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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION



[2018] EWHC 1560 (QB)

Royal Courts of Justice

Monday, 14 May 2018

Before:

MRS JUSTICE ELISABETH LAING

B E T W E E N :

XKF

Applicant

- and -

THE BRITISH BROADCASTING CORPORATION

Defendant

ANONYMISATION APPLIES

THE APPLICANT appeared in Person.

MR A. CALDECOTT QC and MISS C. HAMER (instructed by the BBC) appeared on behalf of the Defendant.

J U D G M E N T

MRS JUSTICE ELISABETH LAING:

- 1 This is an application by the applicant (as I will refer to him in this judgment) for relief restraining the broadcast of an interview with him that took place on 13 March 2018. The parties agreed before the hearing a draft order permitting the applicant to have issued these proceedings in the name of XKF, and providing for that description to be substituted for all purposes in these proceedings in place of references to him by name.
- 2 I am very grateful to the parties for the help they have given me. The defendant has been represented by Mr Caldecott QC and Miss Hamer, and the applicant has represented himself very clearly and articulately. I am grateful to Mr Caldecott and their team for all their help, in particular for the lucid exposition of the relevant law in the skeleton argument, and for the help which he has given very fairly to the applicant in the course of his submissions, and in particular by the drafting of the order to which I have just referred.

- 3 The relief which is sought by the applicant can, I think, most conveniently be treated as being the relief which is claimed in the draft order in tab 7 of the bundle. It is that:

“... until trial or further order the defendant must not broadcast the film footage of the [applicant] recorded at or near his home on 13 March 2018 as part of the *Panorama* programme scheduled to be broadcast on 9 April or otherwise

... and that the defendant must not in the said programme refer to or disclose any information likely to lead to the identification of the area in which the [applicant] now lives and works or disclose his new name.”

At that stage the programme was to be broadcast on 9 April 2018.

- 4 In her witness statement for the purposes of these proceedings Miss Payne, on behalf of the defendant, says in para.17:

“Subject to any order the court may make, the programme proposes to use the following material which would be covered by the relief which the [applicant] seeks:

- (a) a still photograph of the [applicant] taken at the time of his graduation in 2011; and
- (b) the opening footage from the filmed interview with the [applicant] in the street which was initiated without the [applicant’s] consent ...”

in the circumstances which she describes further in her witness statement. I will refer to the transcript of that interview in due course.

The Law

- 5 I take the law from Mr Caldecott’s very helpful skeleton argument. In view of the time (it is now 4.35) and because I have to give judgment today, I have summarised the main points only. I apologise to Mr Caldecott and Miss Hamer if the summary does not fully reflect all the nuances in their skeleton argument. As I have said, the applicant applies to restrain publication - that is the televised broadcast - of an attempt to “doorstep” him near his home as he was walking to work, and of information about where he lives and works. That is relief to which section 12(3) and (4) of the Human Rights Act 1998 (“the HRA”) apply. The court cannot grant such relief unless it is satisfied that the applicant is likely to establish

at trial that publication should not be allowed. The court must pay particular regard to the importance of the Convention right to freedom of expression, and where journalistic material is involved, to the extent to which the material has or is about to become to the public, and it is, or would be, in the public interest for the material to be published, and to any relevant privacy code.

- 6 The threshold for the grant of relief in section 12(3) has been considered by the court. In brief, normally that threshold means that success at trial must be shown to be more likely than not for it to be proper for relief to be granted. In some cases it might be just to grant an injunction even if that test is not met - if, for example, the damage likely to be caused by publication is particularly severe. I accept Mr Caldecott's submission that this is not such a case. The court will normally, it follows, have to form a provisional view of the merits at trial on the interim application.
- 7 In order to succeed at trial in a claim for misuse of private information, a claimant must establish that he has a reasonable expectation of privacy in respect of the information. Whether or not he has such an expectation involves the application of a multi-factorial and objective test. If such an expectation is established, the court must consider how the balance between that expectation of privacy and the press's right to freedom of expression is to be struck. That test has four parts.
- 8 Neither Article 8 nor Article 10 takes precedence over the other. Where their values conflict an intense focus on the comparative importance of the specific rights claimed is necessary. The justification for an interference with each right must be taken into account and a proportionality test must be applied (see the decision of Warby J in *YXB v TNO* [2015] EWHC (QB) 826, to which I was referred).
- 9 The Rehabilitation of Offenders Act is relevant to the relief which is sought in these proceedings, because part of the background is, I think, three spent convictions of the applicant. The effect of the Rehabilitation of Offenders Act is briefly summarised in paragraph 10 of the defendant's skeleton by reference to a passage in the textbook, **Gatley on Libel and Slander**, paragraph 18.2:

“... The basic scheme of the Act is that once someone has become a rehabilitated person in respect of a conviction he is to be treated for all purposes as a person who has not committed or been charged with or prosecutes for or convicted of or sentenced for the offence or offences which were the subject of that conviction.

The main consequences are two-fold; first, in court proceedings evidence to that effect is not generally admissible, and questions which would elicit spent convictions are not to be admitted, while secondly various rules of law are modified so as to remove obligations to admit the existence of spent convictions in answering questions or to disclose the spent convictions of another, and to make a spent conviction not a proper ground for dismissing a person from an occupation or employment or prejudicing him in any way in any occupation or employment. The Act does not render the spent convictions “confidential”: *L v Law Society* [2008] EWCA Civ 811; *KJO v XIM* [2011] EWHC 1768 (QB). (emphasis added)”

- 10 There can be no reasonable expectation of privacy in relation to information which comes to light in a criminal trial. Article 8 is unlikely to be engaged by information about wrongdoing or iniquity. Information about conduct committed in public roles by public

figures is less likely to engage Article 8. A police officer may be a public figure, and conduct or misconduct committed by him clearly engages a weighty public interest if misconduct has been committed in the course of his public role as a police officer.

- 11 Two decisions of the Supreme Court which Mr Caldecott quotes in his skeleton are *R (L) v Commissioner of the Police for the Metropolis* [2010] UKSC; [2010] 1 AC 410 (paragraph 27) and *R (T) v The Chief Constable of Greater Manchester Police* [2014] UKSC 35; [2015] AC 49, paragraph 18. These passages suggest that a conviction will usually or normally recede into the past and become part of a person's private life when it becomes spent under the provisions of the Rehabilitation of Offenders Act. That is a potentially relevant but not decisive factor when deciding where the balance lies between the privacy rights of a convicted person and the relevant public interest which is at stake in the case in question (see paragraph 37 of *Re Gauchran's Application for Judicial Review* [2015] UKSC 29; [2016] AC 345). In that case the countervailing interest was the public interest in retaining biometric data of a convicted person.
- 12 The right to rehabilitation is part of the law of personal privacy. It is relevant in an action concerning spent convictions where the claimant relies on harm to his reputation caused by publication or on an interference with family or private life (see the decision of Warby J in *NT1 and NT2 v Google LLC* [2018] EWHC 779 QB).
- 13 Also relevant, as is apparent from the facts of one of those two claims, is the relationship between rehabilitated conviction and any role in which the claimant is currently engaged. The claimant whose claim failed had been a businessman who had been convicted of fraud while conducting a business and sentenced to four years' imprisonment after a trial. Although he did not have a customer-facing role, he was still engaged in business when he attempted to suppress references to his spent conviction in the claim that he made against Google.
- 14 Filming is capable of engaging Article 8. Whether it does so will depend on the circumstances, including whether the act is private and whether the filming is in a private space, or done covertly. There is clearly a spectrum here. A relevant factor may be whether the circumstances of the filming approach in their nature something akin to harassment or not. That much is clear from *R (Wood) v The Commissioner for Police of the Metropolis* [2010] 1 WLR 123, paragraphs 15 to 47 per Laws LJ. Laws LJ dissented, but the other two members of the court who disagreed with his conclusion on Article 8(2) agreed with his analysis in relation to Article 8(1).
- 15 If the balancing question is reached, the question is whether the restraint on publication is necessary and strikes a fair balance. In that regard editors and journalists should be given reasonable latitude. The court gives deference to the considered views of an editor, and the editor's latitude can include the right to identify the subject of a story. The question is whether revealing the identity of the subject of the story pursues a legitimate aim, and, if so, whether it is the least intrusive means of achieving that aim.
- 16 Exposure of wrongdoing is clearly a legitimate aim, as is exposing police misconduct, and investigating potential miscarriages of justice. The applicant very fairly accepted in his submissions that that was so.

