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In what circumstances can an individual suppress through an injunction the dissemination of information identifying him as someone who has been arrested by the police, but not subsequently convicted of a criminal offence? This issue, considered by the Supreme Court in *Khuja v Times Newspapers Limited (Khuja)*,¹ unearths a tension between the long-standing principle of open justice, and the freedom of the press to report true and accurate information about the criminal justice system on one side, and privacy interests on the other. Where the matter leading to an arrest relates to allegations of the sexual abuse of children the effect on the privacy interests of the arrestee is likely to be particularly severe; putting the arrestee in a category of persons most loathed and feared by society.² It is for this reason that the decision of the Supreme Court by a majority of 5-2, which fell decisively on the side of open justice and the freedom of the press, merits consideration.

1. Introduction

In March 2012, the appellant, a prominent figure in the Oxford area, was arrested by Thames Valley Police along with nine other men in connection with a series of sexual offences against children. The arrests were made as part of “Operation Bullfinch”, which was launched by the police to address a pattern of crime involving the sexual exploitation of vulnerable girls by older men.³ The basis for the appellant’s arrest was that one of the complainants told the police that she had been abused by a man with the same first name (Tariq). However, after the complainant failed to select him in an identity parade, the appellant was told by the police that he was to be released without charge. Of the other nine men arrested, seven were convicted on 14 May 2013. At trial, the appellant was referred to by name on a number of occasions during the course of the complainant’s cross examination, and by a police officer giving evidence that the appellant had participated in the identity parade. The trial attracted national and local media attention, which was heightened by the perception that the victims of the men convicted had not been taken seriously by the police or child protection authorities.

The appellant successfully sought an injunction under section 4(2) of the Contempt of Court Act 1981, which prohibited the disclosure of any information that might identify him as the subject of pending criminal proceedings until he had been charged with a criminal offence. During the trial, the appellant successfully applied for another section 4(2) injunction to prohibit the publication of any report of evidence given at the trial which might identify him.

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¹ *Khuja v Times Newspapers Limited* [2017] UKSC 49.

² See T. Thomas, *Sex Crime: Sex offending and society* (3rd edn. Oxon: Routledge, 2016) 1.

³ n 1 above at [1].

Three applications were made by the respondents (the *Oxford Mail* and *The Times*) to lift the section 4(2) orders. The first two were made by *The Times* towards the end of the trial, and were rejected. The third application, made jointly by both respondents after the trial, looked likely to succeed as the proceedings against the appellant could no longer be prejudiced by the publication of his personal information. Before a ruling was made, the appellant initiated proceedings in the High Court.

On 22 October 2013, Tugendhat J, sitting in the High Court of Justice Queens Bench Division, dismissed the appellant's application for an interim injunction restraining publication of his identifying particulars (name, photograph etc.) in relation to the criminal proceedings.⁴ The application was made on the basis that the injunction was necessary to protect the appellant's right to respect for private and family life under article 8 of the European Convention on Human Rights (ECHR). Tugendhat J held that any such rights were overridden when balanced against the public and the press' rights to receive and impart information free from interference by a public authority under article 10 ECHR, and the principle of open justice protected under article 6 ECHR. The Court of Appeal (Lord Dyson MR, Sharp, and Vos LJJ) unanimously dismissed an appeal, concluding that as Tugendhat J had not erred in principle or reached a conclusion, which was manifestly wrong, it would not intervene.⁵

2. The Majority Decision

Lord Sumption (with whom Lord Neuberger, Lady Hale, Lord Clarke, and Lord Reed agreed) noted the value of the principle of open justice as "a guarantor of the quality of justice."⁶ Relying primarily on *In re S (Identification: Restrictions on Publication)*,⁷ and *In re Guardian News and Media Ltd*,⁸ Lord Sumption ruled that it was not for the courts, save in the most compelling circumstances, to create by process of analogy further exceptions to the principle of open justice than are currently set out in statute.⁹ In so doing, his Lordship rejected the appellant's argument that the judgment in *A v British Broadcasting Corporation*,¹⁰ where the Supreme Court rejected the BBC's application to lift an injunction on the basis that to do so would violate the respondent's rights under articles 2 and 3 ECHR, marked a change of approach. According to Lord Sumption, this decision turned on "very particular facts" and, therefore, did not undermine the general approach set out in previous authorities.¹¹

The appellant advanced a second argument that, in approaching the balancing exercise on the basis that the public will generally be able to distinguish between suspicion and guilt

⁴ *PNM v Times Newspapers Limited* [2013] EWHC 3177 (QB).

