

RECENT DEVELOPMENTS

HUMAN RIGHTS

Pre-charge disclosures, contempt of court, privacy and free speech

Dr Steve Foster*

WFZ v BBC [2023] EWHC 1618 (KB) High Court, King's Bench

Introduction

Following the Supreme Court decision in *Bloomberg LP v ZXC*,¹ a person under criminal investigation has, prior to being charged with any offence, a reasonable expectation of privacy in respect of information relating to that investigation. Thus, as a starting point at least, the revelation of those details will be a breach of an individual's expectation of privacy, as protected by the tort of misuse of private information and by Article 8 of the European Convention (as given effect to under the Human Rights Act 1998). That will be the case unless such disclosure can be justified by the particular circumstances of the case, or later in the full trial by employing a public interest defence to outweigh that initial expectation of privacy.

The High Court used the principle in *Bloomberg* in a recent decision where it granted an interim injunction restraining the BBC from publishing the identity of a high-profile man, who had been arrested in connection with sexual offences but who had not at that point been charged.² In that case the court used the rules of contempt of court, rather than (or in addition to) the law of misuse of private information, and found that the press's freedom to publish and the public's 'right to know' of the arrest were outweighed by the powerful public interest in the criminal justice proceedings not being impeded or prejudiced.

The rule in *Bloomberg* has excited a great deal of academic debate regarding the balance between individual privacy (and reputation) and press freedom,³ but this commentary will focus on the use by the High Court of contempt of court law to justify the interference with the press' freedom to inform the public of ongoing criminal investigations. It will argue that whatever the merits of the principle in *Bloomberg*,⁴ the use of contempt of court to stifle discussion on criminal investigations needs to be restrained in line with the intention and spirit of the Contempt of Court Act 1981. That Act was passed

* Associate Professor in Law, Coventry University

¹ [2022] UKSC 5.

² *WFZ v BBC* [2023] EWHC 1618 (KB)

³ In 2002, five articles were published in the *Journal of Media Law* as part of a symposium on the case: Thomas D.C. Bennett 'Confidence, privacy, and incoherence' (2002) 14(2) JML 245; Robert Craig 'Defendant anonymity until charge, the presumption of innocence and the taxonomy of misuse of private information' (2002) 14(2) JML 266; Jeevan Hariharan 'Privacy and defamation in *ZXC*: some concerns about coherence' (2002) 14(2) JML 238; Gavin Phillipson 'Privacy, defamation and *ZXC v Bloomberg*, Supreme Court confirms suspects' privacy rights: the judgment clarified, two criticisms answered' (2022) 14(2) JML 257; Nicola Moreham 'Privacy, defamation and *ZXC v Bloomberg*' (2022) 14(2) JML 226. See also Nicola Moreham 'Privacy, confidentiality, and reputation: a reasonable expectation of privacy while under criminal investigation' [2023] 139 LQR 360.

⁴ Recently, the Northern Ireland High Court ruled that legislation that made it an offence to identify suspected sex offenders before they were charged (the ban lasting until 25 years after their death) was beyond the Assembly's powers and incompatible with Article 10 of the ECHR. The Court noted that the provision had a chilling effect on press freedom: Alan Erwin, 'Legal challenge by Belfast Telegraph successfully overturns law on sex offence suspects' anonymity', *Belfast Telegraph*, 31 May 2024.

to ensure that the tenets of free speech on matters of public interest are balanced against the administration of justice and the right to a fair trial, thus ensuring that that domestic law complied with Article 10 of the European Convention on Human Rights.⁵ Thus, it will be argued that the use of contempt law in these cases risks the courts' ability to depart from the starting point of privacy expectation established by the Supreme Court in *Bloomberg*, and thus uphold the public interest in publication of police investigations into crime.⁶ The article will also examine a recent decision of the European Court of Human Rights, which further protects an individual's rights not to be prejudiced by pre-trial statements, in this case made by state prosecutors.⁷

Facts and decision in *WFZ*

The claimant, a high-profile man who had been arrested on suspicion of sexual offences against several complainants but not charged, applied for an interim injunction to restrain the BBC's intended publication of his identity. The BBC wished to identify Z by name to serve as an illustration of allegations of serious sexual offences within his industry, which were not acted upon by employers. The claimant submitted that publication would constitute an invasion of his right to privacy, a contempt of court and/or an unjustified interference with his rights to a fair criminal trial as guaranteed by Article 6 of the European Convention.

