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Can the open justice principal ever be overridden to give effect to individuals' article 8 rights in light of *Khuja (PNM) v Times Newspapers?*

Khuja (PNM) v Times Newspapers Ltd [2017] UKSC 49

Adam Wolanski

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Mar 2012 Khuja arrested as part of Operation Bullfinch

Jan 2013 Old Bailey Trial starts in *R v Jamil* and others

Judge Rook makes postponement order under s.4(2) of the Contempt of Court Act 1981

AP, victim, gives evidence

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May Oxford Mail writes to Khuja saying it is considering running a story on the arrest

The Times writes to Khuja stating it intends to report that:

- He was appointed as magistrate in 2007 but has agreed not to hear cases while investigation is ongoing.
- Runs a property letting company on Cowley road, has flats and houses on Iffley road, owns a fleet of luxury cars including one with the plate TAR1Q

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15 May

Khuja's counsel put the Times' email before the court. Asks court for a ruling as to whether publication would breach strict liability rule.

Explains that there had been evidence in the trial that the victim went to Iffley road, and that 'Tariq' had a personalised number plate.

July

Khuja released from police bail and informed by Thames Valley Police that there is insufficient evidence to provide a realistic prospect of conviction, although the case would be kept under review.

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October

TNL applies to lift s.4(2).

Judge Rook hears evidence from the investigating officer and decides that there are no pending or imminent proceedings. Judge says he will lift the s.4(2).

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Hearing before Tugendhat J [2013] EWHC 3177 (QB):

- Approaches application on the basis that the case engages the open justice principle. Rejects 'Trojan Horse' argument.
- Recognised that some members of the public would think Khuja guilty, albeit many would not.

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- Khuja's situation difficult since he could not get vindication through the court proceedings - not a defendant, or a party to civil proceedings.
- Recognised harm that would be caused to him and family. But thought information about what had been said about him at trial would probably leak out anyway.
- High public interest in how allegations of sexual abuse have been investigated.

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Court of Appeal [2014] EWCA Civ 1132

Grounds:

- Judge was wrong to proceed on the basis that the newspapers would just report Khuja's involvement in court proceedings - the 'Trojan Horse'.
- Insufficient weight given to interests of children.
- Judge wrong to proceed on the basis that most people understand the difference between suspicion and guilt.

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Supreme Court [2017] UKSC 49

Lord Sumption JSC

- Significance of open justice principle has increased in an age which attaches growing importance to the public accountability of public officers and institutions and the availability of information about them.
- Inherent power of courts to sit in private where necessary for proper administration of justice, e.g. trade secrets, risks to party or witness. Extends to anonymising parties, witnesses or other matters.

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- Restrictions on what can be reported (as opposed to how the trial is conducted) constitute direct press censorship. The question of whether the court has power to make a reporting restriction is governed by a number of statutes.
- Relevance of rule against prior restraint in libel.

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Did *A v BBC* [2015] AC 588 mark a different approach?

- Lord Reed was prepared to accept that an interest such as serious commercial damage would be enough to justify an anonymity order in a case where there was no public interest. But this merely reflected the increasing significance of the Convention.
- *Devine v Secretary of State for Scotland* (unrep) 22 January 1993: soldiers who had been deployed to end a prison siege were allowed to give evidence behind a screen, and "their appearance and identities were of such peripheral, if any, relevance to the judicial process that it would have been disproportionate to require their disclosure"

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Dissenting judgment: Lords Kerr and Wilson.

- What was meant by Lord Rodger in *Guardian News and Media* when he said "the law proceeds on the basis that most members of the public understand that, even when charged with an offence, you are innocent unless and until proved guilty in a court of law"?
- Tugendhat J wrongly proceeded on the basis it meant that the court should act on the principle that most people believe that someone charged with an offence, or arrested on suspicion of it, is innocent until proved guilty?

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- Increasing judicial and extra judicial concern about the effect upon an innocent person's reputation of publication of the fact of his arrest. Leveson report. Henriques Report.
- Apparently different approach of courts in Canada to anonymity, to the issue of anonymising people named in court in connection with serious offences, e.g. *R v Henry* where Mr Henry sought to overturn his conviction for sexual assault on the grounds that another man, Mr X, was guilty. Mr X was given anonymity.

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Where are we now?

- Open justice principle still of cardinal importance. Innocent people caught up in it may well be damaged by reports of the proceedings: the price to be paid for open justice.
- It is possible to obtain an injunction "in a case where the information was private or there was no sufficiently substantial public interest in publication". But such a case "will be rare". This was not such a case. Khuja's identity was "not a peripheral or irrelevant feature of this particular story".

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- In any such application the court will need to consider the fairness of the trial, the nature of the issues and the existence and extent of any legitimate public interest in the applicant's identity.
- If an application is to be made, it should be made before the trial starts. Mr Khuja had no reasonable expectation of privacy in respect of matters aired in open court.
- It may be important to address in evidence the question of whether members of the public would believe the person guilty or innocent.
- Jurisdiction: High Court.

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THANK YOU

Adam Wolanski