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Case No: KB-2023-002567

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**MEDIA & COMMUNICATIONS LIST**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 29/06/2023

**Before :**

**THE HONOURABLE MRS JUSTICE COLLINS RICE**

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**Between :**

**WFZ**

**Claimant**

**- and -**

**The British Broadcasting Corporation**

**Defendant**

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**Mr Justin Rushbrooke KC & Mr Jacob Dean** (instructed by Farrer & Co LLP) for the  
Claimant

**Mr Adam Wolanski KC & Ms Hope Williams** (instructed by BBC Litigation Department) for  
the Defendant

Hearing dates: 14<sup>th</sup> & 19<sup>th</sup> June 2023

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**Approved Judgment**

This judgment was handed down remotely at 2pm on 29<sup>th</sup> June 2023 by circulation to the  
parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MRS JUSTICE COLLINS RICE

**PUBLIC VERSION**

## Mrs Justice Collins Rice:

### Introduction

1. This is an application for *interim* injunctive relief to restrain intended publication by the BBC of specified information, and for derogations from open justice, until trial of the Claimant's claim. By that claim, he seeks *permanent* injunctive relief on the grounds that publication of the specified information would constitute (1) an invasion of his right to privacy, (2) a contempt of court and/or (3) an unjustified interference with his rights to a fair criminal trial as guaranteed by Art.6 of the European Convention on Human Rights.
2. Exceptionally, I heard the application in private. As I explained at the time in open court, I was satisfied, taking into account all the evidence provided to me, that the circumstances of the application were exceptional and that it was strictly necessary to secure the proper administration of justice for the application to be heard in private. That was because the Claimant is a person with a high public profile, and the specified information he seeks to protect from publication by the BBC includes the fact that he is under active criminal investigation in relation to allegations of serious criminal offences. I considered it impossible to hear the application in public, even subject to anonymisation, without fuelling speculation about his identity, and substantially risking the destruction of his anonymity and the emergence into the public domain of the very information which it was his purpose in bringing these proceedings to protect from publication. That would entirely have defeated the purpose of his claim before it could be properly tried, and would have been inconsistent with the fair conduct of the hearing itself.
3. Having considered the written and oral submissions of Counsel, and the written evidence provided, and reserved judgment, my decision on the Claimant's application has been to grant it. Because of that, this judgment exists in two versions. A private version, setting out my reasoning and its application to the underlying factual matrix in full (but without naming the Claimant), has been provided to the parties and will be retained on the Court records. That version will be protected by measures set out in an Order of the Court. A public version, which provides as much information about my decision as I am satisfied is consistent with the decision itself, is being handed down and published in the usual way.
4. This is the **PUBLIC** version of the judgment.

### Background

5. The Claimant is a man with a high public profile.
6. On 5<sup>th</sup> June 2023, a journalist in the BBC's News Investigation team, wrote him a 'Right of Reply' letter about an investigation the BBC had conducted into sexual misconduct allegations against him. It said they had spoken to a number of women who had given detailed accounts of behaviour by him including the commission of serious sexual offences. It said they intended to identify him in their reporting of this investigation. Although none of the complainants had agreed to be identified in the report, information

about dates and places was provided to enable the Claimant to identify them. The letter set out the content of the allegations of four identifiable complainants, in brief, but explicit, form. It also referenced information provided by friends of the complainants and others. It recorded that the Claimant had been arrested in relation to allegations made by two of the complainants and interviewed under caution in relation to those of a third, and that police investigations were continuing.

7. The Claimant thereupon sought an urgent interim non-disclosure injunction, without having issued an application or claim. By Order dated 8<sup>th</sup> June 2023, Nicklin J gave directions, upon the Claimant undertaking to issue an application and claim, for the application to be heard on 14<sup>th</sup> June. That was on the basis of the Order recording an undertaking from the BBC in the following terms:

The Defendant undertakes to the Court that it will not, until 4.30pm on Wednesday 14 June 2023 use, publish or communicate or disclose to any other person (other than (i) by way of disclosure to legal advisers instructed in relation to these proceedings ('the Defendants' legal advisers') for the purpose of obtaining legal advice in relation to these proceedings or (ii) for the purpose of carrying this Order into effect) all or any part of the following information:

- (1) Any information or purported information which is likely to identify the Claimant as the subject of the allegations of [sexual and abusive offending] referred to in the Defendant's letter dated 5 June 2023 to the Claimant.
- (2) Any information or purported information which is likely to identify the Claimant as having been arrested on suspicion of [serious sexual offences].
- (3) Any information or purported information which is likely to identify the Claimant as having been arrested on suspicion of [an abusive offence].
- (4) Any information or purported information which is likely to identify the Claimant as having been interviewed under caution in relation to allegations of [a serious sexual offence].

For the avoidance of doubt, nothing in this undertaking shall prevent the Defendant from publishing, communicating or disclosing (a) such of the Information, or any part thereof, as was already in, or that thereafter comes into, the public domain in England and Wales as a result of publication in the UK national media (other than as a result of breach of this Order (or a breach of confidence or privacy)) or (b) the fact of any decision taken by the Crown Prosecution Service to charge the Claimant with any offence.

8. That undertaking was subsequently extended until hand-down of this judgment.

## **Legal Framework**

### **(a) *Misuse of Private Information***

9. The modern tort of misuse of private information tort derives from the decision of the House of Lords in *Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22*. That decision in turn was rooted in the incorporation into domestic law, by the Human Rights Act 1998, of Articles 8 and 10 of the European Convention on Human Rights, which provide as follows:

#### **Article 8**

##### **Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

#### **Article 10**

##### **Freedom of expression**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
  2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
10. *Campbell* sets out a two-stage test accordingly. First, does a claimant have a reasonable expectation of privacy in the relevant information? Second, if so, is that expectation outweighed by a defendant's freedom to publish? Subsequent authorities have emphasised that a balancing exercise is accordingly required, and that this exercise is highly fact-specific.

11. The question of whether there is a reasonable expectation of privacy in the first place was confirmed by the Court of Appeal in *Murray v Express Newspapers plc* [2009] Ch 481 at [36] to be:

a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the places at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.

These have come to be known as the ‘*Murray* factors’, but they are illustrative, and not exhaustive, of ‘*all the circumstances of the case*’.

12. Guidance on stage two of the test was recently provided by the Supreme Court in *ZXC v Bloomberg LP* [2022] AC 1158, on which the Claimant in the present case places heavy reliance, but which the BBC seeks to distinguish on the facts, as further discussed below. At [61]-[62], the Court noted:

The extent to which publication is in the public interest is of central importance. ... In considering the public interest in publication, the contribution that publication will make to a debate of general interest is a factor of particular importance. ... Other factors of likely relevance ... are: (1) how well-known is the person concerned and what is the subject of the report; (2) the prior conduct of the person concerned; (3) the method of obtaining the information and its veracity; (4) the content, form and consequences of publication; and (5) the severity of the restriction or interference and its proportionality with the exercise of the freedom of expression.

