

SIR CLIFF V BBC – A NEW ERA IN THE REPORTING OF POLICE INVESTIGATIONS?

Sir Cliff's case against the BBC (Sir Cliff Richard OBE v (1) The British Broadcasting Corporation (2) Chief Constable of South Yorkshire Police [<https://www.judiciary.uk/judgments/sir-cliff-richard-obe-v-bbc/>]) following the raid on his home in August 2014 was billed as of "enormous importance" in relation to whether the media are able to identify a suspect pre-charge, as well as having "massive implications" for the reporting of early phases of police investigations ([link to http://www.bbc.co.uk/news/uk-43731668](http://www.bbc.co.uk/news/uk-43731668)). The first trial of its kind in this country, this article considers the ramifications of this High Court decision on the press reporting of those subject to police investigation.

On the morning of the 14 August 2014, the Berkshire home of Sir Cliff Richard was searched by South Yorkshire Police ('SYP') in connection with allegations of historic child sexual abuse. The BBC broadcast the search more or less as it was taking place, giving it extensive coverage, including aerial shots by helicopter. The story was then picked up by other news media extending its coverage both in this country and abroad. Sir Cliff was not in the UK while his home was searched but viewed it being broadcast. He was subsequently questioned about the allegations but was neither arrested or charged and was told in 2016 that he was no longer under investigation.

At the heart of Sir Cliff's claim was a challenge to media organisations in the reporting about those named by police as being subject to investigation for serious criminal offences. In the face of increasing concern about the public naming of suspects questioned about historic sex offences, the Home Affairs Select Committee had recommended that those accused of such offences should be entitled to anonymity up to the point of charge (HC 962, Pre-Charge Bail, Seventeenth Report of Session 2014-15; <https://www.tsoshop.co.uk/bookstore.asp?FO=1159966&Action=Book&ProductID=9780215084446>). The Government, in its response to the Select Committee report, agreed that there should be a general right to anonymity before charge, except in circumstances where the public interest dictates that an arrested individual should be named (Home Office *Pre-Charge Bail: Summary of Consultation Responses and Proposals for Legislation* March 2015 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/418226/150323_Pre-Charge_Bail_-_Responses_Proposals.pdf). Sir Brian Leveson, in his Inquiry into the Culture, Practices and Ethics of the Press [<https://www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press>] concluded that "*the names or identifying details of those who are arrested or suspected of a crime should not be released to the press nor the public*" (at para 2.39). These sentiments are replicated in the College of Policing Guidance on contact with the media (<https://www.app.college.police.uk/app-content/engagement-and-communication/media-relations/#naming-on-arrest>) "*save in exceptional circumstances where there is a legitimate policing purpose to do so*". Similarly, Sir Richard Henriques' review in the Metropolitan Police Service's handling of historical allegations against high-profile individuals [<http://news.met.police.uk/documents/report-independent-review-of-metropolitan-police-services-handling-of-non-recent-sexual-offence-investigations-61510>] concluded that the conduct of Operation Midland

[\[https://en.wikipedia.org/wiki/Operation_Midland\]](https://en.wikipedia.org/wiki/Operation_Midland) “*the presumption of innocence appears to have been set aside*”.

Sir Cliff’s legal claim was novel in a number of respects. He claimed that his right to privacy under Article 8 ECHR had been breached, as well as a breach of the Data Protection Act 1998. It was the first time such claims had been tried in this country. Another unusual feature of the case was that SYP settled Sir Cliff’s claim against them but, having provided the information regarding the impending raid on Sir Cliff’s home to the BBC, and in the knowledge that the BBC would publish it, SYP sought a contribution to that settlement from the BBC. In a lengthy judgment that is highly critical of the conduct of the BBC, Mr Justice Mann found that Sir Cliff’s privacy rights under Article 8 of the European Convention of Human Rights had indeed been breached. Significantly, Mann J also concluded that damage to reputation can form part of a breach of the right to privacy. He also awarded aggravated damages against the BBC.

Do police investigations give rise to a legitimate expectation of privacy?

The first question for consideration was whether Sir Cliff had a reasonable expectation of privacy. The question of whether a police investigation can give rise to a legitimate expectation of privacy had not previously been the subject of clear judicial determination. Mann J in his ruling held that while this is a fact-sensitive question not susceptible to “*a universal answer*”, as a matter of general principle, a police investigation does give rise to such an expectation. The expectation is not “*an invariable right to privacy*” – there may be reasons why the expectation may be displaced, but a reasonable expectation is the starting point (paras 248-251). A police search would not, without more, displace that expectation. This is so, notwithstanding the fact that the obtaining of the search warrant is a judicial exercise (albeit a private one). Mann J confined these findings to the fact of the search as opposed to any subsequent arrest but noted that if (according to Sir Brian Leveson) arrest should remain private, then pre-arrest measures should not be any different (para 255).