The Facts

- 17 The applicant was a serving police officer. He was dismissed in 2002 when he was convicted, on his plea of guilty, of a series of offences. I have not seen the certificate of

conviction. In paragraph 10 of her witness statement Miss Kane says that the applicant was convicted in July 2003 of conspiracy to steal, theft, and gross misconduct in public office, after an investigation into a plot to steal £160,000 from [redacted] Police, money which had originally been seized from criminals. She notes that the offences are summarised in the judgment of the Court of Appeal in *R v Lane* [2015] EWCA Crim 1226 at paragraph 17, as follows:

- (a) Attempting to steal £160,000 from [redacted] Police custody a sum of money which had been seized from John Mayer.
- (b) Intimidating Mayer, threatening him with report to the Inland Revenue if he tried to reclaim the money.
- (c) Persuading the police accounts department to issue a cheque to Mayer.
- (d) Forging a document supplied to the police accounts department.
- (e) Attempting to open an account in the name of Mayer in collaboration with a known criminal.
- (f) Attempting to secure a cheque by forging a witness statement by Mayer.
- (g) Associating with and possibly further corrupting two other criminals.

18 The applicant was sentenced to four years' imprisonment. As a result of those convictions, the convictions of two appellants were set aside by the Court of Appeal, Criminal Division ('CACD') in *Regina v Khan and Bashir* [2005] EWCA Crim 3100. The facts of that case are somewhat convoluted, and are set out in the judgment of the CACD. Essentially, the appellants' case, and more particularly the case of the appellant Khan, was that they had been set up by a woman called Joanne Fletcher, that she was an ex-girlfriend of Khan's, and that it was suggested that when he brought the relationship to an end she was anxious to get her revenge. That required her to involve the applicant in a corrupt way, and that is said to be what she achieved. The Court noted her various convictions in paragraph 7, and said that although there was evidence independent of the applicant which served to incriminate the appellants, it is noteworthy that suspicions about the nature of the relationship between the applicant and Fletcher has not been newly minted for the purposes of this appeal. It was a direct suggestion at trial that the applicant had suppressed evidence and had planted incriminating objects. Some receipts for legitimately bought items had been improperly disposed of and/or lost during police searches. Identifications and observations made by the applicant were said to have been made dishonestly. Those allegations, the Court of Appeal recorded, were denied by him at the trial. What had not been known during the trial was that throughout the period of the investigation into the conspiracy there was a very close subsisting relationship between the applicant and Fletcher, a relationship which predated the applicant's involvement as the officer investigating these offences. It was also known that the applicant had become very friendly with a number of criminal associates, including a criminal called Powell (see paragraph 8).

19 The Court then summarised the facts relating to the applicant's conviction. To cut a long story short, the Court concluded that the convictions of the two appellants were not safe. In paragraph 16 they said:

"... there was a great deal of evidence which lent support to what may have appeared at trial to have been fairly wild, slightly misplaced allegations of impropriety against

a police officer ... We believe that the evidence of the criminal activity of [the applicant] subsequent to the trial involving these appellants should realistically be seen in context as part and parcel of a continuing course of conduct by [him] to impress Fletcher and to foster their continuing relationship. There is, in addition, evidence of his direct dishonesty in connection with property said to be the proceeds of dishonesty by the appellant.”

That, I think, is a reference to the fact that when he was arrested he had on him a watch that was said to have been seized from Khan.

