

# Clients & Friends Memo

## Privacy and Suspect Rights - UK Supreme Court Confirms an Individual's Right to Privacy When Under Criminal Investigation

17 March 2022

### Summary

In a recent judgment ([Bloomberg LP v ZXC \[2022\] UKSC 5](#)), the UK Supreme Court confirmed that suspects subject to a criminal investigation are entitled, as a general rule, to a reasonable expectation of privacy regarding information relating to the investigation until they are charged. The ruling is consistent with established principles relating to suspect rights, similar decisions from lower courts and published police guidance.

Cases such as *Bloomberg v ZXC* are often highly fact-specific. The Supreme Court did not deal with situations where an individual's wrongdoing is publicised through a separate media investigation independent of police or regulatory processes. It also does not deal with circumstances where an individual is named as having participated in misconduct but is not charged in those proceedings.

Any publication of the fact that an individual is subject to a criminal investigation is inevitably damaging to the reputation of that individual and potentially to any organisation with whom they are associated. In light of this, it is fair for a suspect to expect that an organ of the state keeps "*suspicions, assessments, and preliminary conclusions to the disfavour of [the suspect]*" confidential. Once the authorities decide to bring charges against an individual, the principle of open justice prevails and the matter enters the public domain. The principle of open justice is motivated by the desire (among others) to ensure that courts and tribunals can be held accountable for the decisions that they make, and to maintain public confidence in the way that those decisions are made.

The delicate balance between maintaining the integrity of criminal processes, free press reporting of matters in the public interest and an individual's right to privacy is, and will continue to be, the subject of intense debate. A Bloomberg spokesperson stated that "*We are disappointed by the court's decision, which we believe prevents journalists from doing one of the most essential aspects of their job: putting the conduct of companies and individuals under appropriate scrutiny and protecting the public from possible misconduct*".

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The UK government has announced plans to overhaul the Human Rights Act 1998 and reformulate these principles into a UK Bill of Rights. It is possible that this new legislation will recast the current status quo changing the balance between press and suspect interests as clarified in this case.

### **Background**

In 2016, Bloomberg (the Appellant) published an article naming the Respondent (“**ZXC**”), a US citizen working as a chief executive of a regional division, together with his employer, a UK-listed company (“**X Ltd**”). X Ltd were being investigated by a UK Legal Enforcement Body (“**UKLEB**”) for allegations of fraud, bribery and corruption. To aid with their investigations, UKLEB had sent a confidential letter to the authorities of a foreign state requesting information and documents pertaining to ZXC. This letter expressly requested that its existence and contents were to remain confidential. Bloomberg was able to obtain a copy of this letter and then publish an article in the autumn of 2016 primarily sourced from information found in the letter. Bloomberg reported that ZXC had been interviewed by the UKLEB and that information had been requested in respect of ZXC and also detailed the matters in respect of which he was being investigated.

The investigations remain ongoing, but the current position is that no employees of X Ltd have been charged with any offence.

After Bloomberg refused requests to remove the article from its website, and also following an unsuccessful interim injunction application, ZXC brought a successful claim against Bloomberg for misuse of private information where it was found by both the High Court and Court of Appeal that Bloomberg had breached ZXC's Article 8 rights under the European Convention on Human Rights (the right to respect for private and family life). ZXC contended that he has a reasonable expectation of privacy in relation to the fact that UKLEB was investigating him and that it had requested information relating to him in the context of its investigations. The Court had to balance ZXC's Article 8 rights against Bloomberg's rights under Article 10 (Freedom of expression).

### **The Judgment**

The tort of misuse of private information determines liability with a two stage test. Firstly, one should consider whether the claimant objectively has a reasonable expectation of privacy over the relevant information considering the circumstances of the case. These circumstances include, but are not limited to, those identified in *Murray v. Express Newspapers* [2008] EWCA Civ 446. Those circumstances are likely to include what have become known as the “Murray factors”, which are:

- (1) the attributes of the claimant;
- (2) the nature of the activity in which the claimant was engaged;
- (3) the place at which it was happening;
- (4) the nature and purpose of the intrusion;
- (5) the absence of consent and whether it was known or could be inferred;

- (6) the effect on the claimant; and
- (7) the circumstances in which and the purposes for which the information came into the hands of the publisher.

Stage two is to consider whether any reasonable expectation of privacy is outweighed by the publisher's right to freedom of expression under Article 10 whilst taking into account section 12 of the Human Rights Act 1998.

It should be uncontroversial and widely accepted that there is a substantial negative reputational effect on an innocent person when it is published that they are being investigated by the police or similar investigatory state body. It is the general practice therefore that state investigatory bodies will identify those under investigation only once they have been charged. Bloomberg's arguments challenging this were ultimately rejected by the Supreme Court.

The Supreme Court confirmed that the lower courts gave appropriate consideration to the applicable Murray factors in their analysis, including ZXC's status as a businessman as part of a large public company. ZXC's status might mean that the level of acceptable criticism is greater than that for a private individual; there is however a limit. The Court was clear that ZXC's status is not in itself determinative and should only form part of the stage one analysis. Prominent individuals are still entitled to privacy.

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