⁵ *PNM v Times Newspapers Limited* [2014] EWCA Civ 1132.

⁶ n 1 above at [13].

⁷ [2005] 1 AC 593.

⁸ [2010] 2 AC 697.

⁹ n 1 above at [28].

¹⁰ *A v British Broadcasting Corporation* [2015] AC 588.

¹¹ n 1 above at [28].

(applying *In re Guardian News and Media*),¹² Tugendhat J was committing an error of law by applying a legal presumption that was not warranted. Lord Sumption rejected this argument too, ruling that the Supreme Court in *In re Guardian News and Media* was not creating a legal presumption to be applied notwithstanding the circumstances. Rather, that Court (and Tugendhat J) were merely observing that, while some members of the public would equate suspicion with guilt, most would not. Consequently, Lord Sumption took the view that no error of law had been committed, Tugendhat J was entitled to reach the conclusion that he did.

In approaching the balancing exercise on which the immediate case turned, Lord Sumption determined that the public interest served through press reportage of the criminal trial extended to the publication of the identifying particulars of the appellant as: “the anonymised reporting of issues of legitimate public concern are less likely to interest the public and therefore to provoke discussion.”¹³ Lord Sumption determined that the policy permitting media reporting was grounded in the right of the public to be informed about significant public acts of the state, and the law’s recognition that the way in which the story is presented is a matter of editorial judgment, in which the desire to increase the interest of the story by giving it a human face is a legitimate consideration.¹⁴ Against the backdrop of this weighty public interest, Lord Sumption did acknowledge that some members of the public might equate suspicion with guilt, and that there was risk that the appellant and his family may be subject to harassment or other unpleasant behaviour as a result. However, his Lordship determined that the appellant’s right to respect for his private life under article 8 was not engaged as he did not hold a *reasonable expectation of privacy* over matters that have been discussed at a public trial. Lord Sumption did accept that the appellant’s article 8 rights were engaged owing to the impact that publication may have on his family life (the second limb of article 8(1)). Notwithstanding this concession, his Lordship characterised this impact as indirect and incidental, and ultimately of insufficient gravity to override the countervailing interests at stake.

3. The Minority Decision

Lord Kerr and Lord Wilson observed that if the correct approach to balancing the relevant ECHR rights was followed there would be no danger of an insidious erosion to the principle of open justice.¹⁵ The minority accepted the second argument put forward by the appellant that Tugendhat J took as a legal presumption that most members of the public will distinguish between suspicion and guilt, and, as a result, fell into error. The minority also accepted that, if most members of the public did recognise this distinction, this would tip the balance in favour of the press and the public. Crucially, however, Lords Kerr and Wilson rejected the presumption, noting that no evidence had been adduced, in *In re Guardian News and Media Ltd* or subsequent cases applying the presumption, to support its use.

¹² n 8 above at [66], per Lord Rodger.

¹³ n 1 above at [29].

¹⁴ *ibid* at [34].

¹⁵ *ibid* at [38].

Citing the report of the Leveson Inquiry;¹⁶ a consultation response to a Law Commission paper on contempt of court;¹⁷ and the judgment of Cobb J in *Rotherham Metropolitan Borough Council v M*,¹⁸ Lords Kerr and Wilson noted increasing judicial and political concern about the effect upon an innocent person's reputation of publication of the fact of his or her arrest. The minority also observed a "chasm" between the approach of the majority and the approach taken by Canadian courts in analogous cases,¹⁹ "which [the court] would be unwise to ignore."²⁰ The minority recognised that: "the naming of [the appellant] in the criminal trial creates a powerful extra dimension to the public interest in the proposed publications."²¹ However, this was set against the circumstances in which the appellant came to be named in the trial, which largely surrounded a failure on behalf of the complainant to recognise him in identity parade. Lords Kerr and Wilson concluded that the balance fell in favour of the appellant's article 8 rights:

