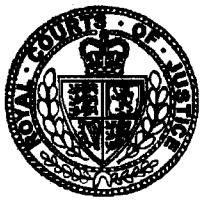

Neutral Citation Number: [2011] EWHC 2480 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Before :

LORD JUSTICE THOMAS
MR JUSTICE KENNETH PARKER

Between :

The Queen on the application of WV	**Claimant**
- and -	
Crown Prosecution Service	**Defendant**

Hearing date: 2011

Approved Judgment

Lord Justice Thomas:

1. WV brought an application for permission to apply for judicial review to quash a decision of the Crown Prosecution Service (CPS) to disclose to the defence in a trial his identity as a person providing information to the police without applying to the trial judge for a ruling that information relating to WV's identity is protected by public interest immunity. We granted leave to bring the proceedings and, as soon as possible, as I will explain, heard evidence. At the conclusion of the hearing in the light of the evidence and in the light of observations made by the court, it was intimated that the CPS would not disclose the identity of WV as it had planned to do. A fresh decision was subsequently made by the CPS that it would not disclose his identity without seeking the ruling of the trial judge. WV also seeks an order that notification be given to his lawyers of any decision to disclose his identity following such a hearing so that he may apply to the court.

2. The facts relating to this application can only be very briefly described. It is essential to protect the identity of WV

(1) The facts

3. WV is a defendant in some criminal proceedings. As a result of certain events, WV told his advocate that he might be prepared to supply certain information to the police in relation to other very much more serious criminal proceedings. Arrangements were made for a visit to be made by his solicitor with a police officer under the cover of a legal visit. The prison authorities were therefore not told the real nature of the police officer's employment; he was represented to be an assistant to the solicitor. This cover was adopted to avoid any risk that a corrupt prison officer might disclose to other criminals the fact of a visit to WV by a police officer; such disclosure would risk endangering the life of WV.

4. As what actually transpired on the visit was not clear from the written statements of the solicitor and the police officer, we heard evidence from WV, the solicitor and the police officer. In the result, subject to minor variations in recollection, it became clear what had happened. The facts, as they emerged, can be summarised as follows:

   i) The police officer explained the procedure under the Serious Organised Crime and Police Act 2005 (SOCPA) under which offenders who assist investigations and prosecution can be given a reduction in their sentence, if they admit the offending and enter into an agreement. If WV gave evidence having entered into such an agreement, steps would be taken to protect his identity by disguising his voice, using screens or a remote television.

   ii) WV made it clear that he would not plead guilty as he was innocent of the charges against him. The procedures under the SOCPA provisions were not therefore available.

   iii) There was then discussion as to whether WV would, if suitable arrangements were made which protected him from any risk that he might be seen to be assisting the police, be interviewed at a police station.

iv) WV then said that he might be prepared to give information about the other much more serious criminal proceedings provided it was off the record and did not lead back to him. The police officer said he would have to tell his superior officers, but his identity would otherwise be protected through the use of a pseudonym. The officer did not in any way contradict the basis upon which WV said he would give information; indeed the officer told us that he appreciated that WV did not want his name disclosed; he never suggested to him that his name might be disclosed.

v) WV then gave the information which the officer recorded.

5. After the visit, there were further discussions between the police officer and the solicitor in which the possibility of WV giving evidence under an agreement made under the SOCPA provisions was discussed, but in the result these came to nothing.

6. About two months prior to the commencement of the trial of the matter in relation to which WV had provided information, the police officer prepared a statement to be used in disclosure to the defence in the trial setting out the information provided by WV but stating that it was provided by a person identified solely by a pseudonym; it made clear that the person providing the information was legally represented during the conversation in which the information was provided.

7. About one month later, therefore one month before the trial, the Crown Prosecution Service informed the solicitor for WV that the Crown had taken the view that the material was disclosable under the Criminal Procedure and Investigations Act 1996 (CPIA) to the defendants and that it would disclose the statement from the police officer together with WV's real name seven days later. That decision followed what is described as a full file review to which we shall refer.

8. An application was then made to the trial judge to prevent the disclosure of WV's identity. The judge concluded that any judge would hesitate before interfering with the Crown's duties of disclosure as it saw them. Although he considered that he had power to prevent disclosure, it would be wrong to prevent the Crown disclosing the identity of WV in circumstances where the Crown had decided it would do so. The parties had told him that they were agreed that there might be a remedy open to WV by way of judicial review of the CPS's decision.

9. An application was therefore made for judicial review of the decision of the CPS. This initially came before us for permission with the hearing to follow if permission was granted, but it became clear that evidence would be required; we adjourned the matter and heard evidence a few days later. Further information was then required, together with further submissions. These were provided a few days later.

(2) The competing interests

(i) The duty to disclose the information

10. Under s. 3(1) of the CPIA the prosecutor is bound to disclose material which might reasonably be considered capable of undermining the case of the prosecution against the accused or of assisting the case for the accused.

11. I am satisfied, and it was not disputed before us, that the information provided by WV was disclosable by the prosecutor in pursuance of the prosecutor's duty under s.3. I also accept that it was highly arguable that the identity of WV was also a matter that was capable of undermining the case for the prosecution or assisting the case for the accused. It is not necessary, in my view, for this court to decide whether the identity of WV was so capable and so I express no concluded view.

12. However the duty under s.3(1) is expressly subject to s.3(6):

> "Material must not be disclosed under this section to the extent that the court, on the application of the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly."

(ii) The danger to the life of WV

13. There is no doubt at all on the evidence that there was a real and substantial risk that if the identity of WV was disclosed, WV might well be killed.

14. It was common ground that Article 2 of the European Convention on Human Rights was engaged as, in the circumstances relating to WV, a positive obligation rested on the state to take preventive operational measures to protect the life of WV who was at risk of the criminal acts of another individual: see *Osman* (1998) 29 EHRR 245. I am satisfied that on the facts of this case the circumstances identified at paragraph 116 of the judgment of the court were met. The authorities of the state knew of a real and immediate risk to the life of WV from the criminal acts of one of the defendants in the trial; they therefore had a duty to take measures within the scope of their powers which would be expected to avoid that risk.

(iii) Confidentiality

15. On the basis of the facts that I have set out, I am satisfied (and the CPS did not contend to the contrary), that an implied undertaking of confidence in relation to WV's identity arose when the information was provided by WV to the police officer in the prison in the circumstances which we have described.

(3) Public Interest Immunity

(i) The general principles

16. The principle of public interest immunity was summarised by Lord Bingham of Cornhill at paragraph 18 of *R v H* [2004] UKHL 3, [2004] 2 AC 134 where he said:

> "Circumstances may arise in which material held by the prosecution and rending to undermine the prosecution or assist the defence cannot be disclosed to the defence, fully or even at all, without the risk of serious prejudice to an important public interest. The public interest most regularly engaged is that in the effective investigation and prosecution of serious crime, which may involve resort to informers and undercover agents, or the use of scientific or operational techniques (such as

> surveillance) which cannot be disclosed without exposing individuals to the risk of personal injury or jeopardising the success of future operations. In such circumstances some derogation from the golden rule of full disclosure may be justified but such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial."

17. The Code of Practice made under s.23 of the CPIA, paragraph 6.12 includes:

> "(iv) Material given in confidence.
>
> (v) Material relating to the identity or activity of the informants or undercover police officers or witnesses or other persons supplying information to the police who may be in danger if their identities are revealed."

(ii) The position of informants

18. There is a long established rule of the common law that the identity of informants is not normally revealed in the course of a criminal trial: see *R v Hardy* (1794) 24 St Tr 199 where Eyre CJ stated:

> "... there is a rule which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed: if it can be made appear that really and truly it is necessary to the investigation of the truth of the case that the name of the person should be disclosed, I should be very unwilling to stop it, but it does not appear to me that it is within the ordinary course to do it, or that there is any necessity for it in this particular case; ..."

It is clear from many cases that the rationale for the rule is not only to protect the safety of the individual informer but also to ensure that the supply of information about criminal activities continues to flow.

19. The rule is, however, not an absolute rule. In *Marks v Beyfus* (1890) 25 QBD 494, Bowen LJ expressed an exception in these terms:

> "The only exception to such a rule would be upon a criminal trial, when the judge if he saw that the strict enforcement of the rule would be likely to cause a miscarriage of justice, might relax it *in favorem innocentiae*; if he did not do so, there would be a risk of innocent people being convicted."

20. In *D v NSPCC* [1978] AC 171, Lord Diplock after referring to *Marks v Beyfus* continued:

> "The rationale of the rule as it applies to police informers is plain. If their identity were liable to be disclosed in a court of

> law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So the public interest in preserving the anonymity of police informers had to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue upon which it is required to adjudicate should be withheld from that tribunal. By the uniform practice of the judges which by the time of *Marks v. Beyfus,* 25 Q.B.D. 494 had already hardened into a rule of law, the balance has fallen upon the side of non-disclosure except where upon the trial of a defendant for a criminal offence disclosure of the identity of the informer could help to show that the defendant was innocent of the offence. In that case, and in that case only, the balance falls upon the side of disclosure."

See also: *R v Hallett* [1986] Crim. L.R. 462 and *R v Agar* (1990) 90 Cr.App.R. 318 at 322-4.

21. Although some cases might suggest that the exception to the rule is an automatic one, it is not. The court has to balance the competing interests. This was made clear by Lord Taylor CJ in *R v Keane* [1994] 1 WLR 747 where, after referring to *Marks v Beyfus* and *R v Governor of Brixton Prison Ex Parte Osman* [1991] 1 WLR 281 said:

> "We prefer to say that the outcome and instances given [in *Marks v Beyfus* and *Ex Parte Osman*] results from performing the balancing exercises not from dispensing with it. If the disputed material may prove the defendant's innocence or avoid a miscarriage of justice then the balance comes down resoundingly in favour of disclosing it."

22. In the case of a registered informant various terms are set out in the agreement made between him and the police and signed by him in his real name and his pseudonym and by his controller on behalf of the police. The agreement provides:

> "You will be known as… and will use this name in any contact with your handlers. This includes any subsequent documents that you are required to sign. ….
>
> Your identity will be protected. You in turn must not reveal your role to anybody without first discussing it with your handlers; this includes other officers, family or friends"

The evidence before us was that it had been decided that the terms of the form should not qualify the obligation undertaken by the police to protect the identity of the informant, as it would be counterproductive to recruitment of informants. Every effort is therefore made by the police to protect the identity of any informant as robustly as possible as the police have undertaken to do in the agreement made with the informant. Apart from registered informants, there are others who provide information to the police in confidence. In the case of hotlines through which the police seek information in higher profile cases, an express assurance is given that identity will be protected.

23. The evidence before us was that the police are acutely aware that any deviation from the obligation to protect the identity of the provider of information may cause significant harm to the provider with a predictable impact on the cooperation of the provider in the specific case and on the willingness of others to provide information.

(iii) Information supplied in confidence

24. Although the information in the present case was supplied in circumstances analogous to WV being an informant, it was, as we have set out, supplied in circumstances subject to an implied undertaking of confidentiality. The issue of confidence in relation to disclosure was considered in the speech of Lord Cross of Chelsea in *Alfred Crompton Amusement Machines v Commissioners of Customs and Excise (No. 2)* [1974] AC 405 at 443-4:

> "Confidentiality is not a separate head of privilege, but it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest. What the court has to do is to weigh on the one hand the considerations which suggest that it is in the public interest that the documents in question should be disclosed and on the other hand those which suggest that it is in the public interest that they should not be disclosed and to balance one against the other."

It was expressed succinctly by Lord Diplock in *D v NSPCC* at page 218:

> "The fact that information has been communicated by one person to another in confidence, however, is not of itself a sufficient ground for protecting from disclosure in a court of law the nature of the information or the identity of the informant if either of these matters would assist the court to ascertain facts which are relevant to an issue upon which it is adjudicating: *Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2)* [1974] A.C. 405, 433-434. The private promise of confidentiality must yield to the general public interest that in the administration of justice truth will out, unless by reason of the character of the information or the relationship of the recipient of the information to the informant a more important public interest is served by protecting the information or the identity of the informant from disclosure in a court of law."

(4) The original decision by the CPS

25. As we have set out, the decision that this court is reviewing is the decision of the CPS to disclose the identity of WV without making any claim to withhold disclosure on the grounds of public interest immunity. The court was provided with a detailed note of the decision signed by the Crown Prosecutor who took the decision.

26. From the note it is clear that the Crown Prosecutor concluded that it would assist the defendants to the trial to have the information which had been provided by WV and WV's identity. His identity was therefore disclosable. The file note continued:

> "I have considered whether a PII application could legitimately be made to withhold this sensitive information but I take the view (and lead counsel agrees) that the assistance that this information would offer to [the defence] would mean that the judge could not in all good conscience order this information be withheld whilst at the same time allowing [the defendant] to have a fair trial."

The note then sets out the conclusion of the Crown Prosecutor that the information was:

> "not given in a confidential context and there was an expectation that under certain circumstances the giving of that information might be disclosed. This does not mean that, although [WV] is in a different position from a registered informant, the police are under a duty to safeguard WV's Article 2 and Article 3 rights and each state must take appropriate steps to safeguard lives within their jurisdiction. *Osman v UK* .... Regardless that WV was not a registered CHIS, the Crown Prosecution Service is mindful of the heavy responsibility that the police bear to take reasonable measures for the safety of people providing information (*P C Donnelly the Chief Constable of Lincolnshire*). In this case, however, this must be balanced against the public interests as regards ..... the prosecution of a serious crime."

The note then set out the measures for detailed police risk assessment and the view of the Crown Prosecutor that the prosecutor was satisfied that adequate protection could be provided properly to manage and minimise the risks.

