

## Overview of Sir Cliff Richard v BBC and South Yorkshire Police

[The High Court](#) in Sir Cliff Richard v BBC and South Yorkshire Police made a number of findings of relevance to the way that national, regional and local media report criminal investigations. The BBC applied to the High Court for leave to appeal, which was rejected, and decided not to apply to the Court of Appeal for leave to appeal. [In its statement on its decision](#), the BBC said “*the judgment creates new case law and represents a dramatic shift against press freedom. In his ruling, the judge himself stated “the case is capable of having a significant impact on press reporting”. It raises significant questions over how the media can report investigations in the future - and creates huge uncertainty over what might qualify as being in the public interest.*” [The BBC also wrote to the Attorney General](#), highlighting the problems with the ruling, including the restrictive, chilling effect on press reporting, and calling on the government to review the state of the law.

Responding to the BBC’s announcement, [the NMA said](#): “*This case has raised wide issues around the reporting of the criminal justice process which local and national news media do on behalf of the public. Given the broader consequences for press freedom, we are surprised that the BBC has decided not to appeal this decision. The NMA will now seek urgent meetings with the Government with the aim of ensuring that freedom of speech is not curtailed as a result of this judgment. Public confidence in the criminal justice system is underpinned by transparency at every stage of the process and anything which damages or limits this openness must be resisted.*”

Justice Mann refused permission to appeal, saying the reasons set out by the BBC had “no real prospect of success.” He added that it was “wrong” and an “erroneous reading” of his ruling to suggest it imposed “some blanket restriction” on the media reporting police investigations. The BBC had argued that the ruling had a “chilling effect” on the media naming suspects in a police investigation and could expose them to the risk of large damages claims brought by named suspects. It argued that the judge had erred in law by finding that Richard’s status as a public figure increased his expectation of privacy, had “not given weight” to the media’s rights and failed to give weight to the presumption of innocence in reporting the raid.

The current police guidelines on media relations, which guide the police on matters that include what information to release to media, and on media accompanying them on raids, can be found [here](#). The Culture Secretary has asked HM Inspector of Constabularies to review police compliance with the current guidelines. The NMA is part of the group that the police consult when updating these guidelines and will update members of proposed changes.

### **Overview of Legal Findings**

The case involved the BBC’s reporting of a court authorised search of Richard’s home by the South Yorkshire police in connection with historical sexual abuse allegations under Operation Yewtree. The BBC covered the search live, as it happened, including a helicopter flying over the property. Richard was never arrested or charged with any crime, and brought a privacy claim against the BBC and the police (misuse of private information and data protection, although the latter was not considered by

the court as Richard accepted that if he won on privacy he did not pursue his action under data protection law<sup>1</sup>).

The High Court made a number of findings about reporting criminal investigations pre-charge. Justice Mann held that those subject to police investigations have a reasonable expectation of privacy: *“It seems to me that on the authorities, and as a matter of general principle, a suspect has a reasonable expectation of privacy in relation to a police investigation... As a general rule it is understandable and justifiable (and reasonable) that a suspect would not wish others to know of the investigation because of the stigma attached.”*<sup>2</sup> The court also held that the existence of a search warrant, indicating that the investigation had substance, and a search that was conducted in public view, did not, without more, displace the presumption of privacy: *“I do not consider that a search warrant, without more, removes the legitimate expectation of privacy... The circumstances of the execution of the warrant may, as a matter of practice, involve a certain compromise of the privacy of the investigation... but it does not follow from that that privacy rights should be automatically lost.”*<sup>3</sup>

This is a significant advancement of the law, reached by relying on the minority in *Khuja v Times Newspapers* in the Supreme Court, which said that the public rush to assume guilt on the basis of an investigation or arrest. In that case, the majority held that whether the public were able to understand that you are innocent until proven guilty in a particular case was context specific, and so needed to be assessed on a case by case basis. This ruling takes the reasonable expectation of privacy from a context specific decision to be made on a case by case basis and treats it as a general rule that must be rebutted.

