

**To what extent is a “reasonable expectation of privacy” trumping the press right to freedom of expression?**

**Gavin Millar QC**

The ***Campbell v MGN*** test for engaging Art 8 -

*Would a person of ordinary sensibilities, if placed in the same situation as the subject of the disclosure, rather than the recipient, would find the disclosure offensive?*

# The balancing exercise



- If engaged, the A8 right has to be evaluated and balanced against the Art 10 right – ***Campbell*** and ***Re S***
- There is no presumed priority, or “trumping”, only on the facts
- What is their comparative importance?
- How is interference with each justified?

- Lord Sumption in ***Khuja v Times*** [2017] (prior restraint injunction)
- the significance of open justice *has if anything increased in an age which attaches growing importance to the public accountability of public officers and institutions and to the availability of information about the performance of their functions...*

- Reporting restrictions on material that is *there to be seen and heard...in open court... is direct press censorship*
- The courts cannot *part company with* the common law and the statutory framework for open justice ...*simply because the issues arise under the heading “private and family life”...*

Indeed:

- *there is no reasonable expectation of privacy in relation to proceedings in open court. The only claim available to [Khuja] is based on the adverse impact...on his family life which will follow indirectly from the damage to his reputation...*

## ***Jackson and Olding v BBC*** (NI) [2017] (removal of online article and injunction)

- The Plaintiffs were public figures but had a REP because
  - Their arrests were private
  - Were for sex offences
  - Allegedly committed in a private place
  - *A limited circle of person knew of them*

- But balance was in favour of Art 10:
  - The information was already in the public domain *in many media formats*
  - So take down and injunction would not prevent significant intrusion into private life; *that had already occurred*
  - Damages would therefore be an adequate remedy



***ZXC v Bloomberg*** [2017] (C's application to remove online article and injunction)

- There is no *blanket rule* precluding a REP for a suspect in police investigation
- C had a REP in the fact he was being investigated by law enforcement agency and in the contents of one of its documents detailing the investigation

# Pre-charge investigations



- But it was a weak Art 8 right: D had already published C's account of his interview under caution; article in issue online for 9 days before C's application
- D's Art 10 right was strong: *a serious piece of journalism about a serious topic; [an]...investigation into offences of bribery, fraud and corruption...*

## ***AJS v NGN*** [2017] (prior restraint)

- It is not the case that everything that happens in a person's home attracts a REP – but is *an important starting point*
- An allegation of rape in C's home (when C elsewhere in the house) made by one visitor against another (X) gave C a REP, though he was a public figure

- Re Art 8: The information was not about *...one of the most intimate aspects of the C's private life...*
- Re Art 10: But, recognising that the story would go public if X were charged, there was currently no public interest in the proposed story; the information is *nothing to do with [C's] public role*

## ***Satakunnan v Finland*** [2017] (prohibition on publication)

- Collation and mass publication of publicly available information about all citizens' taxable income and assets
- Art 8 engaged notwithstanding that each citizen's tax records could be accessed under Finnish law

- No Art 10 violation because publication did not contribute to a public debate. The ECtHR was *not persuaded that publication of taxation data in the manner and to the extent done by the applicant companies contributed to such a debate or indeed its principal purpose...*

Griffin Building, Gray's Inn,  
London WC1R 5LN  
DX 400 Chancery Lane, London

T +44 (0)20 7404 3447

F +44 (0)20 7404 3448

E [matrix@matrixlaw.co.uk](mailto:matrix@matrixlaw.co.uk)