Neutral Citation Number: [2020] EWHC 3541 (QB)

Case No: QB-2018-000708

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

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Date: 21/12/2020

Before:

THE HON. MR JUSTICE WARBY

- -

Between:

Alaedeen Sicri	**Claimant**
- and -	
Associated Newspapers Limited	**Defendant**

- -
- -

Hugh Tomlinson QC and Sara Mansoori (instructed by **Bindmans LLP**) for the **Claimant**
Antony White QC and David Glen (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing dates: 2, 3 and 6 November 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Warby:

I. INTRODUCTION

1. On the evening of 22 May 2017, the singer Ariana Grande gave a concert at the Manchester Arena. As the event came to a close a suicide bomber, Salman Abedi, detonated an improvised explosive device in the foyer. He murdered 22 and injured more than 800 people, many of them children and young people. This was the worst terrorist atrocity in the UK for over a decade. It inevitably led to an urgent countrywide investigation, led by the Greater Manchester Police ("GMP").

2. At about 04:40 on 29 May 2017, armed police arrested the claimant, Alaedeen Sicri, at his home in Shoreham-by-Sea, West Sussex, on suspicion of offences contrary to the Terrorism Act. Within minutes, the GMP had issued a press release stating that a 23-year-old man had been arrested in Shoreham "in connection with the Manchester Arena attack". In line with standard practice, the police did not name the claimant. This action arises from the fact that the defendant did.

3. From 06:45 onwards, the defendant published on its MailOnline website an article ("the Article"), reporting on the arrest of the claimant. Initially, no identifying information was provided. But details were added as the day went on. A version, published at 12:47, identified the arrested man, accurately, as a "trainee Libyan pilot", gave a version of his first name, identified the location of his home, and gave other details capable of leading to his identification by some. Versions, published from 18:00, gave his name as Alaeedeen Zakry, an alternative spelling, and told readers (again accurately) that he "runs an online marketplace for Libyans from his Sussex home". From 18:21, the Article gave the conventional spelling of his name, and a number of additional details. By this time, he was identifiable to the world at large.

4. The reason for the claimant's arrest was that records showed he had received a telephone call from Salman Abedi. The claimant told police that Abedi was a complete stranger, who had called out of the blue seeking to exchange some Libyan currency, a transaction the claimant declined. The police, having spent several days investigating and questioning the claimant, were satisfied that no further action was appropriate. None of this is in dispute. On 3 June 2017, the claimant was released without charge.

5. The defendant did not report the claimant's release. The Article remained online unamended until February 2018, when it was taken down following receipt of a letter of claim from the claimant's solicitors. The claims advanced at that time were not conceded and, on 21 December 2018, the claimant brought this action claiming damages for breach of confidence and misuse of private information. His claim includes claims for aggravated damages - to compensate for increased hurt to feelings - and for special damages, to compensate for financial loss.

6. Misuse of private information is part of the "confidentiality genus", but breach of confidence and misuse of private information are separate and distinct wrongs. At this trial, however, it has been common ground that it is unnecessary to examine their differences. The case can be decided by reference to the latter tort alone, the contours of which have been shaped by Articles 8 and 10 of the Convention.

7. This case has come to trial less than six months after the decision of the Court of Appeal in *ZXC v Bloomberg LP* [2020] EWCA Civ 611 [2020] 3 WLR 838 ("*ZXC CA*"). The Court dismissed an appeal from the decision of Nicklin J, [2019] EWHC 970 (QB) [2019] EMLR 20 ("*ZXC1*"), that the publication of information which identified the claimant as the subject of a criminal investigation represented a misuse of private information. In *ZXC CA* at [82] the Court of Appeal held that, in law:

> "... those who have simply come under suspicion by an organ of the state have, in general, a reasonable and objectively founded expectation of privacy in relation to that fact and an expressed basis for that suspicion."

8. *ZXC* was not the first case in which the Court reached such a conclusion. Mann J had done so earlier in Sir Cliff Richard's claim, *Richard v British Broadcasting Corporation* [2018] EWHC 1837 (Ch) [2019] Ch 169. The issue had been extensively discussed in earlier cases. But *ZXC* was the first such case to reach an appellate court. *ZXC* is of course binding on me.

II. THE ISSUES

9. The main issues that arise for decision are as follows:

(1) Did this claimant have a reasonable expectation of privacy in relation to the information that he had been arrested in connection with the Manchester terrorist attack ("the Information")? This requires consideration of (among others) these questions:

(a) whether the general rule identified in *ZXC CA* applies to this claimant, in all the circumstances of this case including, but not limited to

(b) the nature and gravity of the terrorist atrocity of which the claimant was suspected of being involved; and

(c) the existence and extent of other local and national publications on and after 29 May 2017 which contained identifying details about the claimant.