13. Two particular aspects of the judgment *ZXC* are noteworthy for present purposes. The first is the UKSC’s confirmation, at [146], that ‘*as a legitimate starting point, a person under a criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation...*’. The nature of and rationale for that proposition are considered in more detail at [64]-[73]. Its rationale is that ‘*publication of such information ordinarily causes damage to the person’s reputation together with harm to multiple aspects of the person’s physical and social identity such as the right to personal development, the right to establish and develop relationships with other human beings and the outside world all of which are protected by article 8 of the ECHR... The harm and damage can on occasions be irremediable and profound.*’. That rationale, and the ‘*negative effects of publishing information that a person is under criminal investigation*’ and the ‘*resulting uniform general practice*’, are further expanded on at [80]-[89]. But the Court emphasised that it is a general rule or legitimate starting point only, not a legal rule or presumption; it does not replace the need for evidence and for fact-specific inquiry in every case. And much may turn on

what the information and the investigation are *about*, and in particular how far they include information of an ‘intimate and personal nature’.

14. The second aspect is what the UKSC said in *ZXC* about the relationship between privacy and confidentiality, at [147]-[150]. Whether information is confidential may be *relevant* to whether it is private: *the circumstances in which and the purposes for which the information came into the hands of the publisher* is one of the *Murray* factors. But there is no necessary overlap between the two: information may be private but not confidential, or confidential but not private. Confidentiality arises from an original exchange or disclosure of information – it is at root a relational matter. Privacy is an individual entitlement to autonomous control of information, asserted against the world. See also what is said about this by Lord Neuberger of Abbotsbury PSC in *PJS v News Group Newspapers LTD [2016] AC 1081* at [57]-[66]: the key issue in privacy is *intrusion* or impact, not confidentiality or secrecy.
15. An application for an interim injunction to restrain publication on grounds of misuse of private information is one to which section 12 of the Human Rights Act 1998 applies. As relevant, s.12 provides:

**12. Freedom of expression.**

- (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
- (2) ...
- (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
- (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
- (a) the extent to which—
- (i) the material has, or is about to, become available to the public; or
- (ii) it is, or would be, in the public interest for the material to be published;
- (b) any relevant privacy code.

Potentially relevant privacy codes in the present case include the BBC’s own editorial guidelines and guidance, and the OFCOM Broadcasting Code.

16. Guidance on the correct approach to the test contained in s.12(3) was provided by the House of Lords in *Cream Holdings v Banerjee* [2005] 1 AC 253 at [22]-[23]:

[22] ... Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy section 12(3) must depend on the circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success 'sufficiently favourable', the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal.

[23] This interpretation achieves the purpose underlying section 12(3). Despite its apparent circularity, this interpretation emphasises the importance of the applicant's prospects of success as a factor to be taken into account when the court is deciding whether to make an interim restraint order. It provides, as is only sensible, that the weight to be given to this factor will depend on the circumstances. By this means the general approach outlined above does not accord inappropriate weight to the Convention right to freedom of expression as compared with the right to respect for private life or other Convention rights. This approach gives effect to the parliamentary intention that courts should have particular regard to the importance of the right to freedom of expression and at the same time it is sufficiently flexible in its application to give effect to countervailing Convention rights. In other words, this interpretation of section 12(3) is Convention-compliant.

**(b) Contempt of Court and the right to a fair trial**

17. Article 6 of the Convention guarantees the right to a fair trial. It provides, as relevant:

**Article 6**

**Right to a fair trial**

1. In the determination of his civil rights and obligations and of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]

2. Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.

18. Contempt of court by publication to the public is governed by the Contempt of Court Act 1981, which provides as follows:

**The strict liability rule**

1.- In this Act “the strict liability rule” means the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so.

**Limitation of scope of strict liability**

2.- (1) The strict liability rule applies only in relation to publications, and for this purpose “publication” includes any speech, writing, programme included in a cable programme service or other communication in whatever form, which is addressed to the public at large or any section of the public.

(2) The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

(3) The strict liability rule applies to a publication only if the proceedings in question are active within the meaning of this section at the time of the publication.

(4) Schedule 1 applies for determining the times at which proceedings are to be treated as active within the meaning of this section.

By paragraph 4(a) of Schedule 1, criminal proceedings are ‘active’ from the time of arrest.



19. The relationship between Art.6, Art.10 and the 1981 Act was put this way by the Divisional Court in Attorney-General v Mirror Group Newspapers [2012] 1 WLR 2408 at [32]:

Our attention was drawn to Article 10 of the Convention for the Protection of Human Rights and Freedoms. As is well understood this confirms the right to freedom of expression, and to receive and impart information and ideas without interference. It is however subject to express limitations and such restrictions as may be prescribed by law and necessary in a democratic society ‘for the protection of ... the rights of others’ and ‘for maintaining the authority and impartiality of the judiciary’ which for present purposes includes the jury. The right to a fair trial is of course encapsulated in Article 6 of the Convention which declares the entitlement to a fair hearing. The 1981 Act represents the system provided in this jurisdiction to ensure that the right to a fair trial is protected. In the present context any interference with the Article 10 rights of the defendants depends on proof to the criminal standard that the publications in question have created a substantial risk of serious impediment or prejudice to the course of justice. This falls comfortably within the limitations acknowledged in the Convention itself.

20. Help with applying the s.2(2) test is provided by the House of Lords in Attorney-General v English [1983] 1 AC 116 at 141-142. Risk must be assessed at the time of publication. A ‘substantial risk’ is one which is not ‘only remote’. ‘Seriously’ needs no gloss, but ‘*if, as in the instant case and probably in most other criminal trials upon indictment, it is the outcome of the trial or the need to discharge the jury without proceeding to a verdict that is put at risk there can be no question that that which in the course of justice is put at risk is as serious as anything could be*’.
21. The Divisional Court has given guidance on ‘impeded or prejudiced’ in AG v MGN Ltd including at [29]-[31] and in Attorney-General v Yaxley-Lennon [2019] EWHC 1791 at [72]-[73]. The Court in the former case cited this passage with approval:

The course of justice is not just concerned with the outcome of proceedings. It is concerned with the whole process of the law, including the freedom of a person accused of a crime to elect, so far as the law permits him to do so, the mode of trial which he prefers and to conduct his defence in the way which seems best to him and to his advisers. Any extraneous factor or external pressure which impedes or restricts that election or that conduct, or which impels a person so accused to adopt the course in the conduct of his own defence which he does not wish to adopt, deprives him to an extent of the freedom of choice which the law confers upon him and is, in my judgment, not only a prejudice but a serious prejudice.