- 20 The applicant was also involved in an investigation which led to the conviction of Mr Kevin Lane for murder in 1996. When I say he was involved, he was described in an appeal against conviction by Mr Lane as, I think, the unofficial officer in the case, or *de facto* officer in the case. He was not the officer in the case but he appears to have had some involvement in the investigation. Mr Lane has sought the help of the Criminal Cases Review Commission (“CCRC”). The applicant has been interviewed on two occasions by the CCRC about this case.
- 21 The defendant has become interested in the operation of the CCRC and has decided to make a programme about what it sees as its failings. Two cases are used in the programme as examples. One of those cases is the case of Mr Lane. More than 15 years after his conviction, Mr Lane applied to CACD for leave to appeal against his conviction. The Court gave him an extension of time, but after a hearing, by a judgment on 8 July 2015, refused his renewed application for leave to appeal against his conviction. On that appeal, Mr Lane’s counsel described the applicant as the “*de facto* officer in the case”. There were three main grounds of appeal. The first was that the applicant was a ‘spectacularly corrupt’ officer who could be shown to have misbehaved in the preparation for trial. Specific examples were given in addition to the general concerns expressed about his character. It was also submitted, secondly, that the applicant knew the two suspects who, on Mr Lane’s case, were really guilty of the murder, and had gone to off-the-record meetings before the trial with at least one of them. Those two people were Roger Vincent and David Smith.
- 22 The Court considered all the allegations in detail. There were a lot of detailed allegations. I have read the very comprehensive skeleton argument for the renewed application which was settled by Mr Bennathan QC. The Court’s conclusion was that Mr Lane’s counsel was “building bricks without straw”. The Court concluded that, with very few exceptions, the submissions were speculative and that with one possible exception there was no complaint in relation to which the applicant was shown to have intervened improperly or to have behaved in such a way as to call into question the proper conduct of the trial. Rather, the submission had been that outcomes or developments which were adverse to Mr Lane were said to be “possibly attributable to intervention by [the applicant]” (see paragraph 78 of the judgment of Rafferty LJ). In paragraph 79 she said:

“The arguments are generalised criticisms of [the applicant’s] corrupt and dishonest behaviour with an invitation to us to translate that into his inevitably being the source of any development during the trial which was adverse to [Mr Lane] and impermissibly so.”

The Court of Appeal was not persuaded that the safety of the conviction was in doubt, and refused the renewed application for leave to appeal against conviction.

- 23 It is right to say that one of the concerns which has been mentioned today, which is a concern about the evidence of Mr Skerritt, is not expressly dealt with in the judgment of the

Court. Another concern about a witness, Mr Cox, is expressly dealt with in the judgment of the Court of Appeal.

24 The applicant's conviction became spent in 2014. On 12 July 2015 he changed his name. Since his release from prison he has taken qualifications in photography and has been employed in, I think now, a supervisory role with the same employer for some five years. His line manager and senior managers know about his conviction. He has moved away from his previous home and he has lived at the same address now since 1 July 2015.

25 It is convenient at this point to read paragraph 7.4.32 of the defendant's editorial guidelines, which Mr Caldecott accepts are a relevant privacy code for the purposes of section 12 of the HRA:

“Any proposal to doorstep an individual or organisation, whether in person or on the phone, where we have not previously tried to make an appointment for an interview, must be approved by Director Editorial Policy and Standards. This does not apply to daily newsgathering.

Approval will normally only be given if:

- there is clear evidence of crime or significant wrongdoing, and
- it has not been possible to request an interview, or
- there is good reason to believe that an investigation will be frustrated or allegations avoided (for example, because those under investigation might become out of contact) if a prior approach is made.”

26 I have been shown emails about an approach that was made to the Director Editorial Policy and Standards. In an email sent by Mr Daly, the reporter who approached the applicant, he referred to the programme that was being made about the CCRC and the two example cases. He described Mr Lane's conviction and said that the applicant was one of the detectives at the centre of the case. He was not the senior investigating officer, but played a key role in the investigation and is acknowledged as being the central officer in terms of disclosure at trial time. “It is now known”, the email says, “that [the applicant] had an informal and potentially corrupt association with both Vincent and Smith at the time of the investigation.” The email then refers to the conviction some seven years later of the applicant for “spectacular corruption” involving the theft of £160,000 from his own force and the four-year sentence of imprisonment. The email goes on to say that two years later Vincent and Smith were convicted of a similar contract killing. The email then sets out the contentions made by Mr Lane's legal team about what the applicant had done during the course of the investigation. The email then said:

“We need to put all this to him, particularly in the light of the new scientific evidence relating to the gunshot residue and potential for fingerprint planting. We have found out that the applicant has attempted to keep his location and identity secret, but we have located ...”

there is then a redacted passage -

“... helping and [blank] told us that ...”

a further redacted passage -

“He keeps zero profile online because he is fearful of reprisal from his previous life, but also he is desperate to avoid ...”

a further redacted passage -

“[redacted passage] says that as soon as he hears about our interest he will disappear. [redacted] says he was [redacted] changing his name [redacted] in a bid to stay under the radar. So we have a suspected new address for him and I fear that if we go to him with our allegations in the usual way he will disappear. Therefore, I would like permission to doorstep without prior approach.”

