

HM Attorney General v British Broadcasting Corporation

Press Summary

This summary is provided by the Court for the assistance of those reporting the Court's judgment, which was handed down this morning (neutral citation [2022] EWHC 826 (QB)). It does not form part of that judgment.

Introduction

- 1 The BBC wants to broadcast a programme about an individual, "X". The programme is to include the allegations that X is a dangerous extremist and misogynist who physically and psychologically abused two former female partners, "Ruth" and "Beth"; that X is also a covert human intelligence source ("CHIS") for the Security Service ("MI5"); that X told Beth that he worked for MI5 in order to terrorise and control her; and that MI5 should have known about X's behaviour and realised that it was inappropriate to use him as a CHIS.
- 2 The Attorney General ("the Attorney"), acting on behalf of the Crown, brought a claim for an injunction to prevent the BBC from broadcasting the programme. Her stance has been that she can neither confirm nor deny that X is or was a CHIS, other than in CLOSED proceedings under the Justice and Security Act 2013 ("JSA"). She submits, however, that irrespective of the truth of the allegation, the BBC's proposed broadcast would (a) involve a breach of confidence or false confidence, (b) create a real and immediate risk to the life, safety and private life of X and (c) damage the public interest and national security.
- 3 After OPEN and CLOSED hearings, Mr Justice Chamberlain has today handed down a judgment. It explains that the Court will issue an interim injunction to prevent the BBC from naming or otherwise identifying X. The precise terms of the injunction will be decided after hearing further submissions, but it will not prevent the BBC from airing the core elements of its story. These include Ruth's and Beth's allegations about X's abusive behaviour and statements critical of MI5's conduct, provided that the information broadcast does not identify X.

Procedure

- 4 Where disclosure of evidence would damage the interests of national security, and the court makes a declaration under s. 6 of the JSA (a "s. 6 declaration"), the court can hold a "closed material procedure". This involves a hearing which is partly OPEN (with all parties and their lawyers) and partly CLOSED (with only the Government's lawyers and security-cleared lawyers called "special advocates" representing the interests of the BBC).

- 5 The Attorney applied for closed material procedure and special advocates were appointed to represent the interests of the BBC. After OPEN and CLOSED hearings on 16 February 2022, Mr Justice Chamberlain made a s. 6 declaration and granted the Attorney permission to withhold sensitive material under s. 8 of the JSA. This meant that the Attorney's application for an interim injunction was heard partly in OPEN and partly in CLOSED. The hearing took place on 1 and 2 March 2022.
- 6 For reasons contained in a judgment made public on 24 February 2022 (neutral citation [2022] EWHC 380 (QB)), Mr Justice Chamberlain rejected the Attorney's application that the OPEN hearing should take place wholly or substantially in private (i.e. without the press and public being present). As a result, the OPEN part of the hearing took place in public, with some limitations as to which parts of the evidence could be referred to in argument.

The parties' arguments

- 7 The BBC accepted that the allegation that X is a CHIS is information relating to national security which is currently known only to a small number of people and is therefore capable of legal protection.
- 8 The Attorney submitted that disclosing X's name or image would cause real damage to national security and that the balance of public interests favoured the grant of an injunction. She also contended that identifying X would give rise to a real and immediate risk that X would be killed or subject to serious physical harm and that the Court could grant an injunction to protect X's rights under Articles 2, 3 and 8 of the European Convention on Human Rights.
- 9 The BBC did not accept that revealing X's identity would give rise to a real or immediate risk to X. It submitted that the allegations that X was and remains violent and dangerous towards women are highly credible. It contended that there is a strong public interest in publishing X's identity because the evidence shows that X used his status as a CHIS to coerce and terrify his partner and MI5 should have known about his behaviour and realised that it was inappropriate to use him or continue using him as a CHIS. This is relevant to the public debate on the coercive control of women by their male partners and on the failure of state security institutions to address this problem.
- 10 According to the BBC, publishing X's identity would remove the story from the realms of the abstract and so bolster and intensify the other public interests in the story. It would also enable women considering a relationship or liaison with X to have access to information which may protect them from death or serious harm at the hands of X. A court considering relief which would prevent publication must bear in mind not only X's rights and interests, but also those of the women who would or might be protected by having information about what he has done.