In the Court's view, notwithstanding the references at the end of that passage to prejudice, these were examples of the course of justice being impeded. Another example given was material which would deter a witness from coming forward to give evidence. The Court also cited this passage with approval:

[This] must depend primarily on whether the publication will bring influence to bear which is likely to divert the proceedings in some way from the course which they would otherwise have followed. The influence may affect the conduct of witnesses, the parties or the court. Before proceedings have come to trial and before the facts have been found, it is easy to see how critical public discussion of the issues and criticism of the conduct of the parties, particularly if a party is held up to public obloquy, may impede or prejudice the course of the proceedings by influencing the conduct of witnesses or parties in relation to the proceedings.

The Court continued:

In our judgment, as a matter of principle, the vilification of a suspect under arrest readily falls within the protective ambit of section 2(2) of the Act as a potential impediment to the course of justice. At the simplest level publication of such material may deter or discourage witnesses from coming forward and providing information helpful to the suspect, which may, (depending on the circumstances) help immediately to clear him of suspicion or enable his defence to be fully developed at trial. This may arise, for example, because witnesses may be reluctant to be associated with or perceived to be a supporter of the suspect, or, again, because they may begin to doubt whether information apparently favourable to the suspect could possibly be correct. Adverse publicity may impede the course of justice in a variety of different ways, but in the context we are now considering, it is not an answer that on the evidence actually available, the combination of the directions of the judge and the integrity of the jury would ensure a fair trial. The problem is that the evidence at trial may be incomplete just because its existence may never be known, or indeed may only come to light after conviction.

22. The Court in the Yaxley-Lennon case put it this way:

The creation of a seriously arguable ground of appeal may be a useful criterion in the context of publications that may prejudice the deliberations of a jury. In our judgment, however, the notion of impeding the course of justice is a distinct one that engages very broad considerations, to do with the administration of justice and the public interest.

23. Section 5 of the Act provides that ‘*a publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion*’. It is not suggested in the present case by the BBC that the ‘merely incidental’ provision is of assistance.
24. An application for an interim injunction to restrain publication on grounds of contempt of court potentially raises some preliminary legal issues. In the first place, some doubts have been expressed, including in *Arlidge, Eady & Smith on Contempt of Court* (at [2.222]), on the question of the standing of applicants other than the Attorney-General to apply for such an injunction. The present case has proceeded on the premise, which the BBC does not seek to challenge, that *not only* the Attorney-General has *locus standi* to apply for injunctive relief and that the Claimant does have locus to make the application. I have noted what is said in support of that in the unreported Court of Appeal case of *Leary v BBC* 29 Sept 1989 and in *Peacock v London Weekend Television* (1985) 150 JP 71; and I see the House of Lords noted in *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370 at 381 that ‘*whilst section 7 of the Act of 1981 requires the consent of the Attorney-General before proceedings can be brought for contempt of court under the strict liability rule, this does not fetter the right of an individual to seek a quia timet injunction*’. I am told that the Attorney-General’s Office is on notice of this application, has indicated an expectation that it will be resolved as a ‘private matter’ between the parties for now, and intends to continue to monitor the situation in the light of the outcome of the present application. There is therefore no issue before me of potential *conflict* of jurisdictional standing in practice.
25. Then there is the issue of the standard of proof required before an injunction may be granted. In one of the passages cited above, *AG v MGN* confirmed that it is the *criminal* standard which applies: a Court must be *sure* that a publication creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced before it can injunct it. The authorities more generally indicate the criminal standard of proof: see for example *Attorney-General v Random House Group Ltd* [2009] EWHC 1727 per Tugendhat J at [43], and it appears to have been common ground in *Attorney-General v BBC* [2007] EWCA Civ 280 that the criminal standard applied. It is, of course, an even higher test than the s.12(3) HRA test.
26. Mr Rushbrooke KC, Counsel for the Claimant, draws my attention in the alternative, however, to the recent judgment of the Court of Appeal in *In re G* [2022] EWCA Civ 1312 which reviews the jurisprudence on injunctions more generally. He suggests that the law has now reached a principled position in which a court must focus on the simple core issues of (a) whether a claimant has an ‘interest which merits protection’ and (b) whether the court can identify a legal or equitable principle which justifies exercising the power to order a defendant to do or not do something. Here, he says, the Claimant’s Art.6 right to fair criminal process is an interest which merits protection – and it is an unqualified interest. He reminds me that section 6(1) of the Human Rights Act makes it ‘*unlawful for a public authority to act in a way which is incompatible with a Convention right*’ and that a court is a public authority for these purposes; that, he says, provides the necessary basis for the exercise of the injunctive power of the court. And the appropriate standard of proof is, accordingly, no higher than the s.12(3) test read together with the degree of flexibility directed by *Cream Holdings*. This is not an

analysis with which Mr Wolanski KC, Counsel for the BBC, agrees, and I consider this dispute further below.

27. The authorities are in any event clear that courts should be slow to grant injunctions restraining contempt of court on a *quia timet* (prospective) basis. ‘*It is the wise and settled practice of the courts not to grant injunctions restraining the commission of a criminal act – and contempt of court is a criminal or quasi-criminal act – unless the penalties available under the criminal law have proved to be inadequate to deter the commission of the offences*’ (*Pickering v Liverpool Daily Post* at 381-2). Again, ‘... *the courts should not award him such an injunction except in a clear case where there would manifestly be a contempt of court for the publication to take place*’ (*A-G v BBC [1981] AC 303* at 311-2).

## **Factual context**

### **(a) *The intended publication***

28. The BBC’s evidence of about the *nature* of its proposed output in this case as follows:

The BBC’s proposed broadcast news output relating to the investigation will comprise short packages within news bulletins and short scripted segments within news programmes on television and radio. I anticipate that the longest television and radio packages will be around 5 minutes in length, and the proposed online item runs to around 2000 words. The individual news items on different BBC channels, or platforms, will largely contain the same information packaged in different ways for different audiences, or formats. I would anticipate that, as with any breaking news story, there would be an element of re-packaging and live coverage and commentary as the story develops. ... We do not plan to publish any of our output on websites, or social media pages, which have commenting functions.