Granting the application granted, the court noted that this was an unusual case in that the BBC was proposing a departure from the uniform general practice not to publicly identify individuals who had been arrested before a charging decision had been made. In that sense, courts had plenty to say retrospectively about cases in which suspects had been identified after arrest and before charge and where catastrophic consequences had flowed.⁸ The Supreme Court had recently established that the starting point was that a claimant under criminal investigation, prior to being charged, had a reasonable expectation in law that he would not be identified.⁹

With respect to the claim in contempt of court, since the claimant's current status was as a person under arrest, the court should begin with the question of contempt. It was not in dispute that the claimant had not been named by an authoritative source, so the naming of him by the BBC would be a substantial game-changer and would be a major news story in its own right. His naming would cause an uncontrolled explosion of personal speculation that he would be powerless to stem.¹⁰ Further, he would not have a fair opportunity to respond publicly and the intended publication would present the allegations in an incomplete and unbalanced manner.¹¹ The court then listed the likely negative effects of the BBC's intended publication on the course of justice: publicity could incite false complainants; complainants would be exposed to allegations at any future trial that they had been influenced by the publicity; the publication might discourage defence witnesses who might be unwilling to publicly associate themselves with Z; and bad character material might be put into the public domain which would be inimical to the prospects of a fair trial. These, in the court's view, were all issues associated with post-arrest, pre-charge publicity, and as the period between arrest and charge was governed by the statutory strict liability contempt provisions, fundamental respect was due to the complainants' desire and expectation that the claimant would face formal justice.¹²

In the court's view, the law of contempt was designed to ensure that (their) voices were heard without advance jeopardy, and in this case, the court was sure that naming the claimant created a substantial

⁵ The 1981 Act was passed to ensure after the European Court's ruling in *Sunday Times v United Kingdom* (1979) 2 EHRR 245, considered below.

⁶ Steve Foster, 'Balancing expectations of privacy in police investigations with press freedom: the Supreme Court's decision in *Bloomberg v ZXC*' (2022) 27(1) *Coventry Law Journal* 95.

⁷ *Narbutas v Lithuania*, Application No. 14139/21, decision of the European Court of Human Rights 19 December 2023.

⁸ Citing *A-G v MGN Ltd* [2011] EWHC and *Sicri v Associated Newspapers Ltd* [2020] EWHC 3541 (QB).

⁹ *WFZ v BBC* [2023] EWHC 1618 (KB), [39, 45-47], citing *Bloomberg PL v ZXC*, n. 1.

¹⁰ *WFZ v BBC* [2023] EWHC 1618 (KB), [52].

¹¹ *WFZ v BBC* [2023] EWHC 1618 (KB), [57].

¹² *WFZ v BBC* [2023] EWHC 1618 (KB), [55-58].

risk that the course of justice in the proceedings would be seriously impeded or prejudiced, a risk that was not capable of being mitigated.¹³ Although the court had regard to Article 10 of the European Convention, the press's freedom to publish and the public's "right to know" were outweighed by the powerful public interest in criminal justice. That, in addition to the suspect's interests, was the public interest specifically protected by the Contempt of Court Act 1981.¹⁴

The court then held that it been necessary to decide, it would have been satisfied that the claimant would be likely to establish at trial that publication would have amounted to a misuse of his private information.¹⁵ In its view, the dominant features of the case were the intimate sexual nature of the conduct in question and the likely destructive effect on the claimant's autonomy, reputation and prospects of justice of immense publicity at the instant stage of the criminal proceedings. Thus, the claimant had a reasonable expectation of privacy in those circumstances.¹⁶