(2) If the answer to (1) is yes, did the rights of the defendant and others to disseminate and receive information on matters of public or general interest outweigh the claimant's expectation of privacy?

(3) If the claimant succeeds on liability:

(a) can he recover damages for injury to his reputation?

(b) should there be an award of aggravated damages?

(d) what sum should he be awarded in general damages? And

(e) what, if any, award of special damages should be made?

10. Issues (1) and (2) are not necessarily binary questions. The defendant's case is that the answers may depend, at least in part, on how knowledge of the story evolved in the

claimant's locality and the media on and after 29 May 2017. Issue 3(a) and 3(c), if they arise, call for consideration of (i) an alleged inconsistency between what was said about damages for reputational harm by Mann J in *Richard v BBC* and by Nicklin J in *ZXC1*; (ii) whether the "rule" in *Dingle v Associated Newspapers Ltd* [1964] AC 371 applies in the tort of misuse of private information generally, and/or on the facts of this case.

11. There is no connection between the issues in this case and those being looked at by Sir John Saunders in the Manchester Arena Inquiry. At the time of this trial, that Inquiry, established on 22 October 2019, was hearing evidence relating to the Arena Complex and the Security Arrangements. Its terms of reference have no overlap with the issues in this case.

III. THE TRIAL

12. Thanks to the parties' efficiency, and the efforts made to reduce the scope of the issues, the trial lasted three days rather than the original estimate of five. The facts are substantially uncontroversial. The main areas of factual investigation at trial were the extent to which the Information was public or general knowledge in Shoreham-by-Sea and beyond, other than by virtue of the Article; the defendant's editorial decision-making processes; and issues relating to the claimant's claims for damages.

13. After opening statements by Counsel for each party, the claimant gave evidence and was cross-examined by Mr White QC, for the defendant. The claimant adduced evidence from five other witnesses. One of these was his solicitor, Tamsin Allen, who gave evidence relating to damages and was cross-examined by Mr White. Four other witnesses gave evidence that was relevant wholly or mainly to damages. They were Nezar El-Harushi, an aircraft engineer; Jacqueline Verrall and Dec Mooney, directors of English Language Homestays Limited ("ELH"), for which the claimant worked in 2017; and Mohamed Elazoumi, an employee of Conduent, another company for which the claimant worked after his work with ELH came to an end. The statements of these witnesses were unchallenged, and were read, rather than adduced live on oath or affirmation. All of this was accomplished within the first day of the trial.

14. The defendant's evidence was adduced on day two. Four editorial staff of MailOnline, who were involved with the Article, were called as witnesses to describe how they dealt with the story and why. In descending order of seniority, they were Marianna Partasides, (UK News Editor), Amanda Williams (now Executive Editor, but an Associate Editor at the time), Tom Savage (UK Night News Editor), and Mark Duell (Senior News Reporter). All four gave evidence live. Ms Partasides was cross-examined by Mr Tomlinson QC, the others by Ms Mansoori. The defendants also called evidence from Barry Keevins and Jaya Narain, two freelance journalists who were engaged by the defendant on 29 May 2017 to carry out enquiries. Mr Keevins gave evidence in court and Mr Narain by video-link. Both were cross-examined by Mr Tomlinson.

15. After a break for Counsel to prepare their submissions, I read and heard closing argument on what would have been day five, but ended up as day three of the trial.

IV. THE FACTS

The claimant

16. The claimant was born in 1994, in Tripoli, Libya. His parents, a consultant gynaecologist and an English teacher, still live there. The claimant has been in the United Kingdom since he came here in late 2011, aged 18, to study. The name in which he brings this action is the official transliteration of the Arabic, used in official UK documents. Other transliterations have been used including Ala Zakry, which is a name he uses on social media.

17. In September 2012, the claimant enrolled as a full-time student on a course at an aviation school, based at Shoreham Airport, in Sussex. He graduated with an Air Transport Pilot Licence in July 2014. The fees of some £75,000 were paid by his parents. While studying, he lodged with local families, initially Jackie Verrall and family, and later John and Jenny Crump. After graduating, he rented a flat above a parade of shops in Brunswick Road, in the centre of Shoreham. He worked for Mrs Verrall at ELH, which provided accommodation and English lessons to foreign students during the summer months. On a student visa, he was only able to do up to 20 hours a week of work in this role. He could not work in aviation in the United Kingdom. His evidence is that he was looking for jobs in aviation abroad.