Then there is an email dated 9 March from the Director of Editorial Policy which says:

“On the basis of Mark’s account of the information given to him by [redacted], I agree.”

- 27 On 13 March the applicant was approached by Mr Daly and two others, one of whom was carrying a camera, he told me, at 10.15 in the morning, when he was walking to work from his home through a residential area. This suggests to me, and I infer, that Mr Daly and the two other people must have been waiting outside or near the outside of the applicant’s home in order to do this. The applicant said that he was followed for 400 yards in full view of passers-by. He told me that he found it a shocking and humiliating experience. Mr Daly tried to interview him as he was walking along a busy road.
- 28 The transcript of the interview is at pages 6 to 7 of the exhibit to Miss Kane’s witness statement. Only the grey passages, which are a small part of the interview, are to be televised.

Time	Speaker	Transcript
00:50	MD	Mr [CS]. Mark Daly BBC Panorama. I've just got a few questions for you about the investigation of the Robert Magill murder if that's okay.
	CS	I don't know what you're talking about.
	MD	Mr [CS].
	CS	No.
	MD	Your name's [CS].
	CS	No.
	MD	Yeah I think it is.
	CS	No it isn't.
01:08	MD	You're a former detective for Hertford Constabulary. You investigated the Robert Magill murder. I'd like to ask you about Kevin Lane. Kevin Lane believes ...
	CS	Sorry I don't know what you're talking about.
	MD	Kevin Lane believes that you fitted him up for a murder that he didn't commit. Is that true?

	CS		No.
01:36	MD		What was your relationship with Roger Vincent and David Smith?
	CS		I didn't have a relationship with any of them. No.
	MD		You're a former police officer?
	CS		No.
	MD		I think you are. What's your name? [CS]?
	CS		I don't know who you are.
01:52	MD		My name is Mark Daly. I'm from BBC Panorama. So I'd like to know whether you corruptly influenced the investigation of the Robert Magill murder. This is your chance Mr [CS] to put your side of the story. You were described as a spectacularly corrupt police officer and Kevin Lane believes that you corruptly influenced the investigation of Robert Magill in order to fit him up. Is this the case? Do you have anything to say about this? Mr [CS] if this is not the case this is your chance to say so.
02:35	CS		Well I think I'm going to call the police because I don't know who you are.
	MD		You had a number of unauthorised visits with Roger Vincent and David Smith whilst they were suspected of the murder of Robert Magill. Can you say what those conversations were about? Kevin Lane believes that he spent 20 years in prison for a murder that he did not commit and he effectively believes that you fitted him up. What do you have to say about that?
	CS		I've got nothing to say whatsoever. I don't know what you're talking about.
3:30	MD		Mr [CS].
	CS		I don't know what you're talking about.
	MD		This is my name, will you take this card and if you decide that you'd like to speak at any point about this case we'd very much like to hear from you. I'm working for a BBC Panorama programme about this case. We're going to feature the case and feature your role in this case and this is your chance to say whether you had

			anything to do with Kevin Lane being fitted up. Kevin Lane asks that this is your chance to tell him if there is anything that could help him quash his conviction. Is there anything you'd like to say Mr [CS].
04:11	CS		That, I'm not a corrupt person at all. I don't know what you're talking about. Please go away.
	MD		Can you confirm that you are the former detective Mr [CS]? OK, I have just one more question.
	CS		I don't know what you're talking about.
04:37	MD		Did you fit up Kevin Lane for murder.
	CS		No. No. No. Not at all. No.
	MD		Would you stand and just talk for a few minutes then and explain your role in the investigation?
	CS		Not with the, not with the camera come on.
04:54	MD		Okay well look, you have my card if you wish to get in touch at any point Mr [CS]. I'd be pleased to hear from you. That certainly was detective, former detective [CS] with not very much at all to say for himself. At first he tried to deny that he was [CS, but subsequently it became quite clear that he knew exactly what I was talking about but he had no wish to engage. At least he did deny that he had acted corruptly, but I doubt very much that we'll hear anything from him.

