

UK Supreme Court Considers Privacy Rights of Executives Under Investigation

February 16, 2022

Two recent cases in the UK courts highlight the tension between an individual's right to privacy during a criminal investigation and the freedom of the press to report on the investigation as a matter of public interest. Historically, the UK courts and authorities have largely protected the identities of individuals who are under investigation but not facing charges. However, courts are now scrutinising that long-standing approach – including in a case pending before the UK Supreme Court – raising fresh questions about the privacy rights of the subjects of investigation under Article 8 of the European Convention on Human Rights (ECHR). We detail these cases below.

Background

ZXC v. Bloomberg LP

In May 2020, [the English Court of Appeal handed down its judgment](#) in *Bloomberg*, a case concerning a US executive under investigation by an unspecified UK law enforcement body for allegations of corporate corruption. Having identified the subject in an initial report, Bloomberg published a second report describing a letter of request for mutual legal assistance from the investigator to foreign authorities, including details of the theory of suspected fraud. Of note:

- The letter was marked confidential.
- The investigation was in its early stages.
- The individual had not been arrested.

The individual successfully obtained an award of damages for violation of their Article 8 privacy rights, and Bloomberg appealed.

The Court of Appeal affirmed the ruling, relying on the two-stage balancing exercise customarily used by UK courts:

1. Does the claimant have a reasonable expectation of privacy in the relevant information?
2. If yes, is this expectation outweighed by a countervailing interest in the right to freedom of expression?

The Court of Appeal found that the balance tipped in favour of privacy, even though the investigation related to the business dealings of a large international company and included matters of 'high public interest'.¹ A key reason why the suspect's Article 8 rights prevailed was the potential damage to the suspect's reputation and the risk that the public would overlook the fundamental legal principle that those accused of an offence are deemed innocent until proven guilty.²

Bloomberg appealed to the Supreme Court. Counsel for Bloomberg argued that the Court of Appeal applied an incorrect approach, and that individuals under investigation do not have a reasonable expectation of privacy, even in the absence of charges. If the Supreme Court were to adopt Bloomberg's argument, it would constitute a marked shift in how UK courts have treated these cases. The Supreme Court's judgment is expected imminently.

Amec Foster Wheeler Energy Limited deferred prosecution agreement

Relatedly, the English High Court recently addressed the privacy rights of individuals under investigation by the UK Serious Fraud Office (SFO) in the course of its [approving a deferred prosecution agreement \(DPA\) between the SFO and Amec Foster Wheeler Energy Limited \(AFW\) that brought allegations of bribery and corruption against AFW](#).

In its consideration of the DPA, the High Court noted that the individuals allegedly involved in the misconduct had neither testified nor agreed to the DPA's version of the facts. As such, the High Court [ordered the postponement of publication of the statement of facts and the indictment containing those individuals' names in order to avoid substantial risk of prejudice to the administration of justice](#). The High Court also added a third-party disclaimer to the DPA clarifying that only AFW had been found culpable – not any particular individual.

The High Court intended to consider whether the statement of facts and indictment should be published once individual charging decisions had been made, but [the SFO has since declined to prosecute any individuals](#). On 4 February 2022, the High Court approved an agreement between the SFO and the relevant individuals that only an anonymised statement of facts be published, thus balancing the SFO's goal of transparency and those individuals' right to privacy.

Looking ahead

The Supreme Court's judgment in *ZXC v. Bloomberg LP* will provide much-needed clarity on the scope of the right to privacy of individuals in criminal investigations. The impact of the judgment will be significant, and may curb the privacy rights of individuals identified as under investigation, especially in cases where charges may not be brought, and thus no evidence would be tested through a trial process.

While the High Court in the AFW case erred on the side of protecting the privacy of the individuals under investigation, courts will likely revisit these issues as future DPAs arise. It is also worth noting that the [SFO's current guidance on DPAs states that consideration must be given to the necessity and impact of publication of the identities of third parties, and whether it is compliant with data protection law and the ECHR](#).

In the meantime, on a practical note, companies and individuals who are weighing the impact of reporting possible misconduct to the authorities may wish to consider the potential effect of individuals' identities being revealed to the public – and seek to mitigate such risk through careful negotiation with the authorities if a report to the authorities is made.

Notes

1. See the judgment at <https://www.bailii.org/ew/cases/EWCA/Civ/2020/611.html>, para. 126.
2. See the judgment at <https://www.bailii.org/ew/cases/EWCA/Civ/2020/611.html>, para. 82.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. This content may be considered **Attorney Advertising** and is subject to our [legal](#)

Key Contacts

Tom Epps London	tepps@cooley.com +44 (0) 20 7556 4382
Benjamin Sharrock-Mason London	bsharrock@cooley.com +44 (0) 20 7556 4220

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.