29. As to *content*, its evidence is that the proposed reports will state that the BBC has found that at least a quarter of businesses in the sector in which the Claimant works have had employees investigated by the police for serious sexual offences, yet despite this the sector does not have any policies or procedures for employees who are accused of violence against women, nor any consistency of approach to allegations. It states, ‘*the reports will use [the Claimant’s] case as a stark illustration of these issues*’. They will explain that the Claimant has been investigated by the police and arrested in respect of the allegations, since it is important to explain that his employer knows that this is the position and has taken no action. However the involvement of the police would not be the focus of the reports.
30. As confirmed in the ‘Right of Reply’ letter, the BBC intends to identify the Claimant by name. The evidence of the journalist who wrote it is that the letter set out ‘*the allegations we are proposing to publish*’. The BBC states further that it believes it is

important to publish the allegations relating to one complainant in particular. Her account *‘is central to our reporting. Her allegations are very serious. It is her testimony which speaks most clearly to the systemic failure to respond to allegations of this nature...’*.

31. The BBC clarifies at the same time that *‘the BBC’s proposed news story does not include extensive details of the alleged sexual misconduct, but only an outline in the broadest terms to allow the public to understand the nature and seriousness of the alleged behaviour’*. It also confirms that:

The reports will clearly frame what [the Claimant] is accused of as ‘allegations’ and will make it clear that they are disputed. They will include any comment by [him]. We will not suggest, or imply, that [he] is guilty of the offences he is accused of. We will not include all the details of the alleged offences that have been published by other mainstream media in anonymised reports.

32. Further indications from the BBC about the content of the proposed reporting include its confirmation in a solicitor’s letter of 7<sup>th</sup> June that its purpose was the exposure of serious and repeated alleged sexual misconduct against numerous victims, and giving effect to the desire of the victims to have their allegations against the Claimant made public, but that it was not the BBC’s intention to publish *‘extensive or graphic detail about the allegations’*. Mr Wolanski KC submitted also that there is an additional public interest in examining the complainants’ accounts *‘side by side, particularly given the repetitive nature of the Claimant’s alleged conduct’*.

**(b) *The active criminal proceedings***

33. I have no direct evidence (or representations) from the criminal law enforcement authorities. But the following appears to be common ground.
34. Police arrested the Claimant in 2022 on suspicion of a serious sexual offence following one of the complainants’ allegations. They released a statement to the media identifying the offence. The Claimant was not identified but the place of his arrest was. They later released another statement saying he had been further arrested on suspicion of two serious sexual offences alleged to have been committed against a different woman. The Claimant was bailed shortly afterwards. The police later confirmed it was taking no further action in relation to one of the alleged offences.
35. The police subsequently interviewed the Claimant under caution in relation to a third complainant, on suspicion of committing a sexual offence the year before. They issued a statement to that effect.
36. The BBC’s evidence is that the police have also kept the two complainants in respect of whose allegations the Claimant was arrested informed about the progress of their investigation, as they are required to under the Government’s Code of Practice for Victims of Crime. I have seen examples of informal text messages exchanged between one of the complainants and a victim liaison police officer to this effect. After the BBC’s approach to the Claimant in the ‘Right of Reply’ letter, officers became aware that one complainant had been approached by a journalist and had spoken to them. She

was told that was *'not ideal'* and asked for details *'so that we can negate future impacts'*. The same complainant had been warned by police in the summer of 2022 about *'the use of social media in reference to the case. Anything mentioned online can be disclosed and detrimental to any future trial.'*

37. It was put to the police on 7<sup>th</sup> June 2023 on the Claimant's behalf, following the 'Right of Reply' letter, that the BBC's proposals were a cause of concern. The senior investigating officer replied the following day to say that they had been unaware of the proposals *'and we are also rightly concerned'*. He indicated that their media department had been in touch with the BBC to express their concerns and to say *'it was important the BBC didn't do anything to jeopardise the case'*. But he confirmed that it was the police's expectation that the BBC would act within the law and not do anything to jeopardise the investigation, and that the Claimant's intended application for an injunction was a matter between the parties.
38. No charging decision has yet been taken. The Claimant has been bailed until next month.

## **Consideration**

### **(a) Preliminary**

39. This is an unusual case. The BBC proposes a departure from what the decided authorities describe as the *'uniform general practice'* of the police, and the mainstream media, of not publicly identifying an individual arrested in relation to serious criminal allegations before a charging decision has been made. It has itself been following that practice in this case up until now. A uniform general practice is, however, not a legal rule. It is what the law has to say about the practice, the reasons for it, and most importantly its relevance or otherwise to the particular facts and circumstances of this case, that is the necessary focus of these proceedings.
40. It is common ground that, unless restrained by court order, the BBC will publish a major news story naming the Claimant as the subject of a continuing criminal investigation into allegations made by multiple complainants of serious sexual offending. The relationship between the allegations and the investigation is not simple. The Claimant has been arrested but not (yet) charged in relation to two allegations. He has been interviewed in relation to a third allegation. A decision appears to have been made not to investigate further a fourth allegation. And further allegations have not (yet) been notified formally to the police. All the allegations are of a similar nature.
41. It is also common ground that the Claimant has not been identified by the police in this connection (albeit mention has been made of his age, and some sparse details of the nature, timing and location of some of the allegations). The College of Policing Guidelines on media relations identifies police practice as being not publicly to name or confirm to the media for publication those arrested or suspected of a crime, other than in exceptional circumstances where there is a *'legitimate policing purpose'* to do so – such as threat to life, the prevention or detection of crime or where a public warning has been issued about a wanted person. A decision to identify should be authorised by a chief officer. No such decision has been taken in the present case.