[A]gainst the public interest that the proposed piece about section 4(2) would be considerably more engaging and meaningful, this court needed first to recognise the risk to [the appellant] that his identification would generate a widespread belief not only that he was guilty of crimes which understandably attract an extreme degree of public outrage but also that he had so far evaded punishment for them; and then, in consequence, to balance the risk of profound harm to the reputational, social, emotional, and even physical aspects of his private and family life, notwithstanding that he is presumed by law to be innocent and has had no opportunity to address in public the offences of which at one time the police suspected him to be guilty.²²

4. Discussion

Those in doubt that the appellant might be subject to abuse or harassment upon the lifting of his injunction need only to type his name into the Twitter search bar on the day after the judgment was given. An *Oxford Times* article reporting on the judgment and identifying the appellant was circulated in a "tweet" from Tommy Robinson, former leader of the far-right political group, the English Defence League. This attracted comments from Twitter users that Khuja was a "scumbag", as well as calls to "castrate the mongrel", and "make his life miserable". The story also gained national media attention.²³ Whilst Lord Sumption acknowledged the risk that the appellant might be subject to similar treatment by some

¹⁶ Leveson LJ, *Inquiry into the Culture, Practices and Ethics of the Press: Volume 2* (London TSO, 2012).

¹⁷ Treacy LJ and Tugendhat J, "Contempt of Court: A Judicial response to Law Commission Consultation Paper No 209" (2013).

¹⁸ [2016] EWHC 2660 (Fam) at [39].

¹⁹ See *BG v The Queen in Right of The Province of British Columbia* (2002) BCSC 1417; *R v Henry* (2009) BCCA 86.

²⁰ n 1 above at [54].

²¹ *ibid* at [57].

²² *ibid* at [58].

²³ "The millionaire, a sex trial and his battle for secrecy" (The Times, 20 July 2017); "Oxford grooming arrest man loses anonymity case" (BBC, 19 July 2017).

members of the public as a consequence of publication, his Lordship ruled that the appellant's right to respect to private life could not be engaged through such publication as he could not be said to hold a reasonable expectation of privacy over matters which had been discussed in open court. This line of reasoning, which focuses on current norms of privacy protection rather than on how a particular measure might set back the privacy related interests of the individual, is not surprising given that the Supreme Court has recently affirmed the "reasonable expectation of privacy" test as a mandatory precondition for the engagement of the private life limb of article 8.²⁴ It is, however, regrettable; serving as another example of how domestic courts' elevation of the test unduly narrows the scope of article 8 for those subject to a criminal process by cutting off an analysis of how such a process can impact upon the private life of the individual.²⁵

The minority engaged in a more holistic article 8 analysis, determining the weight of the appellant's article 8 rights not only through reference to the impact that publication might have on his family, but also to the impact that publication would have on *his* reputation, and emotional and physical wellbeing. However, with an exclusive focus on what impact publication would have on the appellant and his family, even this analysis does not fully acknowledge the wider social utility that might be accrued through the protection of the appellant's privacy. When privacy interests clash with other societal interests, such as free speech, they are often deemed to be of marginal importance, selfish, or anti-social.²⁶ The extent to which the public interest can be served *through* privacy protection is often downplayed or ignored.²⁷ Mead suggests that when free speech claims are used to legitimise privacy intrusions this can compromise our ability to form expansive social networks.²⁸ The embarrassing or stigmatising nature of information, such as that which links an individual with child sex offences can, when disseminated, prevent him or her from developing new social relationships. This, according to Mead, is detrimental not only to the individual concerned, but also to society:

The social benefit of A's individual privacy in such a case is predicated on social identity being something that is not inscribed and static but socially contextualised and reflexively interactive. I learn about myself from my interactions with others. A learns to develop, to mature and to change following those interactions – as in turn does B... Thus, there is a shared interest in socialisation, something that a guarantee of limited release of information can help bring about.²⁹

²⁴ *In re JR38* [2015] UKSC 42 at [95].

