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High Court Judge Mrs Justice Collins Rice developed new legal ground in protecting the anonymity of crime suspects on 29th June 2023 by imposing an injunction against the BBC which prevents identification of a high national and international public profile person, referred to as WFZ, who is under active criminal investigation for serious criminal sexual offences.

The judge has issued the injunction on the main ground that **the court is sure to a criminal standard of proof that there would be a substantial risk of serious prejudice to the administration of justice.**

The judge made clear that she would have also granted the injunction on the basis that identification of the claimant by the BBC would have been a misuse of his private information since he has reasonable expectation of privacy about having been arrested and questioned in a police inquiry prior to being charged. This was the starting point for the UK Supreme Court ruling in ZXC in February 2022.

See: WFZ v British Broadcasting Corporation [2023] EWHC 1618 (KB) (29 June 2023) at <https://www.bailii.org/ew/cases/EWHC/KB/2023/1618.html>

See full pdf file of ruling at <https://www.bailii.org/ew/cases/EWHC/KB/2023/1618.pdf>

The judge said it was exceptional that she had heard the case in private.

The BBC informed the court it intended to report that at least a quarter of businesses in the sector in which the Claimant works have had employees investigated by the police for serious sexual offences, yet despite this the sector does not have any policies or procedures for employees who are accused of violence against women, nor any consistency of approach to allegations.

The reports would also use the Claimant's case 'as a stark illustration of these issues'. The BBC was going to report the Claimant has been investigated by the police and arrested in respect of the allegations, since it is important to explain that his employer knows that this is the position and has taken no action.'

The summary of the background in paragraphs 5 to 7:-

5. The Claimant is a man with a high public profile.
6. On 5th June 2023, a journalist in the BBC's News Investigation team, wrote him a 'Right of Reply' letter about an investigation the BBC had conducted into sexual misconduct allegations against him. It said they had spoken to a number of women

who had given detailed accounts of behaviour by him including the commission of serious sexual offences. It said they intended to identify him in their reporting of this investigation. Although none of the complainants had agreed to be identified in the report, information about dates and places was provided to enable the Claimant to identify them. The letter set out the content of the allegations of four identifiable complainants, in brief, but explicit, form. It also referenced information provided by friends of the complainants and others. It recorded that the Claimant had been arrested in relation to allegations made by two of the complainants and interviewed under caution in relation to those of a third, and that police investigations were continuing.

7. The Claimant thereupon sought an urgent interim non-disclosure injunction, without having issued an application or claim.

The Claimant was granted the interim injunction by Mr Justice Nicklin 8th June pending hearing the parties before Mrs Justice Collins Rice.

The key factor in deciding whether to grant an injunction on the grounds of protecting the claimant's reasonable expectation of privacy is whether 'he will probably ('more likely than not') succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights.'

The Judge drew on two aspects of the recent UK Supreme Court ruling in ZXC, one of which was at paragraph 13 of her ruling:

...the UKSC's confirmation, at [146], that '*as a legitimate starting point, a person under a criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation...*'. The nature of and rationale for that proposition are considered in more detail at [64]-[73]. Its rationale is that '*publication of such information ordinarily causes damage to the person's reputation together with harm to multiple aspects of the person's physical and social identity such as the right to personal development, the right to establish and develop relationships with other human beings and the outside world all of which are protected by article 8 of the ECHR... The harm and damage can on occasions be irremediable and profound.*'. That rationale, and the '*negative effects of publishing information that a person is under criminal investigation*' and the '*resulting uniform general practice*', are further expanded on at [80]-[89]. But the Court emphasised that it is a general rule or legitimate starting point only, not a legal rule or presumption; it does not replace the need for evidence and for fact-specific inquiry in every case. And much may turn on what the information and the investigation are *about*, and in particular how far they include information of an 'intimate and personal nature'.

Between paragraphs 17 and 27, the judge explored the previous case law concerning contempt of court. The potential legal ground for issuing the injunction would be derived from the 1981 Contempt of Court Act's strict liability rule that a contemptuous media

publication would have to be a substantial risk of serious prejudice to justice and Article 6 of the Human Rights Act and European Convention which protects the right to a fair trial.

At paragraph 27 she explained: 'The authorities are in any event clear that courts should be slow to grant injunctions restraining contempt of court on a *quia timet* (prospective) basis. *'It is the wise and settled practice of the courts not to grant injunctions restraining the commission of a criminal act – and contempt of court is a criminal or quasi-criminal act – unless the penalties available under the criminal law have proved to be inadequate to deter the commission of the offences'* (*Pickering v Liverpool Daily Post* at 381-2). Again, *'... the courts should not award him such an injunction except in a clear case where there would manifestly be a contempt of court for the publication to take place'* (*A-G v BBC [1981] AC 303* at 311-2).'