The Court's decision

- 11 In a judgment handed down today, Mr Justice Chamberlain decided as follows.

- 12 It is not part of the Court's function in an application of this kind to adjudicate on the truth or falsity of allegations which the defendant wishes to make or on whether its criticisms of MI5 are justified. A party claiming that publication of confidential information is in the public interest must in general show that the allegations it seeks to publish and the criticisms it seeks to advance are serious and have a credible evidential basis. The BBC's allegations comfortably meet this test. The BBC does not, however, have to show that its allegations are true or its criticisms justified in order to rely on the public interest in publishing them: [46]-[48].
- 13 The Court proceeds on the basis that the BBC's view about the danger posed by X has a credible evidential foundation and, therefore, that X may well pose a significant danger to any woman with whom he enters into a relationship or liaison. This danger is not completely addressed by the various statutory mechanisms designed to protect women from domestic abuse and violence (including sexual violence): [49]-[57].
- 14 Public disclosure of a person's identity is in principle capable of addressing the risk posed to women in general by persons liable to engage in violence against them. But the words "in principle" are important. Whether and to what extent public disclosure would in fact serve to address the risks posed by a particular individual depends on the facts: [57]-[58].
- 15 The Attorney's CLOSED evidence contains a detailed and nuanced assessment of the risks to X and others arising from disclosure of X's identity. The CLOSED proceedings have allowed for the assessment to be probed and questioned with the assistance of the special advocates. In the light of that exercise, the Court is satisfied that it provides cogent evidence establishing that disclosure of X's identity would expose him to a "real and immediate risk" of death or serious injury at the hands of others: [59]-[65].
- 16 The CLOSED evidence also establishes that, if X's identity were disclosed publicly, those responsible have assessed that extensive protective measures would be necessary and that they would be likely to implement such measures (bearing in mind that this judgment proceeds on the basis that the Attorney neither confirms nor denies that X is or was a CHIS): [66]-[68].
- 17 The CLOSED evidence relied upon by the Attorney establishes a cogently reasoned and plausible basis for concluding that disclosure of X's identity would be likely to discourage people from acting as CHIS. This would cause material damage to the effectiveness of the work of the security and intelligence agencies and, therefore, the national security of the UK: [69]-[71] and [82].
- 18 The Court would require considerable persuasion to grant an injunction if it would have a material effect on women's ability to access information that might protect them from the risk of violence at the hands of X. But the question whether the relief sought would have that effect has to be answered on the basis of the evidence, OPEN and CLOSED: [74].

- 19 In this case, the effect of the protective measures (bearing in mind the Attorney's "neither confirm nor deny" stance) would substantially undermine the protective effect which disclosure of his identity would have on women considering a relationship or liaison with him. Once these measures had been taken, as they are likely to be, public disclosure of X's identity would not materially reduce any risks that X poses to women: [75].
- 20 An injunction would constitute an interference with the BBC's right to freedom of expression and the right of the public to receive the information the BBC wishes to broadcast. However, while an injunction restraining the BBC from identifying X would undoubtedly affect the immediacy of the story and its attractiveness to an audience, it would not prevent the BBC from conveying the core elements of the story, including the allegation that X abused his CHIS status and the allegation that MI5 is at fault for using or continuing to use him as a CHIS: [76]-[80].
- 21 Therefore, the Attorney is more likely than not to succeed at trial in establishing that the balance of public and private interests favours the grant of an injunction prohibiting the BBC from disclosing X's name and image: [81]-[83].
- 22 It is important that any injunction should identify precisely the information which the BBC is prohibited from broadcasting: [84]-[87]. The "core" information whose disclosure will be prohibited is X's name and image. But there will also be other secondary information which, if disclosed, would tend to identify him. There remain some significant disputes about what can and cannot be safely be referred to without running the risk of identifying X. The Court will resolve these disputes after considering further submissions and its decision will be reflected in the terms of the injunction order made: [88].