42. Nor has the Claimant been identified by the mainstream news outlets which have covered some of the developments in his case in anonymised form, whatever they may know, infer or guess about his identity – including as I say, to date, the BBC itself. Some of the coverage has mentioned his employment.
43. So the considerations – of privacy and of the interests of justice – which may be inferred to underlie the restraint shown so far, and to explain the references to ‘legal reasons’ which have appeared in this connection, are now strongly urged on the court by the Claimant, and as firmly said by the BBC not to be good enough reasons *in this case* to continue to ensure restraint until charging decisions are made one way or the other.
44. Mr Rushbrooke KC says the case is all about this very timing point. And the BBC does not ask me to consider any *particular* timing imperative to publish before charging decisions, other than its editorial decision, which of course I respect, that it has a major news story with a strong public interest dimension ready to go, and that the Claimant has given the Court no good reason to interfere with its important freedom to do so. It may or may not be that charging decisions are imminent. It may or may not be that the Claimant will be charged. So I am asked simply to consider the competing interests at stake within the legal framework set out above which, as explained, is highly sensitive to the facts of individual cases.
45. I was shown no decided authority squarely on the point of supporting the naming of a suspect between arrest and charging decision, on facts directly comparable to the present – that is to say, on an interlocutory application to prevent publication in reliance on prospective risk to privacy and to the administration of justice. I was taken to no practical comparators or examples in practice where a suspect has been identified at this point and the courts have not needed to be involved. Mr Rushbrooke KC says this is because of the general, not to say universal, understanding and practice to the contrary. Courts – and judge-led Inquiries (Henriques, Leveson) – have, however, had plenty to say *retrospectively* about cases in which suspects have been identified in the media after arrest and before charge and where catastrophic consequences have flowed from that.
46. The *AG v MGN* case cited above, for example, was the Attorney-General’s ex post facto application for committal for contempt in the notorious case of Christopher Jefferies, a blameless man arrested on suspicion of murder and subsequently released without charge – and in due course wholly exonerated by the conviction of another man, but meanwhile vilified in the media. The Divisional Court had no hesitation in concluding that the strict liability contempt test was satisfied. The Court acknowledged that the authorities it reviewed ‘*are largely result-based decisions when appeals against conviction on the ground of actual or potential jury prejudice have been dismissed. They were not addressing the predictive question whether the course of justice was prejudiced or impeded or indeed put at risk as at the date of publication.*’ (Even less, it might be added, were they addressing a series of predictive questions *before* publication.) But the Court held (at [3]) that it was *irrelevant* that Mr Jefferies was never charged or tried, that he never would be, that he was innocent, and that he had been defamed. It was the *risk* of impediment or prejudice to the course of justice in proceedings that were ‘active’ at the time (because Mr Jefferies had been arrested) that was obvious, and determinative.

47. More recently, *Sicri v Associated Newspapers Ltd [2020] EWHC 3541 (QB)* concerned a Claimant arrested in connection with the Manchester Arena bombing of 2017. He was named almost immediately in the mainstream press. He was later released without charge, the police having informed him they had found no evidence of his involvement in the atrocity, and that there was no reason for them to investigate further. But the emergence of his name in connection with the bombing into the public domain exposed him to intense media attention, social media hate and trolling, threats to his safety and ultimately substantial interference with his home life and his business. His claim in misuse of private information was successful, Warby J (as he then was) emphasising along the way that an arrest is ‘*an executive act of a provisional nature*’ and endorsing the ZXC starting point that – at any rate where it does not occur in a public place – a claimant has a reasonable expectation in law that he will not be identified in relation to it.
48. The present case is unusual on its facts not only in the high degree of prospectivity it features – it is neither a post-conviction nor a post-publicity challenge – but also in the highly polarised submissions as to the proper starting point of a court in these circumstances. Mr Wolanski KC draws out a principle that my starting point should be – having particular regard to the importance of the Convention right to freedom of expression and especially freedom of the press – deference to the BBC as the primary decision-maker. As a responsible and expert public-service broadcaster, it of course recognises and fully intends to comply with its legal obligations as to the Claimant’s private rights and as to the administration of justice in general. It will make its editorial and publication decisions in due course accordingly, and there is no proper basis for those to be interfered with in advance. Mr Rushbrooke KC, on the other hand, looks at what the BBC has already clearly said it will do, and, seeing a vehicle driven by the BBC with the Claimant on board heading for a cliff-edge, asks the court to apply the emergency handbrake to save him from an impending and unwarranted disaster.
49. The Claimant in this case is neither a convicted man complaining of the effects of publicity on his trial, nor an exonerated man complaining of the disastrous consequences of publicising his arrest. The criminal justice system has not yet done with him one way or the other. His argument is that the BBC’s editorial decision is wrong in law in his particular case, and that he is entitled to prevent its consequences before they will inevitably follow. Since his current status as a person under arrest is a salient feature of the case, I begin with the question of contempt of court, before turning to consider whether any of the alternative bases put forward by the Claimant produces a different result.

**(b) Risk to the course of justice**

50. The BBC has not confirmed to the court, and may not yet have decided, exactly what it proposes to publish. That is its entirely legitimate editorial prerogative. What is clear from its evidence as an absolute minimum, however, is that its proposed publication will name the Claimant and confirm the existence of live criminal proceedings, that is to say that he has been arrested but not charged. It will identify that he is being investigated in relation to allegations of serious sexual offences. It will provide some detail of allegations that have been made against him by a number of complainants. That is the bare minimum. I do not understand that to be controversial. Its evidence is



that it is also interested in patterns of behaviour, similarities and comparisons in the complainants' accounts.

51. It is not in dispute either that the Claimant has not been named or publicly identified in connection with the criminal investigation by any authoritative source. It is agreed, and I accept, that there has certainly been some speculation on social media about his identity. It is a part of the BBC's story to draw attention to the online trolling of complainants of sexual offending, including to illustrate the effects of what it says is insufficient clarity and action from the sector in which the Claimant works in response to their complaints. It is not in dispute that rumour about the Claimant and the allegations against him is current in some quarters.
52. But the BBC naming the Claimant in connection with criminal investigations into allegations of serious sexual offending would undoubtedly be a substantial game-changer. The step up from rumour and gossip to a researched and substantiated breaking and rolling news item on a professional and edited national platform is one of orders of magnitude. The decision to identify would itself be a major and high-impact news story in its own right.
53. And it is clearly intended to be. The BBC's evidence is that it considers identifying the Claimant in this way essential for drawing attention to the underlying matters which are the subject matter of its investigation – the alleged failure of the sector to deal adequately with allegations of sexual misconduct against employees in a way which is fair and respectful to complainants. The Claimant's name will bring the story to life. The BBC intends the Claimant's case to be a 'stark illustration' of the problem to which it wishes to draw attention.
54. Although the BBC submits that the police investigation into the Claimant is not the, or a, main feature of its story, its own evidence cannot easily be reconciled with that. The headline finding of its report – and it is a startling and memorable headline – is that '*at least a quarter of [businesses in the sector] have had [employees] investigated by the police for serious sexual offences*' yet there are no consistent policies or procedures in place for dealing with this. The naming of the Claimant *and* the confirmation that the police are investigating him for serious sexual offences are clearly central to the proposed publication and to the wider points the BBC wishes to make.
55. But advertising or illustrating the general story by identifying the Claimant's case raises the following issues.
56. First, I have no doubt that it would be *entirely* successful in its aim of generating truly enormous publicity. The Claimant is a nationally (and internationally) known name. High-wattage celebrity sex scandals never fail to attract *and retain* attention. And it would be absurd to proceed on the basis that the effect of that publicity would or could be confined to stimulating informed debate on matters of principle relating to sectoral governance and the vulnerability of women complaining of mistreatment. It would, beyond any doubt, detonate an uncontrolled explosion of personal comment and speculation on the allegations themselves, in both mainstream media and especially online, of which the Claimant would be the epicentre and which he would be powerless to stem or withstand. Making him, as he puts it, the 'poster boy' for the issues in the

report would inevitably, and deeply, embed the connection in the public mind. The BBC does not and cannot seriously ask me to assume anything else.