The judge said the case was active in terms of criminal proceedings because at paragraphs 33 and 34:

'Police arrested the Claimant in 2022 on suspicion of a serious sexual offence following one of the complainants' allegations. They released a statement to the media identifying the offence. The Claimant was not identified but the place of his arrest was. They later released another statement saying he had been further arrested on suspicion of two serious sexual offences alleged to have been committed against a different woman. The Claimant was bailed shortly afterwards. The police later confirmed it was taking no further action in relation to one of the alleged offences.

The police subsequently interviewed the Claimant under caution in relation to a third complainant, on suspicion of committing a sexual offence the year before. They issued a statement to that effect.'

The judge said at paragraph 51:

'But the BBC naming the Claimant in connection with criminal investigations into allegations of serious sexual offending would undoubtedly be a substantial game- changer. The step up from rumour and gossip to a researched and substantiated breaking and rolling news item on a professional and edited national platform is one of orders of magnitude. The decision to identify would itself be a major and high-impact news story in its own right.'

The judge explained why she believes naming the claimant by the BBC in their reporting would be a contempt of court between paragraphs 66 and 70:

66. The question I must start with is whether I can be *sure* that what I have called the bare minimum intended publication here – naming the Claimant in connection with his arrest and a police investigation into multiple allegations of (similar) serious sexual offending – is a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

67. My answer is that I can and must. This is a clear case. The risk that the course of justice in the criminal proceedings will be seriously impeded or prejudiced is

substantial and manifest. The case is distinguished by the exceptional, and truly enormous, degree of publicity and public reaction I am entirely satisfied publication by the BBC would generate. It would be wholly naïve to proceed on any other basis and it was not seriously suggested that I should. I do not accept that that publicity could be managed satisfactorily or at all, including by any of the means indicated by the BBC. The identification of the Claimant in however a broad or allusive a manner in connection with the subject matter of its report would ignite a fire it could not hope to control and which would permanently disfigure him in the public mind. The BBC could not in the circumstances of this case avoid causal responsibility by pointing to others who may fan the flames of the fire it would deliberately have set. Even if responsible and regulated publishers reported nothing else at all over and above the bare minimum content the BBC proposes, the harm is inevitably done. The reality of modern public discourse must be faced. The BBC's naming of the Claimant, not least *because* it is a national public service broadcaster, would inevitably be perceived as authorising unrestrained debate subject only to the anonymity of the complainants (which itself might be short-lived). That would bring into play all of the forensic problems set out above in an acute form, and risk irreparable harm to the forensic objectivity essential for any fair criminal trial.

68. I am entirely satisfied on the evidence provided, and by reference to what I regard as its inevitable consequences, that the proposed publication creates a *substantial* risk that the course of justice in the live criminal proceedings currently under way will be seriously impeded or prejudiced by it. That is because, in the respects and for the reasons set out, I am satisfied it creates a *substantial* risk of impeding or prejudicing the necessary efforts to ensure that *all* the evidence, and *only* the evidence, properly forensically relevant to the trial of any criminal charges brought will be available to a jury. It consequently also creates a *substantial* risk of interfering with the proper making of the charging decisions themselves, depending as they do on the evidential prospects. I do not consider these risks capable of ultimately being mitigated by jury management or other measures in a way which would bring it below the substantial, because of the magnitude of the publicity and obloquy I am *sure* would be created by publication before the reporting restrictions attendant on post-charge proceedings have had a chance to be applied, and before any court apart from this one has had an opportunity to manage criminal proceedings in this case in a way which ensures they will be fair.
69. I am therefore sure now, and that the Claimant would establish at trial, that the publication should not be allowed *in a form which identifies him or enables him to be identified* – that is to say, the publication of the ‘specified information’ which the BBC has undertaken until now not to publish – because to do so would amount to a contempt of court. It is not suggested that any further evidence of potential assistance to the BBC is likely to become available before a trial of the Claimant’s claim. Certainly, the course of the criminal proceedings themselves will continue to evolve, and the substance of the Claimant’s claim may be overtaken by events in due course. But that is not my concern on this application.
70. In reaching my conclusion, I have had particular regard to the importance of the Convention right to freedom of expression, especially in the context of press freedom, and to the undoubted public interest in the subject matter of the proposed publication in general. The BBC has a story which brings a legitimate and serious

issue of general public concern to attention. I intervene with great reluctance, and *only* to the extent that the BBC wishes to illustrate its story by identifying a man currently under arrest. In that respect alone, Parliament has provided that, on the facts I have before me, the press's freedom to publish and the public's 'right to know' are definitively outweighed by the powerful public interest in criminal justice, not least where very serious charges may be brought, and not least in the interests of obtaining justice for complainants if they are. That, as well as a suspect's interests, is the public interest specifically protected by the Contempt of Court Act.

At paragraph 77, Mrs Justice Collins Rice confirmed in her ruling that if the injunction had not been granted on the ground she was sure publication would have been a substantial risk of serious prejudice and impedance to justice, she would have granted it on the grounds of reasonable expectation of privacy and the precedent set by ZXC in February 2022:

'First, I have no hesitation in adopting the ZXC 'starting point' that there is a reasonable expectation of privacy in criminal allegations in the period between arrest and charge, for all the reasons set out in that case. I reject the BBC's assertion that that starting point is of relevance only to a case in which, like ZXC itself, information has been obtained (a) in breach of confidence and (b) wholly as a result of criminal investigation by organs of the state. The former contention posits a *necessary* relationship between confidence and privacy which, for the reasons set out in ZXC itself, does not exist in law. I accept that the circumstances in which and the purposes for which any information comes into the hands of the publisher is a relevant *Murray* factor, and I consider that below. But I see no reason in law, principle or practice why the ZXC starting point is to be excluded unless breach of confidence is established. Its rationale, as explained in the case, is entirely independent of the origins of the information and is based on the *consequences* of identifying a suspect between arrest and charge and the harm it can do – harm and damage to human autonomy that '*can on occasions be irremediable and profound*'. '

Her decision was set out in paragraphs 89 and 90:-

89. I grant the Claimant's application to restrain publication of the information which has been subject to the BBC's undertakings until now – that is, publication of the BBC's report in a form which identifies him or enables him to be identified as the subject of active criminal proceedings.
90. The BBC's editorial choice is therefore either to publish its report now without identifying the Claimant, or to await charging decisions (either way) when a fully informed and balanced decision can be taken about the competing interests that might then be engaged. That is a fair and proper choice, and one to which it is rightly constrained by law.

What are the implications of this ruling for professional journalism?

The courts in England and Wales through judicial activism derived from the Human Rights Act and ECtHR jurisprudence have over the last 23 years severely limited the reach and possibilities of professional journalistic practice in covering crime and questionable moral

conduct by public figures and stories which were regarded as being in the public interest- not just in terms of what interested the public- meaning their news and journalistic publication audiences.

The House of Lords ruling in *Lewis v Telegraph* in 1964 made it clear there could be no successful libel action taken against news publications which identified people helping the police with their enquiries and therefore being persons suspected of and investigated for crime.

ZXC and other privacy cases subverted this precedent because reasonable expectation of privacy encompassed impact and damage to reputation by the very fact of publishing the truth of a police investigation and or arrest.

Media contempt law usually operated without the intervention of prior restraint injunctions.

Prosecution was only by the consent and at the behest of the Attorney General.

This would take place after publication deemed to have been judged *prima facie* as creating a substantial risk of serious prejudice or impedance to the administration of justice.

Media contempt law had no tradition of being pursued and enforced by prior restraint injunction on the part of private claimants until now.

Mrs Justice Collins Rice engaged predictive and prospective reasoning for what she judged to have been a future media contempt that could only be convicted at some future trial according to the criminal standard of proof. That is a huge leap and reach of legal adjudication.

The judge made only one reference to what now appears to be a redundancy in respect of protection for the media in prior restraint interventions.

At paragraph 62 she observed 'If a suspect is not charged – and if he has not yet been arrested – then the law of defamation is the principal restraint on publication and claimants face a high hurdle indeed at the interlocutory stage (the 'rule in *Bonnard v Perryman*' [1891] 2 Ch 269).'

The hurdle established in that case is a claimant will ordinarily be unable to obtain an interim injunction to restrain an apprehended alleged defamatory publication where a defendant states an intention to raise an affirmative defence.

But the developments in privacy law which telescope libel into privacy in terms of harm to reputation by the publication of true and false private information have surely circumvented this vital freedom of the press protection.

Media lawyers and academics have been discussing the death of the *Bonnard v Perryman* rule for some years now. See the 5RB publication online 'How to get a libel injunction By Adam Speker KC' at: <https://www.5rb.com/article/libel-injunction/>

WFZ did not seek an injunction in libel. He had no need to. As the judge explained, he would have succeeded in the context of the ZXC privacy regime. Now he has been successful in what I would suggest is an extension of prior restraint powers in media contempt law.

I would argue that the chilling effect on freedom of expression in professional journalism will be immense.

And the current furore over the high profile BBC presenter accused of paying a teenager for indecent images highlights the problem and mischief of legal restraint effectively censoring freedom of expression public knowledge exposing wholly innocent individuals and indeed groups of people to rumour and unfounded suspicion.

The law now allows WFZ to remain protected and anonymous in perpetuity should the police decide not to charge him with any offence.

This is also the case with ZXC. We shall never know if the huge time and resources deployed by the BBC and Bloomberg into long form investigative journalism served any purpose.

And if the public interest of their efforts, and like those of other journalistic publishers, is negated and obviated by no prospect of impactful publication as a result of legal restraint and apprehension of expensive litigation, then what is the point of their existence and their for public benefit inquiries?

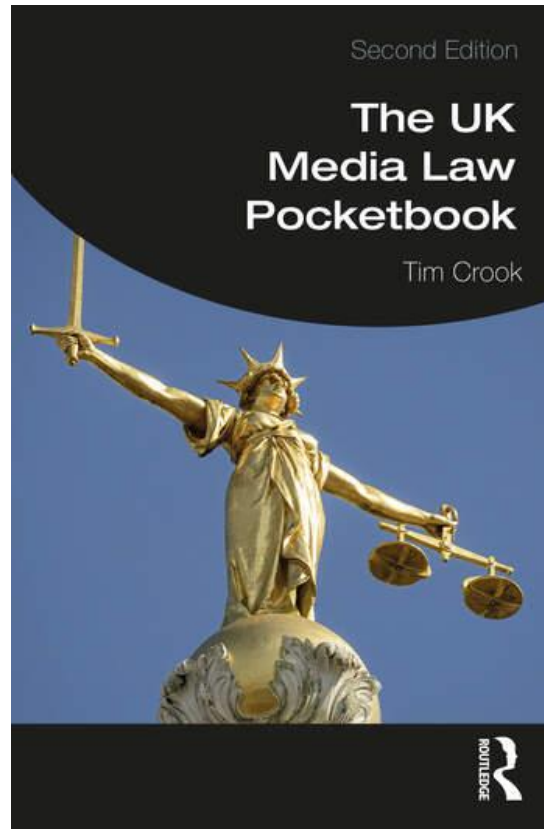
Here lies the substantial deficit in democratic accountability and pressing social needs and purposes that arise when freedom of expression is subtracted and denuded in the equal balancing act with other rights extant in the Human Rights Act and European Convention.

Useful articles and additional references discussing this case.

Mail Online 'Fresh fears about the gagging of the media arise after a 'high public profile' man wins a High Court bid for anonymity ahead of a BBC broadcast. The man won an interim injunction to prevent the BBC from identifying him.' See: <https://www.dailymail.co.uk/news/article-12253145/High-public-profile-man-wins-High-Court-bid-anonymity-ahead-BBC-broadcast.html>

BBC and PA Media: "Court injunction stops BBC from naming 'high profile' man accused of sex offences. The judge acknowledged the BBC's story was on 'a legitimate and serious issue of general public concern.'" See: https://pressgazette.co.uk/media_law/bbc-stopped-naming-man-accused-sex-offences-high-court/

Informm Online: 'High Court grants injunction to restrain publication of information concerning an arrest for sexual offences.' See: <https://inform.org/2023/06/29/news-high-court-grants-injunction-to-restrain-publication-of-information-concerning-an-arrest-for-sexual-offences/>



The second edition of *The UK Media Law Pocketbook* presents updated and extended practical guidance on everyday legal issues for working journalists and media professionals. This book covers traditional print and broadcast as well as digital multimedia, such as blogging and instant messaging, with clear explanations of new legal cases, legislation and regulation, and new chapters on freedom of information and social media law. Links to seven new online chapters allow readers to access all the most up-to-date laws and guidance around data protection, covering inquests, courts-martial, public inquiries, family courts, local government, and the media law of the Channel Islands and the Isle of Man. Tim Crook critically explores emerging global issues and proposals for reform with concise summaries of recent cases illustrating media law in action, as well as tips on pitfalls to avoid.

The UK Media Law Pocketbook is a key reference for journalists and media workers across England, Wales, Scotland, and Northern Ireland. The book's companion website provides downloadable sound files, video summaries, and updates all the developments in one of the most dynamic and rapidly changing fields of law. Visit <https://ukmedialawpocketbook.com>.

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