- 29 As can be seen, the passages which it is intended to broadcast are a heavily edited version of the interview and do not give a full picture of the applicant's answers. The focus is on his denial that his name is CS. Two of the allegations are broadcast as put by Mr Daly, and the only response to those, which is in the greyed passage, is, "I'm not a corrupt person at all, I don't know what you're talking about, please go away." In the course of that interview Mr Daly gave the applicant his card. Later that day the applicant emailed Mr Daly. An exchange of emails followed in which Mr Daly asked the applicant questions, and the applicant tried his best to answer them. Miss Kane in her witness statement says that, "The claimant's denial of any misconduct in these exchanges will be included in the programme."

Submissions

- 30 Given the time, I can only give a brief summary of the submissions. In short, Mr Caldecott submits that the applicant has no reasonable expectation of privacy in his convictions. They are convictions incurred by a police officer in the course of his public duty, and in those circumstances the fact that they are spent convictions is not enough to generate a reasonable expectation of privacy in relation to them. Convictions may well normally recede into private life at the point when they become spent under the Rehabilitation of Offenders Act, but, submits Mr Caldecott, this is not a normal conviction because of the extra public dimensions which I have just described.
- 31 The filming, he accepts, involved revealing the applicant's new identity, but he submits that it would be bizarre if there were no reasonable expectation of privacy in relation to the convictions that the applicant can have a reasonable expectation of privacy about his new identity. If that is wrong, then Mr Caldecott submits there is the very strongest public interest in the investigation of wrongful convictions. He refers in that connection to *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115, a decision of the House of Lords.
- 32 In that case, the House of Lords considered a policy which restricted the ability of serving prisoners to have interviews with journalists, and then restricted the use to which the journalist could put that material in order to challenge convictions which the convicted prisoners argued were wrongful. The House of Lords held that the policy was unlawful because it interfered with the prisoners' fundamental right of access to justice. That was a decision before the Human Rights Act 1998 came into force.
- 33 In short the applicant submits that he is not asking to be forgotten. He accepts that any relevant material can be reported under his former name, and he accepts that there is a strong public interest in the investigation of miscarriages of justice. He submits, however, that those interests are not furthered by what he describes as an unfair interview conducted in the manner which I have just described.

Discussion

- 34 The question for me is whether the applicant's claim to restrain publication is more likely than not to succeed at trial. The initial sub-questions are whether he is more likely than not to show that he has a reasonable expectation of privacy, and to what information any such expectation relates. That is a multi-factorial test and requires an intense focus on the facts. I accept in this connection that there is no real distinction, if I understood the submission from Mr Caldecott correctly, between the issues that arise under Article 8, including private and family life and reputation, and the question which arises in relation to a reasonable expectation of privacy. In my judgment, the applicant is more likely than not to show that there is such an expectation.
- 35 The question here is not, in my judgment, directly whether he has a reasonable expectation of privacy in relation to his previous spent convictions. Given their context, he may well not have. The question rather, in my judgment, is whether, despite his past, he has a reasonable expectation of privacy in relation to his attempt to rehabilitate himself. On the material I have seen, I consider he is more likely than not to establish that his attempt to rehabilitate himself is sincere, and that he has distanced himself from his criminal past.
- 36 The interest at stake here is more than a mere abstract interest in rehabilitation, which is recognised by and given effect to by the provisions of the Rehabilitation of Offenders Act, and it is more than the mere fact that the events in question happened many years ago. It includes, in my judgment, what in practice the applicant has done since his release from

prison to rehabilitate himself, and on the material I have seen he has made significant efforts in that regard. He has obtained new qualifications, a new job, he has moved to a new place, and has established, and is establishing, a new social network. None of this, in my judgment, is materially changed by the fact that some in his new circle know about the convictions, and more know his old name. In my judgment, he is entitled to walk to work without being suddenly ambushed by questions which require him to reveal his new identity and comment out of the blue on matters that happened many years ago, and which he may not readily be able to call to mind.