57. Second, on the particular facts of this case, I cannot see that the Claimant would have a fair opportunity of responding to these allegations, or to the proposed publication, publicly. As I understand his evidence, although he has made statements to the police denying the allegations, he has otherwise exercised his right to refuse to comment to police on the matters put to him to date, reserving his position, as he is entitled to do, until the shape of any charges he may face is clearer. He is also awaiting the outcome of representations made on his behalf to the CPS that the evidential test for charging is simply not met. A bare denial of guilt is all that could possibly be available to him for public use in these circumstances consistently with maintaining his chosen and legitimate defensive position. As against the detail and vividness of the complainants' accounts – albeit anonymised, and however generalised or carefully edited to avoid outright sensation or 'graphic detail' – a bare denial in all the circumstances has little real prospect of being seriously attended to or making narrative headway in the surrounding din of publicity. We are in the territory of the raised eyebrow 'allegedly'.
58. Third, and relatedly, the intended publications would inevitably present the complainants' narratives, and therefore the allegations against the Claimant, in an incomplete and unbalanced manner. I fully accept that it is the entirely legitimate concern of the proposed publication that the complainants be heard, and the response of the sector to their voices be held to public account. These are important matters, and the law does recognise that importance, as discussed below. But it is of course necessarily an exercise in amplifying the complainants' subjectivity – again, I emphasise, entirely unexceptionable so far as it goes. Amplified subjectivity is, however, hard to reconcile with maintaining a fair prospect of the complainants' accounts being subsequently presented and tested with the necessary degree of objectivity in a criminal court in due course (nor, indeed, it might be said, in the court of public opinion).
59. Fourth, the BBC asks me to take into account the likely positive effects of publicity on the course of justice – including warning other women of the suspicions attaching to the Claimant and encouraging other complainants to come forward, whether in his case or more generally. But I note the BBC's evidence that one of the complainants in the report came forward once she became aware of other news stories about the arrest that did not identify the Claimant. And I note that no decision to this effect has been taken by the law enforcement authorities themselves (and it is a matter on which they might be expected to take a professional view of their own). And the likely negative effects of publicity on the course of justice must include the following.
60. There is the 'bandwagon effect' – the risk in today's social media climate that publicity would not only flush out others believing they have cause to complain, but may well incite copycat false complainants, which is not fair to a suspect, helpful to the police or conducive to the effective administration of justice.
61. There is the forensic problem that any subsequent complainants in relation to the Claimant will be exposed to allegations, and to cross-examination in any future trial, on the basis that they have been influenced by the publicity and that their evidence lacks

credibility accordingly. This is a problem about the corrosive effect of publicity on what could otherwise be key evidence relied on by a prosecutor.

62. There is the risk of discouraging defence witnesses, who may be daunted by the overwhelming publicity and unwilling to associate themselves publicly with the Claimant.
63. Most seriously of all, perhaps, this is a case with multiple complainants. It may be that some, but not all, of the complaints will result in charges. As I understand it, there is already no prospect of charges in relation to one allegation. These factors open up the immediate prospect that the proposed publication will place into the public domain a quantity of material which may not bear directly on the issues raised by any charges that *are* brought, but which would still amount to ‘bad character’ material in relation to those charges. The admission of bad character evidence into a criminal trial is controlled by statute and requires careful decision-making by a trial judge precisely in order to ensure that the trial is fair. The forensically uncontrolled deposit of bad character material into the public domain, in a manner calculated to be eye-catching, during live criminal proceedings, is inimical to the prospects of a fair trial.
64. None of this is novel, original or speculative thinking. These are all issues regularly noted in the authorities on contempt of court, including those set out above, as being problems associated with post-arrest, pre-charge publicity: the exertion of external pressure on a suspect’s entitlement to choose the shape of his defence, the effects of holding him up to public obloquy by way of influencing witnesses and the weight that can fairly be given to their evidence, the consequent problems of the evidence at trial being incomplete, and the intrusion into the process of inadmissible evidence. If a suspect is charged, then a detailed statutory regime, including potential reporting restrictions, comes into effect to ensure that the proceedings which follow are fair (see for example section 52A, Crime and Disorder Act 1998). If a suspect is not charged – and if he has not yet been arrested – then the law of defamation is the principal restraint on publication and claimants face a high hurdle indeed at the interlocutory stage (the ‘rule in *Bonnard v Perryman*’ [1891] 2 Ch 269). But between arrest – that ‘*executive act of a provisional nature*’ signalling the police’s reasonable grounds of suspicion – and a charging decision – an executive determination that there is a more than even prospect of conviction and that prosecution serves the public interest – there is a period of time during which both a suspect, and the course of the criminal proceedings, are acutely exposed to the forensic jeopardies of publicity.
65. That is a space governed by the statutory strict liability contempt provisions. They are, and I emphasise this, not concerned solely with a claimant’s right to fair criminal procedure (although they are concerned with that). They are also concerned with the public’s right to fair criminal procedure, and with complainants’ rights to fair criminal procedure. I fully acknowledge the desire of the BBC and the complainants that their voices be heard in this matter. But I must also demonstrate, and demonstrate publicly, the fundamental respect that is due to the complainants’ decision to report their allegations to the police and their desire and expectation that the Claimant will face formal justice. That decision sets in train a process that may or may not lead to trial, conviction and sentence for serious crimes, but it is a process which the complainants clearly want to see properly and fairly completed. The law of contempt is designed to

ensure that their voices are heard – properly, fully and fairly – in that most important of contexts and without advance jeopardy.