18. The claimant had a business called "Hasoub Alafaq", supplying Libyans with products from international sources, which were not available from Libya. He would receive funds in Libyan dinars from customers in Libya, use his UK bank account to purchase goods in the UK (from Amazon or eBay), and send the goods to Libya. The foreign exchange transactions were carried out using a Facebook page called "Pounds for the Libyan community in the UK". As the claimant describes it, "someone gives pounds to you in the UK and you or your representative gives Dinars to their representative of family member in Libya", or the other way round. The claimant receives money from his parents via a similar method: they pay Dinars to someone in Libya, whose friend or relative in England pays the equivalent in Pounds to the claimant here. The claimant put his name and mobile number onto the page as someone looking to exchange money in Libya, so that he could be paid in the UK when someone in Libya ordered goods.

19. The claimant describes himself as "a very sociable person" who was "living a very normal life for a young man". He is a Muslim, who goes to the Mosque occasionally. But he had no interest in radical preachers or views that would be considered extreme in the UK. He was working hard and wanted to be successful. But he would drink and go out and "do things which are disapproved of in my religion." He had a group of friends in Brighton who were recent graduates or still at University, with whom he used to go out at weekends to restaurants or sometimes clubs or bars.

20. Developments in the political and security situation in Libya led the claimant to apply for asylum. On 20 or 21 May 2017, the claimant learned from his solicitor that his application for asylum had been approved by the Home Office.

The call from Abedi

21. Shortly afterwards, he received a call from someone whom he later discovered was Salman Abedi. Abedi asked if the claimant could help exchange Dinars for pounds for

him, saying he had £160-170 worth of Libyan currency and wanted money here. The claimant refused the transaction. He thought the sum was too small, and he did not need the transaction which would have been a favour for a stranger, not his ordinary line of business. He went out to a restaurant that evening to celebrate the Home Office decision with some friends.

The bombing and its aftermath

22. The attack on the Manchester Arena, on 22 May 2017, led to widespread fear and concern. A huge national and international investigation and manhunt was immediately launched by the police and security services. The express assumption was that the bomber had acted as part of a wider terrorist network, which might strike again. The UK terror threat level was raised to its highest level, "critical" (meaning a further attack was expected imminently). This was the first time in nearly 10 years that the threat level had been assessed as being so high. The Queen made a public statement. Campaigning in the General Election was suspended. Troops were deployed to guard Government buildings in London. Operation Temperer was activated for the first time, allowing soldiers to reinforce police in protecting other parts of the country.

23. Over the days that followed:

(1) On 23 May 2017, Abedi's home in Fallowfield was raided, and his 23-year-old brother was arrested in South Manchester. His younger brother was arrested in Libya.

(2) On 24 May 2017, Abedi's father was arrested by Libyan security forces, and five men and a woman were arrested in England: two in South Manchester and one (the woman) in Blackley, in the north of the city, the others in Nuneaton and Wigan. The police held the first of several press conferences.

(3) On 25 May 2017, there were two further arrests: in Withington and Blackley. On 26 May, there were two more arrests in Manchester: a 30-year-old man was arrested in the Moss Side area, and another arrest took place in Rusholme.

(4) On 27 May 2017, two men were arrested in Cheatham Hill following a raid involving a controlled explosion. The terror threat level was lowered from critical to severe.

(5) On 28 May 2017, a 25-year-old was arrested in Old Trafford and a 19-year-old was arrested in the Gorton area.

(6) In addition to further press conferences, the GMP issued regular statements and briefings. Regular official updates were provided online, including on the GMP website and Twitter account.

(7) The bombing and these subsequent events received extensive publicity.

24. The claimant told me, and I accept, that he found the Manchester bombing horrific. As well as thinking about the families of those who died, he was concerned – when he heard the bomber was Libyan - about how people would think about the Libyan community. He did not recognise Abedi's name when he read it in media reports.

The claimant's arrest and detention

The claimant's experience

25. On the morning of 29 May 2017, he was in bed in his second-floor bedroom when – at about 04.40 - police officers broke through the communal door to the street and then through his flat door on the first floor. He awoke to find the officers standing in front of him. They arrested him and took him from the flat to a police van, still wearing his pyjamas. Other police vehicles were there. As they drove off, it was just getting light. He could see nobody there except for the police.

26. The claimant was taken to a police station and interviewed. The claimant appreciated, from the arrest and questions, that he was suspected of involvement in the bombing. Over the course of 24 hours, he was interviewed three times, each interview lasting for approximately 5 hours. In the evening of 29 May 2017, the police were authorised to detain him for a further seven days. Over the following four days, the claimant was interviewed further.

27. He told the police that he did not know Abedi, or anything about the attack other than what had been broadcast and reported in the media. The police asked about his studies, his work and daily life. They had a record of Abedi's call: its date, time and duration. They asked the claimant about that. He did not know he had been in contact with the bomber until the police told him.