²⁵ See J. Purshouse, "The Reasonable Expectation of Privacy and the Criminal Suspect" (2016) 96 *MLR* 871, 882.

²⁶ Criticisms of the right to privacy which run along these lines have come from a number of different angles: see C. A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989) 187; A. Etzioni, *The Limits of Privacy* (New York: Basic Books, 1999).

²⁷ D. Mead, "A socialised conceptualisation of individual privacy: a theoretical and empirical study of the notion of 'public' in MOPI cases" (2017) 9 *Journal of Media Law* 100.

²⁸ *Ibid*, 112.

²⁹ *ibid*, 112.

Understood in this broader sense, the trade off between privacy, on the one hand, and freedom of speech, on the other, is no longer one where the individual's personal and *possibly* reprehensible desire to conceal aspects of his or her self is competing against the common welfare of all of society. Rather it becomes two aspects of the common good competing against one another. For privacy interests to be taken seriously, they must be recognised as being fundamentally important to society and not just the individual making the claim.³⁰

The appellant's argument, that Tugendhat J made an error of law by applying a false presumption that the public will generally appreciate that the appellant was merely suspected of committing child sex offences, and not guilty of them, was a significant point of contention in the Supreme Court. The supposed presumption originates in the following comments from Lord Rodger in *In re Guardian News and Media Ltd*:

In allowing [the publication of the identity of suspects], the law proceeds on the basis that most members of the public understand that, even when charged with an offence, you are innocent unless and until proved guilty in a court of law. That understanding can be expected to apply, *a fortiori*, if you are someone whom the prosecuting authorities are not even in a position to charge with an offence and bring to court.³¹

The minority rightly observed that the statement “the law proceeds on the basis” suggests that, unless there is good reason not to do so, the courts should act on the basis that most people believe that someone arrested or charged with an offence is innocent until proven guilty. The proposition seems to have emerged unsupported by authority or evidence. As Lords Kerr and Wilson note: “Lord Rodger cited no authority for the proposition. Indeed, he referred to no evidence in support of it. No such evidence had been adduced in those proceedings.”³² The minority then cited a series of High Court authorities, and authorities from other jurisdictions to doubt the validity of the proposition. This compelling challenge to the notion that the public will generally recognise and accept the distinction between suspicion and guilt can be developed even further. In *R (L) v Commissioner of Police of the Metropolis*,³³ the Supreme Court held that the dissemination of non-conviction information (including allegations and arrest records) in the (admittedly, separate) context of an Enhanced Criminal Record Certificate would have a detrimental impact on the prospects of job applicants pursuing their chosen career. In holding that such a practice engaged article 8(1) ECHR, Lord Neuberger (who, notably, was in the majority in *Khuja*) observed that the disclosure of any such non-conviction information held on police records would likely “represent something close to a killer blow” to the hopes of a job applicant.³⁴ If it were true that all but an unreasonable minority of the public would not take such arrests or allegations

³⁰ B. Goold, “How Much Surveillance is Too Much? Some Thoughts on Surveillance, Democracy and the Political Value of Privacy” in D. Scharum (ed.), *Overvaaking i en Rettstat: Surveillance in a Constitutional Government* (Fagbokforlaget, 2010) 38-48, 46.

³¹ n 8 above at [66].

³² n 1 above at [47].

³³ *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3.

³⁴ *ibid* at [75].

as an indicator of guilt then it is difficult to see why the disclosure of mere suspicions in the context of criminal records checking would have this kind of detrimental impact.

5. Conclusion

In *Khuja*, the Supreme Court was faced with an unenviable balancing exercise. The majority recognised that the respondents, in seeking to publish the appellant's identifying particulars, were serving a social function of fundamental importance by upholding the principle of open justice. However, in determining the "weight" that should be attributed to the appellant's private life, the majority did not, at least in their articulated reasoning, give sufficient weight to the important social functions served through privacy protections, and the detrimental impact that publication would inevitably have upon the private life of the appellant. Without a full recognition of the impact of publication on the appellant's private life, the Supreme Court could not hope to strike a fair balance between the competing fundamental rights at stake in this case.