27. In considering the decision made by the Crown prosecutor I have taken account of the usual view taken by the courts as to the margin of discretion to be accorded to a prosecutor in deciding whether to continue or discontinue with a prosecution. This is elegantly summarised by Richards LJ at paragraph 41 of his judgment in *R (Gujraj) v DPP* [2011] EWHC 472 (Admin). In such cases the general approach of the courts is to disturb a decision of an independent prosecutor only in highly exceptional cases.

28. Furthermore I have also taken account of the view expressed by Lord Bingham in *R v H*, in relation to the duty of the prosecutor under s.3 of the CPIA. He said at paragraph 35:

> "Only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands."

(5) The approach which should be taken by the CPS

29. In my view as the decision in this case relates to the disclosure of the identity of an informant, a different approach must be taken:

i) The decision of the CPS as recorded in the file note was not based on the full understanding of the circumstances in which the information was

communicated by WV to the police officer; that position is now clear. The information was communicated in confidence and the position of WV was one that required protection of the type accorded to any informant.

ii) When a prosecutor decides whether or not to continue with a prosecution, the prosecutor has to balance the public interest of the state in continuing with the prosecution, the interests of the victim of a crime (if any), and the duty to ensure a fair trial. There may be a conflict between those duties, but the Crown Prosecutor on behalf of the state in deciding whether or not to prosecute is, save in exceptional circumstances, the best person to make the decision on whether to proceed with the prosecution. His decision will be accorded a wide margin of discretion.

iii) In the present kind of case, however, there is a further interest, namely the interest of WV who has his right to the confidentiality of his identity; in addition on the facts of this case, he has his Article 2 rights. There is, in my view, a potential conflict between the duty of the prosecutor who seeks to discharge the duty under s.3 of the CPIA and not to risk a conviction being set aside and the need to uphold the agreement that WV's identity would be kept confidential and the public interest in the flow of information from informers as well as WV's Article 2 rights.

iv) The importance of informants to the prevention of crime has been a feature of our law for centuries. Where assurances are given to registered informants, to others or to the public in general (as is the case of a hotline) that their identity will be protected, those assurances should not be broken by the state without a judicial decision where the interests of the informant, the Crown, the defendant to a trial and the public interest can be carefully and impartially considered.

v) In my judgment it is of the highest importance to public confidence in the administration of justice, that where the interests of justice require that an express or implied undertaking of confidence as to the identity of an informant or other provider of information has to be broken, unless there is informed consent from the informant/provider, the decision to break it is a decision of a judge. Those who provide information in such circumstances have a right to that independent safeguard.

30. Thus in my view the ordinary principle applicable to decisions by prosecutors is not applicable where the CPS seek to disclose the identity of a police informant who objects to that course. It is clear from the evidence from the police that the question of disclosure of an informant's identity is not a borderline case. It is truly exceptional. It seems to me, giving the decision of the Crown Prosecutor anxious scrutiny, that the decision of the Crown Prosecutor was flawed, given the evidence that the court heard and the findings set out.

(6) The position of the trial judge

31. It would follow from the conclusion to which I have come that the decision of the Crown prosecutor should be quashed. We were told by counsel that if that was the decision to which the court came, then the issue of whether the identity of WV had to

be disclosed would be a matter raised before the trial judge and left to him for his decision. The court was informed subsequently that this had been done

32. It is clear from the cases in relation to informants that even if the prosecution desired to disclose the identity of an informant, the judge was obliged to consider whether to prevent disclosure. This appears to have been the import of the remarks of Lord Esher MR in *Marks v Beyfus* at page 500 and the observation of Mann J in *R v Rankine* [1986] QB 861 when giving the judgment of a constitution of a Court of Appeal presided over by Lord Lane CJ at p.867 where he said:

> "Thus, even if the prosecution do not invoke the rule, the judge is nonetheless obliged to apply it."

I do not consider that the decision in *R v H* changes the position; Lord Bingham was there speaking of the general position. The position of the identity of informants is very different for the reasons set out.

33. In my judgement, the Crown Prosecutor should not have decided to make disclosure of the identity without referring the matter to the judge and the judge should not have taken the view he did that he should defer to the decision of the prosecutor. The disclosure of the identity of an informant without his consent is for the reasons I have given one of those cases where the Crown Prosecutor must apply to the court and the court must carefully consider the issues and reach its own decision taking account of the interests to which we have referred by reference to the facts and issues of the case before the court and balancing the interests and risks.

(7) Conclusion

34. In the result, I would quash the original decision of the CPS and give WV permission to apply to the court in the event that the court decides to disclose his identity, subject to argument on jurisdiction in the light of s.28(2) of the Senior Courts Act 1981.

Mr Justice Kenneth Parker:

35. I agree.