28. All of this is the unchallenged evidence of the claimant, which I accept.

The Press Release

29. At 04:22 on 29 May 2017, the GMP released by email the following statement ("the Press Release") and posted the substance of it on the GMP Twitter account shortly thereafter:

> "Subject: Man arrested in Shoreham by Sea in connection with Manchester Arena attack
>
> This morning (Monday 29 May 2017) officers investigating the attack on the Manchester Arena have arrested a 23-year-old man in Shoreham-by-Sea, Sussex on suspicion on (sic) offences contrary to the terrorism act.
>
> A scene remains in place at the address where the man was arrested.
>
> As it stands 16 people in total have been arrested in connection with the investigation, of which two people have since been released without charge.
>
> A total of 14 men remain in custody for questioning."

The "scene" and the defendant's investigations

30. Barry Keevins, a very experienced freelance journalist based in Brighton, learned of the arrest from a contact, shortly before 06.00. At 06:10 he emailed Ms Partasides, Mr Savage and Neil Chandler of the defendant to report that a man had been arrested in

Shoreham "in connection with Manchester" and that he was heading that way. He arrived in Shoreham at about 07.00, in the company of a photographer. He initially provided information to various papers, but was soon "put on order" - that is, retained - by Ms Partasides on behalf of MailOnline.

31. Mr Keevins knew the street name, but on arrival there was no police presence. He identified the claimant's house by noticing people hanging out of upstairs windows. He filed his first copy at 07:27, reporting that police were searching an address in Shoreham. His aim was to find out what had happened and who was involved. Over the hours that followed, he used his experience to try to do this, with limited success.

32. Between 07:30 and 08:00, Mr Keevins spoke to two residents of the claimant's building, Charlie Foss and Sam Schiffer. Mr Foss said he had been woken by screaming and shouting, and witnessed the arrest in the early hours. Mr Schiffer found police at his home when he returned from a night shift. These two were able to describe the claimant, but did not know his name. Between 08:00 and 08:22, Mr Keevins was fortunate enough to encounter John Crump, walking his dog past the building. Mr Crump told him the arrested man had previously lodged with the Crumps and gave his name as "Anadin", which Mr Keevins filed in copy. Before 9am, he spoke to another neighbour Anna Read, who could not provide a name. The police arrived at the address at around that time and later issued a statement, but they did not provide the name or identifying details of the arrested man.

33. Mr Keevins spoke to Mrs Mainda, but she did not have the name. He went to Shoreham Airport but, it being a Bank Holiday, there was nobody there. Returning to the "scene", he spoke to a number of locals but when he filed copy at 13:32 he did not know the claimant's name. He knew, or at least believed, that Mrs Crump had given the name to the Mirror, but he did not get to speak to her until later, and first filed copy containing the name at 14:27. He was then able to, as he did, search online. By 16:17, Amanda Williams was still concerned to know how many people had confirmed the identity. Mr Keevins was only able to identify the Crumps.

34. MailOnline relied on another experienced freelance journalist based in Brighton, Jaya Narain. He trades as, or in, a news agency under the name South Coast News, providing "exclusive stories" to national newspapers. He first heard of a "dawn raid" at Shoreham from a contact who called him at around 08.00 on 29 May 2017. By 08:30, he had seen the GMP Press Release, and decided to go to Shoreham. Before he got there, he called Ms Partasides and, at 09:25, she confirmed his retainer to cover the arrest for MailOnline. Mr Narain arrived at about 10:25. On arrival, he spoke to the journalist for the local paper, the Argus, and a man called Stephen Courtney, but he did not get a name from them.

35. Mr Narain spoke to "more and more" residents, many of whom knew the claimant by sight or by name, but for the most part he was only given the name "Ali". By 11:47, however, Mr Narain had made a bit more progress. He sent copy to Mark Duell, the senior reporter covering the story for MailOnline, reporting that the arrested man had been

> "named locally as Aladine (spelling guess) …"

This appears to have been based on interviews with Mr Chaudhury, a local restaurant owner, and Ms Mainda, a hairdresser. Mr Narain, like Mr Keevins, visited Shoreham Airport but without success. Further efforts to put a name to the arrested man were unsuccessful, and Mr Narain reported as much to Mr Duell at 14:34. He got the name "Aladine" from a local resident, Amy Rhodes, and filed this at 15:15. By around 17:00 he had spoken to the Crumps, who confirmed the claimant's identity and the spelling of his full, official name. At around 17:10, Mr Narain filed copy with this information and quotations from the Crumps.

Media coverage

The Article

36. The first iteration of the Article appeared at 06:45 on 29 May 2017, under the headline "*Man, 23, is 16th suspect to be arrested over Manchester terror attack as armed police swoop on an affluent seaside town 263 miles away in Sussex*". It was attributed to "Paddy Dinham and Paul Thompson and Scott Campbell for MailOnline." This told the reader rather less than the Press Release, as it described but did not name the town where the arrest took place. No complaint is made of that version.

37. The Article was modified on about 44 occasions thereafter. Many of the changes involved the addition or changing of photographs, and most of them are immaterial. From 06:47, the town was named, and the defendant published the first of a number of photos of the town. From 07:02 the place of arrest was identified as the High Street, Shoreham, and there was an image of the High Street. From 11:16 onwards, details about the claimant began to emerge. It was said that he was "believed to have been arrested in a flat above a parade of shops in the town centre", and a photograph was published of police in the street outside the claimant's flat.

38. The claimant's claim relates to versions of the Article published at and after 12:47 on 29 May 2017. It is from that time onwards that he alleges that the Information was wrongfully disclosed to the public by the defendant. It is sufficient to set out the words of the version published at 12:47, and to identify the key changes made in later versions.

(1) **The 12:47 version**, with Mr Narain's name added to the by-line, was headed:

> "Trainee Libyan pilot, 23, is 16th suspect arrested in connection with Ariana Grande concert bombing as police raid affluent Sussex seaside town and a second property in Manchester"

This version not only identified the claimant as a trainee pilot, and gave his nationality, it was also the first version to name him, using (at this stage) his first name. It filled out the picture about his home, and gave some other information about his lifestyle. The body of the Article read as follows (with paragraph numbers added):

> **"[1]** The 23-year-old man arrested over the Manchester bombing more than 250 miles away from the scene was studying to become a pilot, it was claimed today.

[2] The suspect was detained at a home in Shoreham-by-Sea, West Sussex, and he is the 16th person to be arrested in connection with the atrocity last Monday that claimed the lives of 22 people and injured more than 100.

[3] Residents said that the man, who has been named locally as Aladine, was training to become a pilot and lived in a flat on a parade of shops just five minutes from the seafront, which was being searched by officers today.

[PICTURES]

[4] He would have his hair done at Violet's Hairdresser's below and was known as a sociable and friendly neighbour. Its owner Violet Mainda said: 'He was a young Libyan guy who was always very jovial and nice.

[5] 'He said he was training to be a pilot at Shoreham Airfield and he had just completed doing that. I am really, really shocked by this. I can't believe he had been arrested.

[6] 'He had a few friends and a girlfriend and always seemed very nice. I don't know if he worked, I think he just studied to be a pilot. He said he was studying to become a pilot at Shoreham.'

[7] Mrs Mainda, who was born in Kenya but lives in Shoreham with her husband Chris, said she knew him as 'Aladine' and he had told her he came from Libya.

[8] She added: 'He told me he came from Libya. He must have been here more than a year and he was always jovial.'

[9] She said the 23-year-old did not wear Muslim-style clothing and did not have a beard. He had a foreign girlfriend who dressed in Western clothing.

[10] Asmal Chaudhury, owner of the Palki Indian restaurant opposite, said he saw Aladine regularly. He said: 'He would come in an order food - he liked biryani. He had a few friends who would come round.

[11] 'Only last night I saw him shouting out of his window to a friend in the street. He was telling him to come in. He was shouting for him to come into the flat. I thought it was strange.

[12] 'He was a tall guy, quite young. He dressed in Western clothing. He told me he was Libyan and that he studied nearby but I don't know anything else about him.'

> **[13]** Nobody was available to talk today at Shoreham Airfield, which is also known as Brighton City Airport, but requests for comment have been left with the press office.
>
> **[14]** Greater Manchester Police also confirmed searches were conducted overnight at addresses in Chester, Cheshire and Whalley Range, Manchester, as part of the ongoing investigation.
>
> **[15]** It comes after a 19-year-old was detained in the Gorton area of the city on suspicion of terror offences yesterday by officers who conducted raids throughout the day, as police close in on Salman Abedi's terrorist ring.
>
> **[16]** As it stands, 16 people have been confirmed as being arrested in connection with the blast that followed an Ariana Grande concert, with two released without charge and 14 still being held in police custody."

(2) **From 18:00**, the defendant published a version of the Article which included new material, identifying the claimant as one of Abedi's "associates", correcting the spelling of his name, and including details of his business. In place of paragraphs [1-3] above, the opening paragraphs now read as follows:

> "**[1A]** Police have arrested a commercial pilot as they begin to close in on the Manchester bomber's network of associates.
>
> **[2A]** A 23-year-old man from Libya was today taken into custody by detectives after he was arrested at a property in Shoreham-by-the-Sea, 260 miles from the scene of last week's fatal attack.
>
> **[3A]** The man has named locally as Alaedeen Zakry and describes himself as a 'commercial pilot and digital marketer', who runs an online market place for Libyians (sic) from his Sussex home."

Paragraphs [4] and following remained substantially as before. The name was given more prominence in the version published from 18:02.

(3) **The version published from 18:21** contained more substantial changes. These, for the first time, gave the claimant's full name, in its official spelling, and his age on arrival in the UK. Other details or alleged details about him were contained in quotations attributed to Jenny Crump, his former landlady. The opening paragraphs remained as quoted at [38(2)] above. The Article still contained the section of text quoting Violet Mainda and other neighbours ([38(1)] above, paras [4] onwards), but the following new material was inserted between the two:

> **"[3B]** Zakry - also known as Alaedeen Sicri - is understood to have come to Britain from Libya's capital Tripoli when he was 18.

> **[3C]** Alaedeen Zakry - also known as Alaedeen Sicri - is understood to came over to the UK from Tripoli when he was 18 years old and lodged with John and Jenny Crump in Shoreham-on-Sea.
>
> **[3D]** They said he was a perfect lodger who studied hard at the Northbrook College where he studied to become a pilot, passing all his exams. But around three years ago his behaviour began to change and he would go missing for several days, travelling to London with friends. Jenny Crump said: 'He started going off for days on end and he had all these mates who would come round and he would go to London and stay with them. I didn't know what was happening.' …"

(4) **Versions published from 19:07** included two photographs of the claimant, one of them captioned:

> "Arrested: A 23-year-old man taken into police custody today has been named locally as Alaedeen Zakry from Shoreham, Sussex."

39. The Particulars of Claim attached a version of the Article that first appeared much later: at 11am on 30 May 2017. The Skeleton Argument for the defendant sought to make something of this, but there was no merit in the defendant's (admittedly mild) complaints of a "change of case". It is only through the process of disclosure that the claimant was able to pinpoint the time from which identifying information was disclosed. The Reply made clear which versions were the subject of complaint.

40. The majority of the evidence given by the defendant's witnesses at trial concerned (a) the editorial processes that led to the defendant's reporting taking the form it did, and (b) the witnesses' views about what policy or legal principle should be followed in relation to the naming of suspects. I shall return to both aspects of this evidence. The second aspect is almost entirely irrelevant and inadmissible. The relevance of the first aspect also requires consideration, but it does call for findings of fact about matters that are in dispute.

Other reports

41. The claimant's arrest was extensively reported elsewhere in the media. The existence, timing and content of such reports is relevant to issues (1)(c), (2) and (3)(d) and (e) above. Some of the reports were in the Arabic media. I shall come back to that. For the moment I focus on publications in England and Wales.

42. The claimant's legal team prepared a schedule, entitled "Local and National Articles published on 29 May 2017 which referred to the arrest of the Claimant". I accept its factual content, which is essentially undisputed. Both sides have submitted comments on this schedule, which I have considered. Ten key points emerge:

(1) From 08:56 to 10:02, reports appeared in local newspapers (the Shoreham Herald, Brighton and Hove News, and Brighton and Hove Independent) which identified

the location of the arrest and raid, and included photographs of police outside the claimant's property.

(2) At 10:29, a tweet from BBC South East told readers that "A 23-year-old man has been arrested on suspicion of terrorism offences in West Sussex after police raided a flat in Shoreham", and showed photographs of the "scene" outside the claimant's home, with the shop names visible.

(3) None of these reports contained a name, nationality, or any information about the claimant's occupation. The first publication to give the claimant's first name, nationality and occupation was the defendant's Article in its 12:47 version.

(4) At 13:00, The Times published a report headed "Manchester terror police search rubbish dump near city", which contained information about the claimant. It referred to "claims that" the 23-year-old arrested in Shoreham "is a trainee pilot from Libya" who is "believed to live above a shop on the high street" and "describes himself on LinkedIn as a commercial pilot ... runs an online store based in Tripoli [and] … as a digital marketer." This article quoted Ms Mainda.

(5) At 13:20, the Daily Telegraph published a report headed "Manchester attack: 'Trainee pilot' arrested as investigation spreads across Britain". The report referred to a 23-year-old, understood to be Libyan, who was arrested at a property in Shoreham-by-Sea, Sussex, more than 260 miles from the Manchester Arena…"

(6) At 13:43, The Independent published a report referring to the arrested man's age and describing him as a "Libyan trainee pilot". The Argus (a local paper) did the same in a report first published between 14:00 and before 19:00. Both articles contained quotes from locals about the claimant. Neither named the claimant.

(7) At about 14:06, the Press Association ("PA") circulated a report headed "More raids by police investigating Manchester terror attack", which was forwarded to Amanda Williams by the MailOnline copy taster, Keiligh Baker, with the comment "arrests wrap – think you have all of this". A "wrap" is a collation of copy, not all of which would be new, as Ms Williams explained in her evidence. This copy covered a large number of topics. It did not focus on the claimant's arrest. It referred to a 23-year-old man arrested in Shoreham, and quoted Ms Mainda believing he was "someone who was training or had trained to be a pilot".

(8) At 17:09, The Guardian published a report headed "Manchester attack: man arrested in Sussex as investigation continues", which contained the claimant's name (in its unofficial variant) and details of his business activities, describing him as a digital marketing specialist and a trainee pilot "according to his social media profile". The article contained a sub-heading:

> "Police say 23-year-old man, who is believed to be chief executive of Libyan online market place, held on suspicion of terror offences."

and contained the following text:

> "Detectives have arrested the chief executive of a Libyan marketplace website and raided more houses in an effort to close in on the Manchester Arena bomber's network.
>
> A 23-year-old man – understood to be Ala Zakry, who runs Hasoub Alafak, a UK-registered online marketplace based in Tripoli – was arrested in the Sussex town of Shoreham-by-Sea, about 265 miles away from the scene of last week's attack.
>
> …"

The article went on to quote "a colleague in Tripoli" and the claimant's mother, Dr Amal Azzuzz who was said to have:

> "Told The Guardian her son was a 'good boy' and would never be involved with terrorism" … he has no relation to this kind of behaviour."

(9) At around 18:59, The Argus updated its article to name the claimant as "Aladine". It is not obvious when that updating took place, but I accept that claimant's case, based on close analysis of versions captured on WebArchive, that it was between 16:37 and 18:59, and I find that it was probably at, or shortly before, the second of those times. The defendant's circumstantial case to the contrary is based on the language of the updated article and what had been published elsewhere, and is less persuasive.

(10) Later in the evening, other publications gave the claimant's name and details about him. Such information was included in articles published by The Telegraph from 21:53, The Mirror from 22:26, and The Sun from 23:14.

43. The Guardian article did not go unnoticed by the MailOnline team. At 17:29, within 20 minutes of its appearance, Mr Keevins emailed Amanda Williams and Ms Partasides saying "The Guardian have named him". By about 6pm Mr Keevins had found the claimant's Facebook page, sent Ms Partasides a link to the profile, and written that he thought it was "pretty certain" they had correctly identified the arrested man. It was after this that the defendant published the claimant's full name.

The claimant's release

44. The claimant was released on 3 June 2017. Officers came to his cell and said they had decided to take no further action and to release him. They said they had found no evidence of his being involved with the bombing at all. They had looked carefully into him and found no reason for him to be held or further investigated. They warned him that the media knew all about him, and that his arrest and picture had been on the TV and in the papers. He had known none of this so "this was a huge shock to me." He had believed his family did not know about the arrest. He had planned to tell them he had been ill or in hospital, to avoid them panicking.

45. The claimant was advised by the police to stay away from his home for the first two weeks. They said there would be people waiting outside his door as "it was likely they would know I was being released". The claimant asked the police to drive him to a friend's house, which they did. This account is unchallenged.

46. The police were not far wrong. Mr Narain learned of the claimant's release – he could not remember how, and decided to "doorstep" the claimant. At 10pm on 4 June 2017, he emailed Ms Partasides in these terms:

> "I know this is absolutely not among your top 100 priorities at the mo but Alaedeen Zakry was released from custody yesterday and is due to return to Shoreham. I'm doing to go round to knock him tomorrow morning to see what he has to say about why police held him for seven days. Let me know if you need cover."

Asked by Mr Tomlinson what he meant by this, Mr Narain said "Generally, the release of someone from custody is not as important as the arrest". When she was asked about this, Ms Partasides could not explain Mr Narain's remark that this was not among her "100 top priorities", but she said "we don't as a rule" report a release from custody. It was put to her that the public was being misled because "you tell them about the arrest but you don't tell them when people have been released". Her answer was "That is generally, yes." Pressed further, she said she could not remember her exact decision-making process then. She suggested "there are other contextual reasons that go into whether or not we should run that story as well." She did not clearly identify any such reasons, and could not remember why the article was not updated.

Impact on the claimant

47. After his release he learned from his friend Mohammed Elazoumi "how my name had been published everywhere, that there had been worldwide publicity and my family knew, and how everyone has been talking about it". At Mr Elazoumi's suggestion he did an internet search, finding that his name was "everywhere as a suspected terrorist". His evidence is that "All the people who knew me in the UK and my family in Libya were speaking and updating each other about the situation".

