

Post-arrest, pre-charge naming of high-profile suspects: contempt of court, privacy and fair trial issues

The High Court's decision to grant an urgent interim injunction against the BBC in *WFZ v British Broadcasting Corporation* [2023] EWHC 1618 (KB) (29 June 2023) is a reminder, in an unusual case, of the centrality of key legal principles relating to contempt of court, and of the tensions between the rights to a fair trial, privacy and freedom of expression.

By **Naji Tilley** - 15 August 2023

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Background

It is a well-known policing and journalistic practice not to publish the names of individuals who have been arrested but not (yet) charged in relation to alleged criminal offences, unless there is some exceptional 'legitimate policing purpose' to do so – such as a threat to life, or for the prevention or detection of crime.

The reasons for this are clear. In a critical time period, where both the suspect and the course of the criminal proceedings against them are under the most acute threat from publicity and the court of public opinion, naming the suspect *could* cause irreparable harm to everyone who is (or may later become) involved in those proceedings.

These considerations form the rationale for the strict liability contempt of court regime in the Contempt of Court Act 1981, as well as for the balance struck between the media's freedom of expression against the suspect's rights to privacy and to the fairness of any subsequent trial. Those principles received considerable judicial airtime in this case.

Facts

The BBC wished to report on its findings that at least a quarter of businesses in a particular industry lacked adequate procedures for dealing with allegations of sexual misconduct by employees.

X, a very high-profile individual, had been arrested and was under active police investigation following complaints of sexual offences against various women. X's employer, knowing of X's arrest, had apparently taken no action. The BBC therefore wished to use X's case as part of its proposed report, in order to provide a "stark illustration" of these wider issues.



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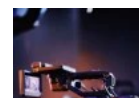
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X urgently applied for an interim injunction, arguing that publication would constitute a contempt of court, as well as an unlawful interference with X's rights to privacy and a fair trial.

Decision

Collins Rice J observed that this was an unusual case, both in that the BBC was proposing a departure from general journalistic practice, and because this case was prospective – there was apparently no decided authority which had considered the question as part of an urgent interim injunction application, seeking to prevent publication that was in prospect.

The judge framed her ruling principally around the contempt of court issue, as X was currently a person under arrest. She noted that X had not been named by an authoritative source, and despite the BBC's intention only to name X as part of a far wider report, the judge decided that naming X would “undoubtedly be a substantial game-changer”, and a “major and high-impact news story in its own right”. This was particularly because the BBC wished to use X as a “stark illustration” of the wider issues.

In the judge's view, this would cause an uncontrolled explosion of publicity and speculation against X. Moreover, X would not be given a fair opportunity to respond publicly to the allegations, which would inevitably be presented in an incomplete and unbalanced manner.

The judge then stated that publication would produce likely adverse effects on the course of justice, including:

- A “bandwagon effect” of false complainants;
- Accusations that future complainants came forward having been influenced by the publicity;
- A reluctance among defence witnesses in coming forward, for fear of associating themselves publicly with X; and
- A significant amount of ‘bad character’ material might be placed into the public domain, undermining prospects of a fair trial.

As such, the judge was sure that naming X would constitute strict liability contempt, in creating a substantial risk of a serious impediment or prejudice to the course of justice in the proceedings. The powerful public interest in criminal justice, as well as the interests of the suspect, were interests protected by the Contempt of Court Act 1981 and outweighed the BBC's right to freedom of expression in this case.

Collins Rice J then observed that, while it was not necessary to decide the other issues, she would have been satisfied that X would be likely to show at trial that publication would have constituted a misuse of private information.

Comment

As the judge observed, this case was unusual, owing to the court having to decide, on an urgent, prospective basis, the question of whether to allow the BBC to name a person arrested but not (yet) charged.

However, what perhaps makes the resulting judgment more unusual is the degree to which it is framed around X's uniquely high public profile. Indeed, the judge concluded: “This 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”.

The judge also observed that this case was unusual “because of what [...] the BBC wants to do at this particular stage of the process. It is not unusual in the principles I have applied, nor in the outcome my conclusions produce.”

In that respect, the judgment offers a reminder of the centrality of those principles. Whether or not the court would have reached the same conclusion, however, if the claimant's profile was lower, is an open question. While the judge may have deemed this a clear case, it might perhaps be better evaluated as a more extreme ‘test case’ for interim injunction applications in this context – and it might have to take another unusually urgent case, with not so celebrated a claimant, to see how the principle grows out from this decision.

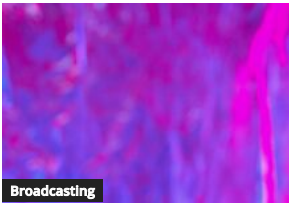
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