66. The question I must start with is whether I can be *sure* that what I have called the bare minimum intended publication here – naming the Claimant in connection with his arrest and a police investigation into multiple allegations of (similar) serious sexual offending – is a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.
67. My answer is that I can and must. This is a clear case. The risk that the course of justice in the criminal proceedings will be seriously impeded or prejudiced is substantial and manifest. The case is distinguished by the exceptional, and truly enormous, degree of publicity and public reaction I am entirely satisfied publication by the BBC would generate. It would be wholly naïve to proceed on any other basis and it was not seriously suggested that I should. I do not accept that that publicity could be managed satisfactorily or at all, including by any of the means indicated by the BBC. The identification of the Claimant in however a broad or allusive a manner in connection with the subject matter of its report would ignite a fire it could not hope to control and which would permanently disfigure him in the public mind. The BBC could not in the circumstances of this case avoid causal responsibility by pointing to others who may fan the flames of the fire it would deliberately have set. Even if responsible and regulated publishers reported nothing else at all over and above the bare minimum content the BBC proposes, the harm is inevitably done. The reality of modern public discourse must be faced. The BBC's naming of the Claimant, not least *because* it is a national public service broadcaster, would inevitably be perceived as authorising unrestrained debate subject only to the anonymity of the complainants (which itself might be short-lived). That would bring into play all of the forensic problems set out above in an acute form, and risk irreparable harm to the forensic objectivity essential for any fair criminal trial.
68. I am entirely satisfied on the evidence provided, and by reference to what I regard as its inevitable consequences, that the proposed publication creates a *substantial* risk that the course of justice in the live criminal proceedings currently under way will be seriously impeded or prejudiced by it. That is because, in the respects and for the reasons set out, I am satisfied it creates a *substantial* risk of impeding or prejudicing the necessary efforts to ensure that *all* the evidence, and *only* the evidence, properly forensically relevant to the trial of any criminal charges brought will be available to a jury. It consequently also creates a *substantial* risk of interfering with the proper making of the charging decisions themselves, depending as they do on the evidential prospects. I do not consider these risks capable of ultimately being mitigated by jury management or other measures in a way which would bring it below the substantial, because of the magnitude of the publicity and obloquy I am *sure* would be created by publication before the reporting restrictions attendant on post-charge proceedings have had a chance to be applied, and before any court apart from this one has had an opportunity to manage criminal proceedings in this case in a way which ensures they will be fair.
69. I am therefore sure now, and that the Claimant would establish at trial, that the publication should not be allowed *in a form which identifies him or enables him to be*

*identified* – that is to say, the publication of the ‘specified information’ which the BBC has undertaken until now not to publish – because to do so would amount to a contempt of court. It is not suggested that any further evidence of potential assistance to the BBC is likely to become available before a trial of the Claimant’s claim. Certainly, the course of the criminal proceedings themselves will continue to evolve, and the substance of the Claimant’s claim may be overtaken by events in due course. But that is not my concern on this application.

70. In reaching my conclusion, I have had particular regard to the importance of the Convention right to freedom of expression, especially in the context of press freedom, and to the undoubted public interest in the subject matter of the proposed publication in general. The BBC has a story which brings a legitimate and serious issue of general public concern to attention. I intervene with great reluctance, and *only* to the extent that the BBC wishes to illustrate its story by identifying a man currently under arrest. In that respect alone, Parliament has provided that, on the facts I have before me, the press’s freedom to publish and the public’s ‘right to know’ are definitively outweighed by the powerful public interest in criminal justice, not least where very serious charges may be brought, and not least in the interests of obtaining justice for complainants if they are. That, as well as a suspect’s interests, is the public interest specifically protected by the Contempt of Court Act.
71. I should also emphasise that it has been no part of my analysis to form any view whatever about the prospects that charges will be brought, the strength of the criminal case against the Claimant or the credibility of the complainants’ accounts. I am in no position to do so, and it is wholly unnecessary to my purpose. I am concerned solely with *risk* to the criminal process of imminent publication, and that must be considered on the basis of any and all eventualities equally. Indeed, it is the entire purpose of my task to ensure that it is the process itself, and not any matter extraneous to it, which can fairly run its course to whatever outcome that leads.
72. This case is unusual because of what it is the BBC wants to do *at this particular stage* of the process. It is not unusual in the principles I have applied, nor in the outcome my conclusions produce. On the contrary, it might be thought obvious, in a case in which publicity on the inevitable scale the present facts would generate is in prospect.

(c) *The Claimant’s alternative submissions*

73. In these circumstances, I do not need separately to consider Mr Rushbrooke KC’s submissions about the availability of a similar conclusion based on Art.6 alone. I do have some doubts that the law has reached the position for which he contends on the basis of *In re G*. The context of that case was radically different. My starting point has to be the unanimity of the authorities in proceeding on the basis that the criminal standard of proof applies in contempt cases, including in prospective cases such as the present, notwithstanding the conceptual efforts that have to be made with a test requiring a court to be *sure* of a *risk*. And as the Divisional Court explained in *A-G v MGN* in one of the passages cited above, the balance Parliament has struck in the Contempt of Court Act and in section 12(3) HRA conserves (unqualified) Art.6 rights in a way which is fully reconcilable with publishers’ Art.10 rights, and does not

obviously point to the necessity or appropriateness of separate consideration of Art.6 on a standalone basis.

74. There may in future be a case (although it is not easy to imagine) in which a court cannot be *sure* at an interlocutory stage of a present *risk* to active criminal justice proceedings, but where it is satisfied that a Claimant would be likely to establish at a trial that his Art.6 rights have been breached in relation to those proceedings. That would raise acutely the question of how a court's legal obligation not to act inconsistently with Convention rights is to be reconciled with the criminal standard of proof. But the present case is not that case.
75. If, however, I had not been (or been entitled to be) *sure* that publication of the specified information would be in contempt of court for the reasons given, I would have been satisfied that the Claimant would be likely to establish at trial that it would have amounted to a misuse of his private information. In all the circumstances of the present case, it should come as no surprise that the same outcome is arrived at by a different route. That is for the following reasons.
76. First, I have no hesitation in adopting the ZXC 'starting point' that there is a reasonable expectation of privacy in criminal allegations in the period between arrest and charge, for all the reasons set out in that case. I reject the BBC's assertion that that starting point is of relevance only to a case in which, like ZXC itself, information has been obtained (a) in breach of confidence and (b) wholly as a result of criminal investigation by organs of the state. The former contention posits a *necessary* relationship between confidence and privacy which, for the reasons set out in ZXC itself, does not exist in law. I accept that the circumstances in which and the purposes for which any information comes into the hands of the publisher is a relevant *Murray* factor, and I consider that below. But I see no reason in law, principle or practice why the ZXC starting point is to be excluded unless breach of confidence is established. Its rationale, as explained in the case, is entirely independent of the origins of the information and is based on the *consequences* of identifying a suspect between arrest and charge and the harm it can do – harm and damage to human autonomy that '*can on occasions be irremediable and profound*'.  
*irremediable and profound*'.
77. The second contention, upon which the BBC places great weight, is that if information has been acquired by independent journalistic enterprise and not by unlawful means parasitic on the formal criminal process itself, then the starting point does not apply. It is true that, for the purposes of identifying the 'nature of the activity' in question, the Court in ZXC differentiated between what might have been found out about the claimant by independent research and what had in fact been obtained. The point in that case was the 'relevant information' was all about the suspicions of the UK authorities underlying a mutual legal assistance request, and about the claimant as the subject of those suspicions and inquiries. But again I find no basis in ZXC, in any other authority, in principle or in practice, for a proposition that the fact that journalistic investigations are undertaken *in parallel with* criminal investigations deprives an arrested claimant of the ZXC starting point.
78. This is a case in which the BBC's investigative journalism and the police investigation have proceeded in parallel. It would be artificial to regard them as 'distinct and separate scenarios'. Both depend on accessing and evaluating the accounts of the same

complainants. The complainants' status as victims in the police investigation has entitled them to access information about its progress. The two strands are intertwined. But in any case, whether the BBC has found out any more than the police by its own endeavours does not appear to me to be material, much less conclusive, to a starting point the rationale of which is clearly articulated in terms of the consequences of publicity.