A reasonable expectation of privacy is not necessarily diminished because the individual concerned is a public figure (*Rocknroll v News Group Newspapers Limited* [2013] EWHC 24 (Ch) <https://www.judiciary.uk/judgments/edward-rocknroll-ngn-ltd-judgment-17012013/>). In addition, the information does not lose its private character because the nature of the recipient varies, and where it is disclosed in circumstances that do not affect the right. There might be operational reasons for disclosure, but the right to privacy is not affected simply because the information has come in the media’s hands (para 258-9). In this case, Mr Johnson, the BBC journalist, had acquired “*private information in circumstances which did not destroy the privacy*” right and it was not disclosed “*for good operational reasons*” (para 260). As a result of this, Mann J found that Article 8 was engaged.

The Axel Criteria

Mann J then went on to consider the guidance of the Grand Chamber of the European Court of Human Rights in *Axel Springer v Germany* [2012] EMLR 15. In answering the question of whether the publication could be regarded as a contribution to a debate of public interest, Mann J distinguished between a) an investigation into the actions of an unidentified celebrity and b) the identification of the individual and held that “[i]t does not follow that, because an investigation at a general level was a matter of public interest, the identity of the person concerned also attracted that characterisation” (para 280-282). In any event, he considered that the BBC were less concerned with the public interest. They were, in his judgment, more concerned with the chance to “scoop” their competitors and the fact that it was a big story.

Mann J accepted to an extent that a person placing themselves in a public role might, in certain circumstances, lead to a reduction in their right to privacy, and that Sir Cliff's well-known religious beliefs could make disclosure of actual "unchristian" conduct something to which he was vulnerable. However, there was a distinction between that and "*unsubstantiated allegations, or investigations, into unproved conduct*". In fact, the contrast between the conduct alleged and his publicly stated Christian views was what made "*the publication of the material ...capable of being so intrusive and...so damaging to his reputation and life*" (para 286).

Mr Johnson had been "tipped off" about the investigation into Sir Cliff, probably by a police source (possibly from Operation Yewtree or the Metropolitan Police). Mr Johnson had informed SYP that he had received information from Operation Yewtree and let it be known that it was story that he could publish and that he might do so. Concerned about premature publication, SYP and the BBC reporter Mr Johnson agreed that he would not publish the story in exchange for advance notification of the search (para 224). In this regard, Mann J held that whilst some subterfuge on the part of journalists can be justified that was not the case here. Information which was obviously sensitive and private in nature was obtained from a source which Mr Johnson knew should not have revealed it. The information was confirmed and then bolstered as the result of a threat (as perceived by SYP) to publish the material. In addition, Sir Cliff's representatives were not given sufficient time for statement or discussion prior to the broadcast (far less an opportunity to seek to restrain the broadcast) although this point attracted less weight. The publication was undertaken with what Mann J describes as "*a significant degree of breathless sensationalism*" (para 300). The disclosure of the police investigation would have been serious for Sir Cliff once it became widely known but the effects were amplified by the manner in which the investigation was publicised.

The balance between Art 8 and Art 10

In coming down squarely in favour of Sir Cliff, Mann J found that the effects of disclosure, given the nature of the allegations, meant that the BBC's rights to freedom of expression did not tip the balance away from Sir Cliff's privacy right. The stigma associated with allegations of the utmost seriousness was affected by the fact that the public failed consistently to keep in mind the presumption of innocence. Whilst acknowledging the public interest in the reporting of offences of historic sex abuse, he rejected the suggestion that this should lead to the identification of the individual concerned in circumstances such as this. The impact of the breach was magnified by the style of reporting.

Damages and Contribution claims by SYP

Mann J accepted Sir Cliff's evidence, which was largely unchallenged, as to the effect on him of the broadcasts. The story was taken up by other news outlets. His health deteriorated as a result. Various work projects were shelved. Significantly, Mann J, taking his lead from the decision in *Khuja v The Times* (<https://www.supremecourt.uk/cases/uksc-2014-0270.html>) held that the protection of reputation is not confined to defamation cases and can form part of a breach of privacy rights. General damages of £190,000 were awarded. Aggravated damages were also awarded in the sum of £20,000 due to the submission of the broadcast for an award. Mann J also found that the BBC bore greater responsibility for the breach than did SYP and awarded a split of 35%/65% between the two.

Implications

The implications of this case on pre-charge reporting are significant. Whilst it does not deal directly with arrest, that too forms part of a police investigation and the public naming of

individuals at this stage is also likely to be caught by the ruling. Furthermore, it clarifies that damage to reputation can be litigated as a breach of the privacy right under Art 8 as well as in defamation. It seems likely however that the BBC will appeal this decision and that the matter will be the subject of further judicial pronouncement in due course.

Patricia Londono is a barrister at Red Lion Chambers
(<https://www.redlionchambers.co.uk/barrister/patricia-londono/>)