Analysis

In contrast to more recent cases that have prevented the media and others from disclosing pre-trial information, the present case was decided under the law of contempt of court rather than misuse of private information, although the High Court stated that the claimant would also have been successful had the action been brought in misuse of private information. Traditionally, contempt of court has been used where an individual's right to a fair trial would be compromised by public (media) discussions of guilt or possible outcome before the trial, thereby jeopardising the right to a fair trial; although the main purpose of contempt law is to protect the administration of justice, and the public's confidence in such. In such cases, it must be shown that the media intended to interfere with proceedings, or, under s.2 of the Contempt of Court Act 1981, that the publications would create a *substantial risk* that the course of proceedings in question will be *seriously impeded or prejudiced*.¹⁷ Further, legal proceedings begin at the point of arrest,¹⁸ although a recent Law Commission report into contempt of court has invited consultees' views on whether criminal proceedings should continue to be considered active from the point of arrest, or be moved to the point of charge.¹⁹ Any such change would not disturb the ruling in *Bloomberg* with respect to misuse of private information cases, but would relieve the press from threats of contempt actions.

However, contempt of court can be employed with respect to interferences with the pre-trial process, and in *Attorney-General v MGN Ltd*,²⁰ the court accepted that the vilification of a suspect under arrest readily fell within the protective ambit of s.2(2) of the Act, and as a potential impediment to justice. In the court's view, at the simplest level, publication of such material might deter or discourage witnesses from coming forward and providing information helpful to the suspect's defence. Accordingly, it was not an answer that a combination of the directions of the trial judge and the integrity of the jury would ensure a fair trial; the evidence at trial could be incomplete or its existence might never be known or only come to light after conviction. It is in this sense, therefore, that contempt laws are being employed in pre-arrest cases, and the media and others need to get round not only the *Bloomberg* starting point, below, but also defend a charge of contempt. This also leaves unresolved the question whether the public interest defence, contained in s. 5 of the 1981 Act,²¹ is available to those who disclose such

¹³ *WFZ v BBC* [2023] EWHC 1618 (KB) [70].

¹⁴ *WFZ v BBC* [2023] EWHC 1618 (KB). [70-72]

¹⁵ *WFZ v BBC* [2023] EWHC 1618 (KB). [75]

¹⁶ *WFZ v BBC* [2023] EWHC 1618 (KB). [86], citing *Murray v Express Newspapers Plc* [2008] EWCA 446.

¹⁷ *Attorney-General v Newsgroup Newspapers* [1987] 1 QB 1.

¹⁸ Section 2 and Shed 1, Contempt of Court Act 1981.

¹⁹ Law Commission, *Reforming the Law: Contempt of Court*, Consultation Paper 262, 9 July 2024, chapter 5, 5.102.

However, the Commission concluded that arguably the present restriction is necessary and proportionate to protect the fair trial rights of the person who has been arrested. On that basis, therefore, it felt that it may be appropriate to continue treating criminal proceedings as active from the point of arrest (at 5.101).

²⁰ [2012] 1 WLR 2408.

²¹ Section 5 provides that a publication made as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to the particular legal proceedings is merely incidental to the discussion

information, and how that defence could be accommodated in the law relating to misuse of private information.