- 37 I park here the question of whether the door-stepping was justified under the relevant privacy code. I have considerable doubt whether the exception which I have referred to is engaged, i.e. that there is clear evidence here of criminality or significant wrongdoing. Mr Caldecott pointed in this connection to the concerns about the two witnesses in the Lane trial, Cox and Skerritt only. I have already referred to those. However, I am not able to say at this stage that the applicant is more likely than not to succeed at trial on this discrete issue. I merely record my concern about it. I do accept, however, that he is more likely than not to establish at trial that his practical attempts to rehabilitate himself will be jeopardised by the proposed broadcast.
- 38 The second question is how the balance referred to by Lord Steyn, and which I have already described, is more likely than not to be struck at trial. Where the values at stake - i.e. the values protected by Articles 8 and 10 are in conflict - an intense focus on the comparative importance of the specific rights claimed is necessary. That is the first issue which I will consider.
- 39 The conflict here, in my judgment, is not between the right of the defendant to investigate and to report on a potential miscarriage of justice and the applicant's reasonable expectation of privacy, as I have found it to be. The applicant does not dispute that the defendant has such a right, and the relief sought by the applicant will not interfere with such a right. The conflict is between his reasonable expectation of privacy and the method chosen by the defendant to approach and interview him. I assume, as I have already said here in the defendant's favour, that the defendant was entitled by the code by door-step the applicant, but that is not decisive. It is merely a factor to which I must give particular regard.
- 40 What is the defendant seeking to achieve by that method? In my judgment, the method of approach and the selective way in which the fruits of that method are to be broadcast do not materially inform the public but serve to create an impression that the applicant was being evasive in circumstances where he was taken by surprise and was entitled to say that [CS] was not his name because he has changed his name. It seems to me that the applicant is more likely than not to show at trial that the defendant was seeking to embarrass him and put him on the spot in circumstances where it would have been fairer to allow him to give a considered response, once the defendant knew, as it very quickly did know, that he was prepared to engage with the defendant by email. In this context, it is significant, in my judgment, that at the point when Mr Daly interviewed the applicant, he did not know that he had a new name, as Mr Caldecott indicated in the course of his submissions.
- 41 Mr Caldecott submitted that the purpose of this approach was to enable the viewer to make a judgment about the applicant and his central role or conduct, but I consider that the way in which the interview was obtained, and the kind of way in which it is proposed to be edited, do not enable a viewer to reach a fair judgment about the underlying material.
- 42 I turn to the justifications for any interference. The justification, in my judgment, for the interference with the defendant's rights is that it protects the applicant's practical attempts to

rehabilitate himself in a new job, in new social relationships and in a new home. The justification for the interference with the applicant's right would not, in my judgment, be the pursuit of an investigation into a miscarriage of justice, but rather what appears to be a desire to broadcast footage of the applicant in circumstances that may make him look and sound evasive, but which do not, in my judgment, materially contribute to informing viewers about the case.

- 43 I turn then to the question of proportionality. In this context Mr Caldecott submitted that I should give little or no weight to the recent decision of the CACD about the *Lane* case. I do not give it great weight, but it seems to me that it is relevant to the balance on both sides. A very detailed and thoughtful appeal against conviction - as I have said, I have read the skeleton argument - which was based to a significant extent on criticisms about the specific conduct of the applicant in the investigation and his general corruption and criminality has relatively recently been dismissed by the Court. On the basis of what I have seen and been told, the only new material is forensic evidence which Mr Caldecott said had no direct bearing on the conduct of the applicant.
- 44 In my judgment, the interference with the defendant's rights is proportionate to a legitimate aim. The relief sought goes no further than is necessary to support that aim. It does not prevent the defendant from reporting the allegations made by Mr Lane. What it instead prevents is the defendant from broadcasting footage of the applicant near his home and enabling him to be readily identified by those who now know him. It does not seem to me that any of those things contributes to or is necessary for the legitimate aim of reporting on, and investigating, potential miscarriages of justice, and potential misconduct by those who once held public office.
- 45 It would not, in my judgment, be proportionate interference with the applicant's Article 8 rights and his reasonable expectation of privacy for this material to be broadcast for reasons similar to those which I have already given. It is not necessary to achieve the legitimate aim of investigating or reporting on a potential miscarriage of justice.

CERTIFICATE

Opus 2 International Ltd. hereby certifies that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge