

The expectation of privacy for suspects in criminal investigations: an overview of the decision in ZXC v Bloomberg

Introduction

In the vast majority of cases, those suspected of involvement in criminal offences will not become known to the general public until they have been charged and brought before the courts. Whilst this practice generally leads to an assumption that those under investigation will have the benefit of pre-charge anonymity, the state of the law in this area has been a matter of debate in recent years, in part due to the fallout from a number of high profile cases involving allegations of historic sexual abuse which followed the revelations about Jimmy Saville in 2012. It is against this backdrop that the Court of Appeal's recent judgment in the case of *ZXC v Bloomberg* [2020] EWCA Civ 611 should be read.

The facts

The Claimant was the Chief Executive of a company that was the subject of a criminal investigation. The Defendant had published an article regarding the conduct of that investigation, focusing in particular on a request for assistance that had been submitted by the investigating authority to their counterparts in another country.

The offences being investigated included bribery, corruption, and various other offences under both the Proceeds of Crime 2002 and Fraud Act 2006. The article identified the Claimant as a suspect and revealed various details about the role they were suspected to have played in the commission of the offences, including specific details of false representations they were said to have made and how the proceeds of the offences were believed to have been distributed. This information came from documents obtained by the Defendant which had been passed to the foreign authority as part of the request for assistance. Although it did not participate in the proceedings, the investigating authority objected to the publication on the grounds that these documents were highly sensitive and that the publication risked compromising the ongoing investigation.

The Claimant's solicitors requested that the article be removed from the Defendant's website on the grounds that it contained previously undisclosed and confidential information relating

to an ongoing investigation in respect of which no charges had been brought. The Defendant declined to do so, and the Claimant made an application for injunctive relief which was refused. The Claimant then issued proceedings for misuse of private information and succeeded at trial, with Nicklin J awarding damages and an injunction restraining any further publication. The Defendant appealed.

The general expectation of privacy for suspects in criminal investigations

The question at the first stage of claims based on the misuse of private information is whether a claimant has a reasonable expectation of privacy under Article 8 of the ECHR. This involves an objective assessment of the information contained in the publication and how a reasonable person would feel about the resulting publicity. In this case, the trial judge concluded that the Claimant did have such an expectation in relation to the information contained in the article, and this was the focus of the Defendant's first ground of appeal.

The Defendant argued that it is not the existence of an investigation that attracts an expectation of privacy, but the nature of the activity that was being investigated. The Claimant's conduct in his role as a senior executive of a large company were public aspects of his life and so did not warrant protection under Article 8.

Approving the approach taken by the trial judge, their Lordships rejected this argument, making clear that both the fact that someone is a suspect, along with any details that disclose the basis for that suspicion, do attract a general expectation of privacy¹. Echoing the reasoning followed in the earlier case of *Richard v BBC [2019] Ch 169* (a claim brought by Sir Cliff Richard in relation to coverage of a police raid at his house following allegations of historic sexual abuse), the Court referred to "the human characteristic to assume the worst (that there is no smoke without fire); and to overlook the fundamental legal principle that those who are accused of an offence are deemed to be innocent until they are proven guilty."²

This is the first time the Court of Appeal has had to deal with this question since the decision in *Richard*, and whilst it is not the first time such a conclusion has been reached, the clear

¹ See paragraph 82.

² *Ibid.*

statement of principle will undoubtedly have significant implications for the way in which criminal investigations are reported.

A general as opposed to absolute expectation

The Court was also eager to emphasise that the expectation is not invariable. There may be legitimate operational reasons for the police or other agencies to release information relating to a particular suspect, or circumstances where the suspect deprives themselves of the ability to enforce their right to privacy by virtue of their own conduct.

One example of this can be found in the earlier case of *In re JR38 [2016] AC 113*, where the Applicant – a 14 year old whose picture had been released to the media by police following their participation in a riot – was unable to rely on their right to privacy because the purpose of the publication was to identify them and others responsible for serious public disorder. Another significant feature of that decision was the fact that the activity in question took place in a public place, which was where the photographs were taken, making it more difficult for the Applicant to assert that they warranted protection in accordance with their rights under Article 8.

