



12 March 2014

## PRESS SUMMARY

**R (on the application of British Sky Broadcasting Limited) (Respondent) v The Commissioner of Police of the Metropolis (Appellant) [2014] UKSC 17**  
*On appeal from: [2011] EWHC 3451 (Admin)*

**JUSTICES:** Lady Hale (Deputy President), Lord Kerr, Lord Reed, Lord Hughes, Lord Toulson

### BACKGROUND TO THE APPEALS

In March 2011 the Metropolitan Police arrested two military officers on suspicion of having committed offences under the Official Secrets Act 1989. The alleged offences concerned suspected leaks of top secret information from meetings of the COBRA Cabinet security committee to the security editor of British Sky Broadcasting Limited (“BSkyB”). The investigation against these officers has since been dropped, but the case has continued due to the importance of the legal issue raised.

Having arrested these officers, the police informed BSkyB that a criminal investigation had begun and sought disclosure of various documents, including copies of all emails between the security editor and the officers since October 2010. On 14 April 2011 the police served an application for a production order under the Police and Criminal Evidence Act 1984 on BSkyB, supported by a statement signed by a Detective Sergeant Holt (“DS Holt”).

The Police and Criminal Evidence Act 1984 (“the 1984 Act”) consolidated various police powers to obtain evidence for a criminal investigation. Generally, a magistrate may issue a search warrant on an application by a police constable made *ex parte* - without any other parties being aware or present. However, this process does not apply to material which is acquired or created for the purposes of journalism, and is in the possession of a person who acquired or created it for the purposes of journalism. Such material must be sought by a special procedure under Schedule 1 to the 1984 Act, which requires an application for a production order to be made to a Crown Court judge and to be heard *inter partes* - with any other affected parties present in court.

The police’s application for the production order was heard on 26 April 2011 and 3 May 2011 by a Crown Court judge in the Old Bailey, with both the police and BSkyB present. Both sides put in skeleton arguments and witness statements. The police made an application to adduce further evidence from DS Holt in the absence of BSkyB’s representatives. BSkyB objected to that course of action and raised other objections to the application. The judge allowed DS Holt to give evidence in the absence of BSkyB’s representatives, and made the production order. BSkyB sought judicial review of the judge’s decision.

The Divisional Court quashed the production order. It held, applying the Supreme Court’s judgment in *Al Rawi v The Security Service* [2011] UKSC 34, that it was procedurally unfair for BSkyB to have had an order made against it without full access to the evidence on which the police’s case was based and the opportunity to comment on or challenge that evidence. The police appealed.

## JUDGMENT

The Supreme Court unanimously dismisses the appeal. The judgment of the Court is given by Lord Toulson, with whom the other Justices agree.

The principle in *Al Rawi* applies to civil and criminal trials, and requires that any evidence used in such trials be disclosed to all parties. However, this case does not involve a trial but a statutory procedure designed to gather evidence for a possible case from a third party. As a generality, the *Al Rawi* principle should not be applied to such applications, since they do not involve the determination of substantive legal rights. An application under Schedule 1 to the 1984 Act to obtain journalistic material is however special, and is likely to involve the journalist's legal rights. Parliament had recognised this when it legislated that such an application should be heard *inter partes*. The exclusion of one party from some or all of the evidence is inconsistent with the nature of an *inter partes* hearing.

## REASONS FOR THE JUDGMENT

- The principle in *Al Rawi* is that, in a civil or criminal trial, it is not permissible for one party to be prevented from seeing evidence relevant to the other party's case. There are however a number of classes of case where departure from this rule can be justified for special reasons in the interests of justice. These include child welfare proceedings and proceedings involving the protection of confidential information [23].
- This case does not involve a trial, but a statutory procedure designed to gather evidence for a criminal case. In general, the *Al Rawi* principle should not be applied to an application made by a party to litigation or prospective litigation to use the procedural powers of the court to obtain evidence for the purposes of the litigation from someone who is not a party or intended party to the litigation. Such an application does not involve the determination of substantive legal rights as between the applicant and the respondent [24-28].
- However, the statutory procedure in this case is a special one. An application to obtain journalistic material is a highly sensitive and potentially difficult area, which is very likely to involve the journalist's legal rights. This has been recognised by Parliament, which has established the special procedure under Schedule 1 of the 1984 Act [26, 29].
- Parliament has required, by that special procedure, that an application for a production order shall be made *inter partes*. As a result, when that application is made, there is a discrete legal issue between the applicant (here the police) and the respondent (here BSKyB). Equal treatment of the parties to that issue requires that each should know what material the other is asking the court to take into account in making its decision, and should have a fair opportunity to respond to it. The Crown Court judge in this case should not have taken into account evidence from which BSKyB was excluded [30-31].
- For the avoidance of doubt, this does not prevent a court hearing a public interest immunity ("PII") application in relation to a production order *ex parte*. In a PII application the issue is whether the evidence is to be admitted at all. If the evidence is to be admitted in support of a production order, however, the *inter partes* nature of the hearing is inconsistent with that evidence being given *ex parte* [32].

*References in square brackets are to paragraphs in the judgment*

## **NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**

<http://supremecourt.uk/decided-cases/index.shtml>