79. In any event, the ZXC starting point is no more than that. Turning then to the wider question of whether the Claimant has a reasonable expectation of privacy in the identified information, the other relevant Murray factors in the present case appear to be as follows.
80. The key attribute of the Claimant for present purposes is that he has a high public profile and can expect exceptionally intrusive consequences from the placing of allegations about his sexual conduct into the public domain in circumstances designed to, and highly likely to, attract maximum attention. He has been held out in his sector as a valuable and valued individual. But he has not been held out, nor has he held himself out, as any sort of model in relation to his private life which I have no evidence of him commodifying or publicising in the manner of some celebrity influencers.
81. The key point about the nature of the activity in question is that it has to do with allegations that have been made, and which are being investigated by the police, about the conduct of the Claimant's sexual and intimate life in ways which go much wider than the bare naming of alleged acts of criminality. I understand from the Claimant's evidence that he is reserving his position on the potential consensuality of some the matters alleged, and, particularly because of the prominence of multiple complainants and the issue of a *distinctive pattern* of conduct in the case, his sexual preferences and intimate history are likely to feature in, or in the wider narrative surrounding, the publication. Even if the BBC is closely limited in the detail it provides, it is entirely inevitable that publication will lead to serious invasion, if not the destruction, of the Claimant's sexual privacy, the autonomous control of which – subject of course to the exigencies of criminal procedure itself – is at the heart of the protections afforded by Art.8 and consistently upheld as such in the courts.
82. Mr Wolanski KC sought to draw a distinction in the present case between sexual privacy in general, and sexual offending – '*there is no privacy in wrongdoing*'. That may be so. But the present case does not concern sexual wrongdoing. It concerns *contested allegations* of sexual wrongdoing, and the fact that they are being investigated by the police following the Claimant's arrest on *suspicion* of sexual wrongdoing. I cannot proceed on any other basis.
83. Then, most obviously, there is the likely destructive impact of the proposed publicity not just on the Claimant's reputation and intimate life, but also by way of the interference I am satisfied, at least to the *civil* standard, the proposed publication would, or would be likely to, make with his entitlement to seek to vindicate himself fairly in criminal proceedings, for all the reasons I have set out. That too goes to his privacy and autonomy.
84. I take into account the evidence of some seepage of the allegations into the public domain. I accept there is evidence of a degree of public rumour and online speculation from time to time. (One complainant had tweeted his name in mid-2022, but it appears

this was quickly taken down. She had previously entered into a non-disclosure agreement with the Claimant as part of the settlement of a civil claim arising out of some of the same facts for a substantial sum of money.) The Claimant sets out evidence of the attempts he has been making to have other online material taken down. In any event, as I have set out, the nature and degree of publicity attendant on the BBC naming him would have an impact out of all proportion to anything already in the public domain.

85. I accept entirely that the BBC has obtained the information it has acquired either from the complainants or otherwise by its own investigations. I accept that the complainants themselves have Convention rights to autonomous control and distribution of information about their sexual experiences with the Claimant. I have regard to the position of other women who, even *between arrest and charging decision*, may have an interest in being alerted to the potential risks of becoming intimate with the Claimant. I accept that the BBC's story about the response of the sector to complaints about the sexual conduct of workers within it is a legitimate matter of public interest. Its purpose is not to expose wrongdoing by the Claimant per se (since the matter is already in the hands of the police), nor is it a story about the criminal investigation of the allegations made against him per se. Its purpose, as explained to me, is to use the Claimant's identity and arrest to draw attention to a wider problem. I accept to that extent that the identification of the Claimant by name, as such, pursues a legitimate aim (*Re BBC* [2010] 1 AC 145 per Lord Hope at [26]).
86. All of that is part of the factual matrix I have to look at in considering whether the Claimant has a reasonable expectation of privacy. Looking at the *Murray* factors, and the circumstances of the case as a whole, I have no hesitation in concluding that the dominant features of the present case are the intimate sexual and relationship nature of the conduct in question, and the likely destructive effect on the Claimant's human autonomy, reputation and prospects for justice, of immense publicity at this stage in the criminal proceedings. He has a reasonable expectation of privacy in those circumstances.
87. Turning to the second part of the test, I need add little to the considerations I have already set out about the limited extent to which the public interest in enhanced debate on the underlying issues *with the added element of the identification of the Claimant – and at this particular stage in the proceedings* – can counterbalance the powerful public interest in justice in cases of alleged serious sexual offending. That is a public interest in which the complainants themselves are fully invested. They wish their voices to be heard, and to be amplified by a trusted public service broadcaster. But I have no evidence whatever that they wish to do so at the expense of risking, to any degree, such prospects as there may properly be of the Claimant facing criminal justice on the basis of their allegations.
88. The second stage of the test has in effect been largely addressed in the analysis I have already set out above. That is why I say it is not a surprise that it leads to the same result. I bear in mind that, while I do accept that the identification of the Claimant does have a legitimate role in bringing the BBC's report to life, the 'severity of the restriction' in not permitting it to do so before a charging decision is made is not said to make the story impossible or pointless. The freedom of the press, in which the public interest is so very strong, is in the end properly abridged in all these circumstances by the powerful



public interest in criminal justice both in general and in the particular case of this individual Claimant. I am satisfied in all these circumstances that, as matters stand today, the Claimant is likely to establish at trial that publication should not be allowed on the ground that it would constitute an unwarranted invasion of his privacy.

### **Decision**

89. I grant the Claimant's application to restrain publication of the information which has been subject to the BBC's undertakings until now – that is, publication of the BBC's report in a form which identifies him or enables him to be identified as the subject of active criminal proceedings.
  
90. The BBC's editorial choice is therefore either to publish its report now without identifying the Claimant, or to await charging decisions (either way) when a fully informed and balanced decision can be taken about the competing interests that might then be engaged. That is a fair and proper choice, and one to which it is rightly constrained by law.