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CASE AND COMMENT

PRIVACY AND THIRD PARTIES TO CRIMINAL PROCEEDINGS

In *Khuja (formerly PNM) v Times Newspapers Ltd.* [2017] UKSC 49; [2017] 3 W.L.R. 351, the appellant (*A*) failed to obtain an injunction restraining two newspapers from publishing information given about him in a criminal trial in which he had been a third party. The defendants were charged with serious sex offences involving children. *A* feared that the public would associate him with those offences if the information was published. He claimed that publication would interfere with his and his family's private and family life. As against this, the open justice principle means that, wherever possible, proceedings should be heard in public and that there should be fair reporting of the proceedings. This principle carries great weight in the common law.

There were therefore competing human rights to be balanced, namely the individual's right to respect for private and family life, guaranteed by Article 8 of the European Convention on Human Rights (the Convention), and the media's right to freedom of expression, guaranteed by Article 10 of the Convention. Furthermore, the case is illuminating because the Supreme Court adopted a more "granular" approach to balancing than in the past. It dealt more specifically with the circumstances of the case.

A had been arrested in connection with the offences. He was later released on the basis that charges against him would be kept under review. A complainant had referred to his first name (a common first name) but not picked him out at an identity parade. *A*'s name was referred to in open court at the trial, but not reported in the media as a result of orders made the Contempt of Court Act 1981, s. 4(2). The newspapers wished only to publish the events referred to in the criminal proceedings, which included his arrest and de-arrest.

Ultimately, the police decided not to charge *A*. Once that happened, it was clear that those orders could be discharged. *A* then started civil

proceedings to restrain publication, relying on his and his family's Article 8 rights.

In the High Court, Tugendhat J. rejected the application, conducting a thorough balancing exercise. He cited Lord Rodger's observation in *Re Guardian News and Media Ltd.* [2010] UKSC 1; [2010] 2 A.C. 697, at [66], that, in allowing the name of a defendant to criminal proceedings to be published, the law proceeded on the basis that most people understood that a person was innocent until proved guilty. This was all the more so where a person had not even been charged. *A* appealed again, but his appeal was dismissed by the Court of Appeal.

By a majority, the Supreme Court agreed. Lord Sumption, with whom Lord Neuberger, Lady Hale, Lord Clarke and Lord Reed concurred, explained that the open justice principle, while important, was never absolute. He noted that, in defamation, the public interest in freedom of expression is reflected in the principle that in general the court does not restrain any publication where the defendant proposes to plead that the words were true. The complainant is left to a post-publication remedy in damages.

Similarly, in *OPO (a child) v Rhodes* [2015] UKSC 32; [2016] A.C. 219 (not cited), the Supreme Court held that the tort of intentionally causing harm by making distressing statements (see *Wilkinson v Downton* [1897] 2 Q.B. 57) did not enable a child's guardian to obtain an injunction preventing the child's father from publishing true autobiographical information about himself. This was so even if publication was intended to cause distress to the child (at [77]). Although that appeal was not concerned with the question of any Article 8 violation, Lord Neuberger, with whom Lord Wilson agreed, opined that the common law should generally be consistent with the Convention (at [120]).

Lord Sumption referred to *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47; [2005] 1 A.C. 593, which had bound the lower courts. There the House of Lords refused to restrain, at the instance of a child's guardian, publication of the name of the child's parent accused of murdering a sibling, which would lead to the child's identification: the open justice principle could only be displaced in unusual or exceptional circumstances (at [18], per Lord Steyn). The House attached great weight to press freedom and the open justice principle, which maintained public confidence in criminal justice.

In *Khuja*, the Supreme Court placed much greater weight than in prior cases, such as *Re S*, on an intensive scrutiny of the relevant fact-sensitive factors. Lord Sumption considered that *A* was in no different position from a defendant who is tried (in public) but acquitted. Moreover, the accepted impact on family life was indirect and incidental: the law would be incoherent if it were to refuse an injunction to prevent direct damage to *A*'s reputation, while granting it to prevent the indirect impact on his family life. Proceedings often caused publicity for those not directly

involved. Lord Sumption held that *A* could have no expectation of privacy because the matters he sought to restrain had already been discussed in public. There was also no case for preventing *A* from being identified by name. The extent of the reporting was a matter for editorial judgment, and *A*'s identity was a material feature of the story. Lord Rodger's observation did not amount to a legal presumption and Tugendhat J. had not treated it as such. However, Lord Sumption would not have given as much weight to public understanding of the presumption of innocence principle as the judge had.