The situation encountered in *JR38* is perhaps the most obvious, and indeed most commonly occurring example of the legitimate operational reasons referred to in *ZXC*. Police forces routinely release pictures or other details that might identify individual suspects when trying to gather information. In recent years for example, there has been a growing tendency for police to use social media to assist them with their investigations. Whilst this decision undoubtedly underlines the need for investigators to think carefully before putting a suspect's private information into the public domain, if the reason for doing so is to try and identify or locate a suspect or, for example, to try and encourage witnesses to come forward to assist an investigation, there would be a strong argument that this amounted to a justifiable exception to the general expectation outlined by the Court in this case.

The effect of pre-charge publicity on criminal trials

The decision in *ZXC* is clear that the justification for preserving suspects' anonymity is the need to protect against people wrongly equating suspicion with guilt. So, whilst a claim for

misuse of private information can provide a civil remedy in the pre-charge phase of an investigation, there may well be a risk that any damage done by the publication could have an adverse impact on any subsequent criminal proceedings.

This is a point that was considered in *R v Abu Hamza [2006] EWCA Crim 2918*, where the Defendant argued that damaging pre-trial publicity had adversely affected his ability to have a fair trial, and that the trial judge should therefore have stayed the proceedings. Dismissing the appeal, the Court of Appeal held that whilst the trial judge had correctly acknowledged that the publicity could have jeopardised the fairness of the trial, the effect could properly be neutralised by appropriately directing the jury during summing up.

A rare example of such an argument succeeding can be found in the case of *R v Reade [1993] 10 WLUK 145*. The Defendants were three police officers who had interviewed the Birmingham Six and were now charged with perverting the course of justice in relation to their conduct during the investigation. Granting their application to stay the proceedings, Garland J found that the intensity and duration of the publicity had prejudiced the Defendants' right to a fair trial to such an extent that it could not be remedied by directions to the jury. He also stressed that this approach should only be used sparingly in the most exceptional of circumstances. In the vast majority of cases, therefore, it is likely that the solution will be to deal with the matter in summing up, but it is an issue the defence should be alert to, if only to ensure that appropriate directions are indeed given. For example, by directly addressing the importance of the jury disregarding anything they may have read or seen prior to the trial so that they decide the case on the basis of the evidence alone and ensuring that any such directions are adequately tailored to the specific facts of the case.

Conclusion

One of the effects of the decision in *ZXC* may be to revive the debate about the possibility of legislation in this area. The judgment refers to the observations made by retired High Court judge Sir Richard Henriques, who has argued that the damaging effects of false allegations warrant statutory protection.³ Such an approach would at least have the benefit of instantly

³ 'An Independent Review of the Metropolitan Police Service's handling of non-recent sexual offence investigations alleged against persons of public prominence'.

extending this protection to those who cannot afford to challenge (typically well resourced) defendants in the civil courts, though the free speech implications that are currently taken into account in such proceedings would need to be carefully considered.⁴ In this regard, it should be noted that the Government found insufficient evidence to justify the reintroduction of anonymity⁵ for defendants in rape case in 2010.⁶ As Sir Richard notes, such proposals would undoubtedly incur the wrath of the tabloid press, so it is difficult to see where the political will for such a proposal might come from in any event. For the time being, therefore, the decision in *ZXC* is likely to be the main source of protection for those concerned about the threat that criminal investigation poses to their reputation.

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⁴ For example, would any such measures be designed to limit coverage of allegations in the pre-charge phase alone, or would they restrict the ability of anyone, including victims of alleged abuse, to ever publicly discuss the allegations where charges are never brought?

⁵ Section 6 of the Sexual Offences (Amendment) Act 1976 granted anonymity to defendants in rape cases, but this was eventually repealed by section 158 of the Criminal Justice Act 1988.

⁶ 'Providing anonymity to those accused of rape: An assessment of evidence', Ministry of Justice.