In *Bloomberg*, the UK Supreme Court confirmed that, in general, a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation. Consequently, the revelation of those details will amount to a breach of an individual's expectation of privacy, unless justified by any public interest defence, or other circumstances that refute or outweigh that initial expectation of privacy. *Bloomberg*, and the High Court ruling in *Cliff Richard v BBC*,²² gave rise to several areas of concern with respect to media freedom and the public interest defence. Thus, the decisions might be unduly restrictive of press freedom and investigative journalism, clashing with many of the principles that the European Court has established in the area of public interest free speech.²³ There are also concerns that *Bloomberg* is difficult to reconcile with the principle that Article 8 should not be relied on in order to complain of a loss of reputation that resulted from the claimant's own actions.²⁴ The Supreme Court held that this principle only applied where a person is *actually convicted* of a criminal offence or investigated and found to have committed the alleged misconduct. The European Court has certainly allowed interference with privacy rights where that involves the reporting of public events *after* the claimant's arrest, and where there is a public interest in disclosing those details.²⁵ The expectation of privacy may also be lost where the information has already entered the public domain, especially where the claimant was responsible for that disclosure.²⁶

Further, the claimant's expectation of privacy in *Bloomberg* survived despite being an officer a large corporation who was being investigated for fraud and corruption; facts outweighed by the dominant element of harm to reputation and the presumption against pre-charge disclosure. It is, thus, getting more difficult to imagine cases where pre-trial disclosure might be justified, beyond those cases where the individuals themselves had been responsible for putting the information in the public domain. Despite that, the Northern Ireland High Court recently ruled that the Justice (Sexual Offences and Trafficking Victims) Act (Northern Ireland) 2022, which granted anonymity to sexual offence suspects, and made it a criminal offence to identify such persons before they were charged, was incompatible with press rights to freedom of expression.²⁷ That ruling was on the compatibility of secondary legislation with Article 10 (and the Assembly's legislative powers).²⁸ In this case, the court finding incompatibility because: the Assembly had failed to consider organisations such as the media throughout the legislative process; the Act contained no public interest defence available to the media; and that the media were not identified as persons who could challenge or modify the statutory ban. Thus, that judgment does little to question the *Bloomberg* ruling, or indeed resolve the conflict in our present case, but certainly clarifies the absoluteness of the rule and starting point of privacy in such cases.

Despite the arguments against pre-arrest disclosure, the Strasbourg Court is keen to protect the individual from a disproportionate and unnecessary interference with their private and reputational rights. It has, thus, imposed limitations on the press when reporting on criminal investigations as a means of upholding due process and individual privacy, including the right to be forgotten and to facilitate the process of rehabilitation.²⁹ It has also approved of restrictions that uphold the

²² [2018] EWHC 1837 (Ch).

²³ *Sunday Times v United Kingdom* (1979) 2 EHRR 245, *Lingens v Austria* (1986) 8 EHRR 407, *Oberschlick v Austria* (1995) 19 EHRR 389, *Observer and Guardian v United Kingdom* (1991) 14 EHRR 153, and *Axel Springer v Austria* (2012) 55 EHRR 6).

²⁴ *Gillberg v Sweden* (2012) 34 BHRC 247.

²⁵ *Axel Springer v Germany* (2012) 55 EHRR 6.

²⁶ *RTBF v Belgium*, Application no. 417/15, decision of the European Court of Human Rights, 11 December 2022.

²⁷ *In the Matter of an Application by Mediahuis UK Limited and the Irish News Limited for Judicial Review* [2024] NIKB 45.

²⁸ Under s.6 of the Northern Ireland Act 1998, a provision of an Act is not law if it is outside the legislative competence of the Assembly, and where it is incompatible with ECHR rights; see s.21, Human Rights Act 1998, which states that laws passed by the assembly are subordinate legislation and thus can be struck down as incompatible with ECHR rights.

²⁹ *Egeland v Norway* (2010) 50 E.H.R.R. 2 and *Mediengruppe Österreich GmbH v Austria* (Application No. 37713/18, decision of the European Court of Human Rights 26 April 2022

administration of justice, and where the media have misused confidential information in the reporting on the case.³⁰ In a recent judgment, in *Narbus v Lithuania*,³¹ the Court found a violation of Article 8 when the President, the Minister of Health and several members of the Seimas (parliament), had made public comments implying his guilt after he had been subjected to provisional detention on suspicion of fraud. There had also been a complaint that the investigating authorities had disclosed excessive information about the case to the media, including his full name, thereby harming his reputation. Although the Court accepted that providing information to the public about the trial contributed to a debate of public interest – concerning his involvement in purchase of Covid-19 tests - the disclosure of his identity had greatly increased media interest in the case. The Court also noted that the applicant had not been a politician or in public office at the time (he had been a university lecturer, the head of a private company and a self-employed consultant). Further, his previous public role had not made him comparable to a politician or public official, to justify the disclosure of his identity.