Importantly for practitioners, Lord Sumption also left open the possibility in other circumstances of an injunction restraining publication where the information was private or there was no sufficient public interest in publication. But he held that, where information had been given in open court, such cases were likely to be rare. The present case was not one of them.

The minority, Lord Kerr and Lord Wilson, also conducted an intensive balancing exercise. They differed from the majority in their assessment of the harm that would be caused by publication. They considered that Lord Rodger's observation (that most people understood that a person was innocent until proved guilty) amounted to an incorrect presumption of law. This invalidated the judge's decision. The minority did not state what decision they would have made, but they clearly foresaw harm to *A* as a material factor.

The Supreme Court's balancing exercise mirrored the intensive approach adopted by the European Court of Human Rights (the Strasbourg Court) where there are competing rights under Articles 8 and 10. The Strasbourg Court recognises that the duty of the media is "to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest" (*Von Hannover v Germany (No. 2)* (Application nos. 40660/08 and 60641/08) [2012] ECHR 40660/08, at [102]). For Article 8 to come into play, "an attack on a person's reputation must attain a certain level of seriousness" and cause prejudice to enjoyment of the Article 8 right (*Axel Springer AG v Germany* (Application no. 39954/08) [2012] ECHR 39954/08, at [83]). The Strasbourg Court has identified a number of criteria which must be considered when competing rights under Articles 8 and 10 have to be balanced: the contribution of the material to a debate of public interest; the degree of notoriety of the person affected; the prior conduct of the person concerned; the content, form and consequences of the publication; and where appropriate the circumstances in which the information was obtained (*Von Hannover*, at [108]–[113]). Prior conduct of *A* was not relevant in *Khuja*, but the Supreme Court considered all the other matters without directly relying on Strasbourg jurisprudence.

Significantly for *Khuja*, the Strasbourg Court requires the harm to the individual to be balanced against the public interest in publication *even if*

the information to be published is true. The media does not necessarily have the right to publish something simply because it is true or alleged to be true.

This can be seen in another recent case in a different context. In *Satakunnan Markkinapőrssi Oy and another v Finland* (Application no. 931/13) [2017] ECHR 931/13, Finnish law made tax information filed by a taxpayer publicly accessible but did not enable another person to collect, store and disseminate the data, as the applicant media had done, incurring sanctions. The Strasbourg Court held that the media's right to freedom of expression was not violated. It balanced the public interest in enabling people to monitor tax collection against the taxpayer's Article 8 right, and concluded that the limitation on the media's right to freedom of expression was justified. So too, in *Khuja*, the material could not be published simply because it was true. There had to be a balancing of both Convention rights.

In conclusion, *Khuja* not only reflects the approach of Convention case law, albeit without explicitly saying so; as explained above, it also reveals a shift to a more "granular" approach to the balancing of competing Convention rights.

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DEVOLUTION AND DISCRIMINATION BETWEEN CITIZENS UNDER ARTICLE 14 ECHR: PRESERVING LOCAL PROVISION

Many women from Northern Ireland (NI) travel to England each year to pay for abortion services because of the limited availability of the service in NI. In *R (on the application of A and B) (Appellants) v Secretary of State for Health (Respondent)* [2017] UKSC 41; [2017] 1 W.L.R. 2492, the Supreme Court was asked whether it was unlawful for the Secretary of State for Health to have failed to make provision for abortion services free of charge under the National Health Service in England to women who are UK citizens usually resident in NI. The majority answered "no" and, on delivering the judgment, Lord Wilson (for the majority) described the Court as "sharply divided" on both the public law and human rights arguments that had been before it.

The outcome in *A and B* has obvious significance for the estimated (minimum of) 1,000 NI women who travel to England for abortions each year (evidence summarised at [5]), in that they must still pay to access the service unlike their English counterparts. The focus of this comment, however, is on the wider implications of the Court's human rights analysis for UK citizens in the context of allegations of discrimination concerning