The duty

> also extends to statements of any witnesses potentially favourable to the defence".

The Court continued at paragraph 60,

> "It is a fundamental aspect of the right to a fair trail that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party… . In addition, Article 6 (1) requires, as indeed does English Law, that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused".

I consider that this is a tacit acceptance by the Court that the common law position and the position under the 1996 Act is consistent with Article 6 of the ECHR. Given that the policy of the PO equates with that of the DPP, I consider that there are no grounds for quashing the DPP's decision in this matter.

(ii) I consider there is no basis for quashing the PO's decision to refuse to disclose material from the complaints investigation to the office of the DPP or that the PO has behaved in a manner inconsistent with its obligations under the Human Rights (Northern Ireland) Act 1998. I consider that there is no general right or power to obtain discovery against a third party in criminal cases in the Magistrates' Court in Northern Ireland. As I will deal with shortly, I see no reason to conclude that the decision of the House of Lords in *R v Derby Magistrates' Court* should be reviewed in light of Article 6 above ECHR. As I have indicated I do not believe that fairness requires more than that the PO should undertake, as she has done in this case, to disclose material which, in her opinion, will serve to undermine the prosecution case or assist the defence case. I am unaware of any authority that suggests that PO should go further than this.

[30] I reject the argument that the PO is an ignorant third party who cannot be relied upon to be sufficiently steeped in the nuances and subtleties of the Defendant's case in either instance. Such an argument misrepresents and fails to understand the nature of the Office of the PO. As earlier outlined, the Office of the PO has been created by statute under the 1998 Act and is enjoined to exercise her

powers to secure not only the efficiency, effectiveness and independence of the police complaints system but also to ensure the confidence of the public and members of the police force in that system. This independent body, as Mr Larkin QC pointed out, has possession of the police file and in my view is fully au fait with the issues outstanding in these matters. Her position is quite unlike that of the usual third party position where agencies such as the Social Services or medical records officers would be quite unaware of the issues to be determined.

[31] I consider that parliament has recognised this in the terms of reference given to the PO and in the guidelines which the Secretary of State has set out. The nature of the investigation by the PO must be scrupulously protected and her independence guaranteed. The dangers inherent in widespread and untrammelled disclosure are well illustrated in the case of *R v Police Complaints Authority ex parte Green* (2002) (EWCA Civ 389, English Court of Appeal Civil Division) 26 March 2002 (hereinafter called "Ex parte Green"). That case involved a consideration by the court of an application for disclosure by the Police Complaints Authority in the course of an investigation. Hale LJ said at page 3:

> "The statutory functions of the Police Complaints Authority are there to fulfil at least three purposes;
>
> (1) the primary purpose must be to secure proper behaviour by police officers, by ensuring that allegations of improper behaviour are fully investigated and any wrongdoers brought to book, either by prosecution or by disciplinary procedures.
>
> (2) that purpose can only be achieved by a process which is fair and perceived to be fair, by both parties to the complaint, the complainant and the officer against whom the complaint is made. Proper behaviour is not secured or promoted by a disciplinary process which is arbitrary or unfair…
>
> (3) the process must also be such as to promote public confidence in the police. It is hugely important in a democratic society that the great mass of the population who are inclined to be law abiding should have the reassurance that their law enforcement agencies can be trusted to act properly or face sanctions if they do not. …hence the need for independent and effective investigation leading to sanctions where appropriate."

At paragraph 81 Hale LJ went on to say:

> "However, purpose (1) maybe be prejudiced by a general practice of disclosure, although there are cases where it would be enhanced. The problems are contamination and confidentiality. Contamination is not generally a problem in the civil and family jurisdictions which start from the proposition that witnesses are doing their best however misguided or mistaken their best may be. It is however a problem in the criminal jurisdiction which does not start from that proposition. Witnesses (apart from police officers) must be kept apart and not allowed to see one another's witness statements for two reasons: there is a risk of either (a) that they will deliberately trim their evidence to fit in with evidence of others (ie act dishonestly) or, perhaps more seriously, (b) that their honest evidence will be disbelieved because the accusation of trimming can be made to discredit it".