The court found that this presumption of a reasonable expectation of privacy was the starting point, which could be displaced by other factors when balanced against the media’s Article 10 rights to freedom of expression. The factors to be considered were:<sup>4</sup>

- Whether reporting the matter would contribute to a debate of general public interest
- The status of the person and the subject matter of the report
- Any relevant prior conduct of the person
- The method by which the information was obtained, and its accuracy
- The content, form and consequences of publication

When this was applied to Cliff Richard’s case, the following points are worth noting:

- In relation to contributing to a debate of general public interest, Justice Mann found that while the topic of investigation (sexual abuse allegations) was of public interest, it did not follow that the specific identity of the person was also of public interest. In this instance, knowing that the police were investigating Cliff Richard specifically did not add to the public debate.<sup>5</sup> This is contrary to the established principle that identification in such cases is important as it facilitates other potential victims coming forward.
- Regarding the status of the person and their prior conduct, the Court accepted (to a degree) that someone who puts themselves in the public eye has partially diminished their privacy

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<sup>1</sup> Paragraph 226

<sup>2</sup> Paragraph 248

<sup>3</sup> Paragraph 255

<sup>4</sup> Paragraph 276

<sup>5</sup> Paragraph 282

expectations. However, this did not apply to all expectations of privacy, and was fact sensitive, depending on the extent, and on what subjects, they have surrendered their privacy; some areas of privacy remain unaffected by being a public figure. The Court found that, in this instance, criminal investigation pre-charge was one such area on which they had not diminished their expectation of privacy.<sup>6</sup>

- When considering the prior conduct of the person, the Court found that in this instance, Cliff Richard's very public Christian faith was relevant, but only for disclosures of "actual conduct", not of allegations or investigations.<sup>7</sup> The Court found that, in relation to public figure status, the severity of the subject matter, and the person's prior behaviour, each factor cut both ways: the more serious the subject matter in relation to that person, the greater the protection for free speech AND the greater their expectation of privacy.<sup>8</sup> Again, this is a departure from the case law, which states that being a public figure with publicly stated beliefs, this should increase the public interest of knowing of allegations made that run contrary to those beliefs.<sup>9</sup>
- Importantly, the Court found that how the material was obtained by the media to be extremely relevant. In this instance, the Court found that the journalist has obtained the information using implied threats (the BBC disputed this). *"Not all journalistic subterfuge, or ploys such as that adopted one way or another by [the journalist] are unethical. They are sometimes justifiable. But on the facts of this case it does weaken the BBC's position. It is very significant that the publication started with obviously private and sensitive information, obtained from someone who, to the knowledge of [the journalist], ought not to have revealed it, and confirmed and bolstered with a ploy in the form of a perceived threat that ought not to have been made (or allowed to stand)."*<sup>10</sup> Justice Mann quotes paragraph 3.5.2 of the police Guidance on Relationships with the Media that applied at the time of the incident (they have since been updated). The full paragraph, with the quoted section underlined:

Police forces must balance an individual's right to respect for a private and family life, the rights of publishers to freedom of expression and the rights of defendants to a fair trial. Decisions must be made on a case-by-case basis but, save in clearly identified circumstances, or where legal restrictions apply, the names or identifying details of those who are arrested or suspected of a crime should not be released by police forces to the press or the public. Such circumstances include a threat to life, the prevention or detection of crime or a matter of public interest and confidence. This approach aims to support consistency and avoid undesirable variance which can confuse press and public.
- Although the BBC did contact Richard's representatives and leave enough time to comment, Justice Mann considered *"it is also proper to give the subject some sort of opportunity to challenge publication before it happens, whether by persuasion or injunction."*<sup>11</sup> It was held that a proper opportunity to reply included providing sufficient information, which it was

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<sup>6</sup> Paragraph 284

<sup>7</sup> Paragraph 285

<sup>8</sup> Paragraph 286

<sup>9</sup> See *Axel Springer AG v Germany* [2012] EMLR

<sup>10</sup> Paragraph 292

<sup>11</sup> Paragraph 293

found in this instance the BBC did not. The finding that it fell short of its own ethical guidelines was held to be relevant, although of minor importance in comparison to other factors.

- The most significant factors in coming to the conclusion that the court reached were:
  - The consequences for Cliff Richard – the inability of the public to bear in mind the presumption of innocence means that there is inevitable stigma associated with being investigated, which is catalysed by the extreme nature of the allegations. *“Reporting on the investigation and the search was a serious invasion which required an equally serious justification”*.<sup>12</sup>
  - The public interest in the investigation of historic sex abuse does not equate to the public interest in those investigated being identified.<sup>13</sup>
  - The style of the reporting was sensationalised. It was found that a measured reading of the relevant facts from the newsroom would have been a serious privacy infringement, making what the BBC did much more.<sup>14</sup>

This is the first case in which substantial damages have been awarded for reputational damage in a breach of privacy claim.

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<sup>12</sup> Paragraph 316

<sup>13</sup> Paragraph 317

<sup>14</sup> Paragraph 318