



From the Director-General

15 August 2018

Rt Hon Geoffrey Cox QC MP
The Attorney General
5-8 The Sanctuary
Westminster
London SW1P 3JS

Dear Attorney General

As you will be aware, on 18 July 2018 Mr Justice Mann handed down judgment in the case of *Sir Cliff Richard OBE v BBC and South Yorkshire Police* [2018] EWHC 1837.

The BBC has decided not to seek permission from the Court of Appeal to appeal against that judgment – even though we are advised and believe that the judge erred in law in finding that broadcasters and journalists, when reporting on matters in the public interest, normally have no right to publish the name of a person who is the subject of a criminal investigation. That issue is a matter of very considerable general importance, as the Prime Minister herself recognised on the day of the judgment.

We have reluctantly come to the conclusion that an appeal would be an unsatisfactory means of addressing the issues of principle, as we have been advised that it would be very difficult to persuade the Court of Appeal to isolate the issues of principle from the judge's findings as to the conduct of the BBC in this case. We understand that the Court is likely to say that it is for Parliament, not the judiciary, to devise a statutory scheme setting out in detail the balance between competing public interests.

We set out in the attached why we are now asking you, on behalf of the Government, to consider the merits of conducting a review of the state of the law on these issues, including an assessment of the need for primary legislation which will protect the right to report properly and fairly criminal investigations, and to name the person under investigation.

Yours sincerely

A handwritten signature in black ink that reads 'Tony Hall'.

Tony Hall
Director-General

Sir Cliff Richard OBE v BBC and South Yorkshire Police [2018] EWHC 1837

Errors of law by the trial judge

The BBC had reported on a search of Sir Cliff's apartment, thereby revealing to the public that he was under investigation for an historic allegation of child sexual abuse. The report was factually accurate; it scrupulously observed the presumption of innocence; and it did not disclose any intrusive detail about the underlying allegation.

The judge accepted (at paragraph 281 of the judgment) that there was a public interest in the BBC reporting "*an investigation into (and search of the premises of) a well-known but unidentified celebrity*". As the judge noted, this was "*very much a source of legitimate public interest and concern*" - particularly in 2014 as a result of a number of offences and alleged offences of sexual abuse by celebrities and others in public life who had used (or were accused of using) their celebrity status to facilitate their offences - "*and the public had a legitimate interest in knowing at a general level that the police were pursuing alleged perpetrators, and particularly those who might have abused their celebrity status*".

However, the judge did not think there was a public interest in naming the celebrity who was under investigation. The judge awarded general damages of £190,000: an award in privacy at a level without precedent which the judge justified in part because he considered it right to compensate Sir Cliff for the damage to his reputation, even though what the BBC reported was true.

Ever since modern policing began, nearly two centuries ago, the reporting of criminal investigations has been governed only by the law of defamation and contempt. Parliament has never intervened, except to introduce the 'strict liability' rule in the Contempt of Court Act 1981 and to protect the identity of the alleged victims of sexual offences. The suggestion that the suspect's privacy rights might be involved is a relatively new one, and had never received unequivocal judicial endorsement until the judgment in this case.

The BBC has been advised that the judge made a number of errors of law in reaching his conclusions. To give but one example, it has been recognised at the highest judicial level that reporting the name of a person involved in a public interest story has substantial value for the public and that, critically, the courts should respect editorial decisions as to whether or not to report the name. So, in *Re Guardian News and Media* [2010] 2 AC 697, Lord Rodger in the Supreme Court said at [63]:

"What's in a name? "A lot", the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed... More succinctly, Lord Hoffmann observed in [Campbell v MGN Ltd \[2004\] 2 AC 457](#), 474, para 59, "judges are not newspaper editors". See also Lord Hope of Craighead in [In re British Broadcasting Corpn \[2010\] 1 AC 145](#), para 25. This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of

newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.”

Yet the trial judge, while finding that the BBC’s reporting was on a matter of public interest, failed entirely to acknowledge this important principle.

Implications of the judgment

The implications of the judgment are profound. As the judge himself observed: *“the case is capable of having a significant impact on press reporting”* (judgment 322). A number of experienced legal commentators and editors have expressed grave concerns. To summarise some:

- News organisations will now be very reluctant to name a suspect in a criminal investigation on a matter of public interest unless the police are prepared to say, on the record, that they have a good policing reason for doing so. That will be the case even if a suspect’s name is being widely reported on social media. The level of damages apparently now applicable to a media organisation that makes a wrong decision is so high that the media is likely to err on the side of caution;
- The media’s role of undertaking a critical analysis of police activity will be significantly impaired: cases in which the police undertake inappropriate investigations, or inappropriately fail to pursue proper investigations will be under-reported;
- The beneficial effect of media reports of police investigations encouraging witnesses (either inculpatory or exculpatory) or complainants to come forward will no longer be achieved (unless the police themselves state that they are seeking witnesses, which is not always the case);
- The judge accepted that there was a public interest in reporting the fact of the judicial approval for a search and the fact of the investigation concerning *“a well-known but unidentified celebrity”* (paragraph 281). To report the matter in that way would inevitably provoke speculation (almost all of which would be uninformed) as to the identity of the “celebrity” concerned. This would be very damaging to the interests of many other people who would, no doubt, wish to make public that they were not the celebrity concerned;
- All manner of complex cases will arise where there has been previous reporting of allegations, for example in circumstances where complaints are first raised via social media, but an investigation is then started, or where there are regulatory investigations running in tandem with police investigations;
- Significant damages for reputational harm are now recoverable as part of a claim for misuse of private information. In defamation claims the defence of truth to the meaning of a publication is available to media defendants; no such defence is available in privacy claims. The judge found that everything the BBC reported about the search was accurate but that Sir Cliff was entitled to financial damages for the harm to his reputation as part of the privacy claim;
- The judge increased the award of damages due to the high public profile of Sir Cliff and the seriousness of the offence that he was being investigated for. As a result media organisations will now be more wary of reporting investigations into the wealthy and the well-known for fear of large damages awards – even when they know the information they have is accurate.

In summary, there will be, sooner or later, a case in which there is public outcry due to a suspect reoffending when publicity might have aided a better investigation of the risk that they posed, and/or a public outcry where it transpires that an innocent person has been dragged through years of investigation which they never deserved.

The BBC's decision not to appeal

The BBC has carefully considered whether the important issues of principle would be likely to be clarified by pursuing an appeal to the Court of Appeal. We have reluctantly come to the conclusion that an appeal would be an unsatisfactory means of addressing the issues of principle.

It would be very difficult to persuade the Court of Appeal to isolate the issues of principle from the judge's findings as to the conduct of the BBC in this case. The Court of Appeal would be likely to conclude that, even if (as the BBC has been advised) the judge made an error of law in failing to find that there is normally a right for journalists to name the individual who is the subject of a search or investigation in circumstances such as those of the present case, the BBC breached the privacy of Sir Cliff by the tone and techniques of the reporting.

Indeed, the BBC has accepted that the manner of the reporting in this case was inappropriate and it has apologised to Sir Cliff for that - even though, we emphasise, the BBC is advised and believes it was entitled to report the fact of the investigation into his alleged conduct and to name him as the person concerned.

The BBC believes that the probability is that the Court of Appeal, in upholding the judge's factual findings, would be very reluctant to address broader questions of principle. Indeed, the BBC is doubtful that an appeal on these specific facts is a sensible way of addressing the issues of principle. The Court is very likely to say that it is for Parliament, not the judiciary, to devise a statutory scheme setting out in detail the balance between competing public interests.

For those reasons it may be more appropriate for the Government to consider the merits of conducting a review of the state of the law on these issues, including an assessment of the need for primary legislation which will protect the right to report properly and fairly criminal investigations, and to name the person under investigation.

Importance of the media's right to name police suspects in public interest reporting

To date neither the Government nor Parliament has wished to pursue any tightening of the law in this regard and has demonstrated longstanding support for the media's right to report on criminal investigations.

In response to a question about this judgment, the Prime Minister stated : 'This is a difficult issue, it has to be dealt with sensitively and I looked at it when I was Home Secretary. There may well be cases where the publication of a name enables other victims to come forward and therefore to strengthen the case against an individual. So this is not somewhere where we either do all of one or all of another; it is an issue for careful judgment. But in exercising that careful judgment, the police have to recognise their responsibilities and the media need to recognise their responsibilities as well.' (Official Report, Commons, 18.7.2018).

This approach was also taken when both the Government and the Opposition opposed the introduction of further restrictions on the naming of suspects before charge during the passage of the Policing and Crime Act 2017. The Minister, Baroness Williams of Trafford stated:

'I must emphasise that public reporting of a suspect's name is unusual, but in certain circumstances the police authorise release so that any other potential victims of a suspect are encouraged to come forward. The introduction of a statutory scheme would hamper the police's ability to act in this way. We know that such identification can help other victims to recognise that they are not the only ones who have suffered sexual abuse—as the noble Lord, Lord Rosser, rightly articulated—and this might encourage them to overcome their reluctance to come forward' (Official Report, Lords, 16/11/16).

These most recent statements reflect the position taken by the Government over a number of years.

In 2011, the Government opposed the Anonymity (Arrested Persons) Bill with the Minister for Justice stating that:

"Under the present law, the media are broadly free to report the identity of suspects at all stages of the criminal process—when they are under investigation, when they are arrested, and when they are charged.

The media are free also to report criminal trials, subject to a range of statutory and common law reporting restrictions, which are designed to protect the integrity of criminal proceedings. There are protections in the law to try to stop individuals being pilloried in the press, including libel provisions and, where comment may be prejudicial to any future proceedings, contempt. Taken together, these arrangements reflect our long and proud common law tradition of open justice." (Official Report, Commons, 4.2.2011).

In March 2015, the Prime Minister, when Home Secretary said the following: *"While we are clear that transparency and consistency should be at the heart of the criminal justice system, ... we recognise that there is a difficult balance to strike in some criminal investigations between the operational advantages of naming suspects and respecting suspects' right to privacy".*