[32] At paragraph 83, dealing with confidentiality, Hale LJ was somewhat more dismissive of this danger:

> "83. Confidentiality is a different problem. People who give evidence to the investigating officer cannot be given a complete guarantee of confidentiality because their evidence may be needed to prove either a criminal or a disciplinary case. But a general promise of confidentiality unless their evidence is required for this purpose means that exculpatory evidence will normally be confidential whilst incriminating evidence will not. In other words, there is a real risk that conclusions favourable to the officer (and hence adverse to the complainant) may be based upon evidence which will not be disclosed, whereas the evidence for any proceedings against him will ultimately and correctly have to be disclosed".

[33] I have concluded that contamination in cases such as the two before me are real risks and are matters that have to be taken into account when looking at the duty of disclosure by the PO.

[34] I consider also that there is a further relevant factor raised by both Mr Larkin QC and Mr Morgan QC who appeared on behalf of the DPP. There is a danger that if all those interviewed by the PO become convinced that their statements may end up with the prosecution body, there may be some reticence on their part to co-operate. Hence, I believe there was not only logic but careful

deliberation in the nature of disclosure which has been outlined in the 1998 Order and the NIO Guidance with regard to the need to secure fairness of the rights of the accused in this context. An illustration of this is that the statement of the accused, if it was handed over "willy-nilly" by the PO to the DPP, could prove detrimental to the accused and might therefore inhibit his frankness to the PO.

[35] Accordingly I have concluded that the PO has acted in accordance with her statutory obligations and the NIO guidance in this case and that there has been no breach by her under the Human Rights Act 1998.

[36] I have concluded that Article 118 of the Magistrates' Court (Northern Ireland) Order 1981 should still be interpreted in light of the decision in *R v Derby* to which I have already referred and does not require reassessment in light of Article 6 of the ECHR. I recognise that Article 6 is to be given a broad and purposive interpretation and that is should apply throughout the judicial system. But that does not mean that the same procedure must be followed in all Courts whether dealing with Crown Court proceedings or summary proceedings. It has long been recognised that there are differences both of substance and procedure in the different courts. For example, there are no juries in Magistrates' Courts, provision for legal aid is not as generous as in the Crown Courts etc. Proceedings in the Magistrates' Courts are summary issues and it is important that hearings and trials should proceed, consistent with fairness, without delay. Hence as in *R v H Home Records* (1997) 1 Cr App R 176 courts have recognised that legislation prevents disclosure of material which may simply be useful in cross examination in these courts. It is significant that Girvan J in *PJO'N* was dealing with a Crown Court disclosure position and the provisions of the Criminal Procedure and Investigations Act 1996. Under the 1996 Act, Parliament has chosen to insert sections in the Judicature (Northern Ireland) Act 1978 (for example, Sections 51(b)) which make provisions for the first time in respect of pre-trial disclosure. In making express provision for advance disclosure Mr Larkin QC cogently submits that this necessarily, as a matter of elementary statutory construction, broadens what is properly obtainable by witness summons beyond a category identified in *Derby Magistrates' Courts* and *R v H*. Parliament has chosen not to extend those provisions to the Magistrates' Court Order at a time when it clearly must have been aware of the differences. I consider this to be a clear indication that it was not intended that these provisions should apply in the Magistrates' Court or that the interpretation of that Order by the House of Lords in *Derby* needed to be amended. I agree with Mr Larkin when he argues that fairness does not require uniformity of procedure and that what is fair depends on circumstance and context. The power of the resident magistrate is limited by Article 118 as interpreted by the House of Lords in *R v Derby* and in the absence of a change of interpretation by the House of Lords, I am of the view that the principles therein set out still hold good.

[37] Accordingly, I have come to the conclusion that the decision of the resident magistrate in Liddy's case was erroneous in so far as she has refused to be guided by the principles of *R v Derby* in the interpretation of Article 118 of the 1980 Order. I

therefore set aside and quash her summons directed to the PO on the 25 March 2003 to attend at the said court on the 1 April 2003 and to produce statements made by the defendant Malachy Liddy and other witnesses in regard to two complaints made by the defendant to the Police Ombudsman arising from the matters therein set out. Insofar as these conclusions are relevant to the *Butler* case, I refuse the amended application by the applicant seeking a declaration that the learned resident magistrate is entitled to issue a summons under Article 118 of the Magistrates' Court (Northern Ireland) Order 1981 to the Police Ombudsman or to any third party to produce the documents in question or any relevant document for consideration by the court as to whether they contain material which may assist the defence or undermine the prosecution case and as to what material ought to be disclosed to the defendant.