Similarly, in domestic law the courts can protect the identities and private life of those who are facing legal proceedings, even after charge and during the proceedings. Thus, in the recent case of *JWS v JZX*,³² the court granted an anonymity order against the defendant, a well-known public figure in the early stages – the claim form had not yet been served - of a civil claim relating to historic sexual abuse of a minor (the claimant). The court found that the defendant's Article 8 rights were clearly engaged, as the complaints were likely to cause the wider public to hold derogatory opinions of him, beyond what would generally be expected of a party to litigation. This intrusion would be more than pure embarrassment, and would imply criminality. Further, there was no justification for, or public interest in identifying him at such an early stage in proceedings when the materials raised highly significant evidential questions that would need to be addressed for the claim to be successful.³³

As to the defendant being a well-known public figure, the court found that while it was not the court's function to protect a party from all embarrassment or stigma caused by involvement in litigation, in this case the defendant would suffer irreparable damage to reputation by identification. Further, there would be significant losses to numerous other individuals working in/associated with enterprises with which he was concerned and which were wholly unconnected with the alleged claim.³⁴ The Court also noted that any event, the defendant had accepted that, if he was unsuccessful in his defence, his anonymity should be waived, and at that point (if not earlier), the public would have the full benefit of the facts with which to satisfy any legitimate interest in his conduct.

The key to Convention-compliance appears to be a willingness of the domestic courts, and the legislature, to accommodate the underlying values of *both* the right to privacy and freedom of expression, and to accommodate the public interest in free speech and press freedom in appropriate cases. However, recent case law has shown a preponderance towards protecting the various privacy and fair trial rights of the individual, recognising the dangers of trial by media and the lack of public interest in unwarranted intrusions into the right of private life of those facing investigations and undergoing legal proceedings.

Conclusion

For many, the starting point established by the UK Supreme Court in *Bloomberg* attached undue weight to the fact that the media might breach the practice of confidentiality whilst reporting on ongoing criminal proceedings. Further, the use of contempt laws in the *MGN* and *WFZ* cases augments the individual's right of privacy and reputation, adding their due process rights to those already guaranteed

³⁰ *Bedat v Switzerland* (2016) 63 EHRR 15

³¹ Application No. 14139/21, decision of the European Court of Human Rights, 19 December 2023.

³² [2024] EWHC 1345 (KB).

³³ Further, there was medical evidence as to the likely health impact on him of a loss of privacy in the claim. Such evidence would not necessarily be sufficient reason to prefer private life over freedom of expression, the evidence of future health risk in this case was well-defined and met the applicable standard to merit interference with the usual principles of open justice.

³⁴ Another significant factor was the very real risk of for jigsaw identification of the vulnerable, already anonymised claimant by waiving anonymity of the defendant.

by Article 8. Thus, in most cases the media might fail in any public interest defence by breaching confidentiality and the presumption of privacy, added to their transgression of contempt laws.

Adding contempt of court laws to the claimant's armoury will make it more difficult for the media and others to justify public discussion of these matters pre-trial. The rulings in *Bloomberg* and the present case do not impose a blanket ban of the publication of pre-arrest information, but the fact that it provides the starting point of the court's balance might mean that that media investigation into suspected criminal or immoral behaviour might become the exception rather the norm. This might be advantageous in discouraging trial by media – the traditional purpose of contempt laws – but detrimental to genuine investigations into suspected criminal behaviour and public debate on matters of clear public interest.