48. He spoke to his parents on the day of his release. They were desperately worried. They did not understand the police and court system in the UK. Both were very distressed, which upset the claimant in turn. He learned later than his mother had suffered medical consequences from the news, suffering PTSD and being hospitalised for two days. His father was suspended from work on 5 June 2017, and his employment with the two clinics he worked at was later terminated.

49. Over the first few days after his release, the claimant looked briefly at the press coverage. He "saw that all the major newspapers were reporting that I had been arrested on suspicion of terrorist offences and that they had published my name … and address, then my Facebook photograph." He found it sickening and was distressed to see that it was also being published around the whole world, including the Arabic speaking world.

50. The claimant describes further aspects of the impact on him, which include fear for his safety, hostile messages on social media, and damage to the business of Hasoub Alafaq. He moved to Bournemouth, in an attempt to reduce the effects of the adverse publicity. In June 2017, he learned that ELH had terminated his work with them. The letter he received, from Ms Mooney, made clear that the reason was the negative publicity and media coverage following the claimant's arrest. The evidence of Mr Mooney and Ms Verrall confirms this, and is not in dispute.

51. The claimant felt very low, went to a GP in February 2018, and was prescribed a well-known anti-depressant, but – he says - without much effect. The claimant says that he was unable to work for the rest of 2018. In late 2018, he did set up a new company, to carry out export work, and obtained a job with a company called Conduent with whom he worked for 5 or 6 months. He left to work for L3 Harris, an aviation training company. But in November 2019 he left to help out a family member in Turkey. He has not worked since.

V. PROCEDURAL HISTORY

The pre-action correspondence

52. The claimant went to solicitors, Bindmans LLP. On 8 January 2018, they sent the defendant a detailed 14-page letter of claim on his behalf, headed "Proposed defamation, Privacy and Data Protection Claim". It contained complaints about the Article, a shorter version published in hard copy on 30 May 2017, and a separate article published on 31 May 2017.

53. The Article was the primary focus, and the misuse claim was explained first. The letter complained that the identification of the claimant as the individual arrested was "an act of irresponsible journalism" which infringed his reasonable expectation of privacy, with no possible public interest justification. The claim in defamation was explained next. It was said that the Article meant "that there were strong grounds to suspect that Mr Sicri was a terrorist involved in the murderous bombing of innocent people", which was "wholly false", "self-evidently extremely serious" and could not be defended by reference to the public interest defence provided for in s 4 of the Defamation Act 2013. The data protection claim asserted that the information in the articles was sensitive personal data which had been processed in breach of duty, including breach of the Fourth Principle (accuracy).

54. The defendant's solicitors, RPC, replied in detail on 18 February 2018. In relation to the misuse claim, it was denied that the claimant had a reasonable expectation of privacy in the Information; it was "entirely unreasonable", they said, to expect information about the arrest to remain private when there had been "a lengthy and highly visible police operation around his home" in connection with a major recent terrorist incident. Alternatively, it was said, publication was justified in the public interest. Two main points were made: "the public is … entitled to know who has been arrested in the course of an investigation into a very serious terrorist incident" and that:

> "there is a legitimate public interest in transparency in police investigations into such incidents and proper public concern in seeing that the police are making progress."

55. Although both parties' cases have been elaborated, and presented in more detail and with greater subtlety and sophistication at this trial, the main battle lines remain broadly as drawn by this exchange of correspondence.

56. It is relevant to note the defendant's response to the defamation claim. This was (1) to dispute the alleged meaning, contending that the article meant only that there were reasonable grounds to investigate the claimant's possible involvement with the bomber, (2) to maintain that this meaning was true, as the claimant had spoken with Abedi "only

a day or so before about a financial transaction involving Libya", and (3) to rely on the defence of public interest. In response to the data protection claim, it was said that there could be no complaint as the Article had been taken down, without admission of liability.

The statements of case

57. The Claim Form was issued, and served with Particulars of Claim, on 21 December 2018. This was some 19 months after the publication complained of, and thus after the expiry of the primary limitation period for any defamation claim, which is 1 year from first publication (Limitation Act 1980, s 4A; Defamation Act 2013, s 8). The claims were the ones before me now: claims in misuse and breach of confidence in respect of the Article.

58. It is convenient to note here some features of the statements of case in respect of misuse:

(1) The claimant's case, that he enjoyed a reasonable expectation of privacy in relation to the Information, and that its publication lacked justification, relied principally on facts about the Information and the context which (it was said) the defendant "knew or ought to have known".

(2) The defendant's case was also one that relied mainly on objective facts. The defendant disputed the claimant's case on reasonable expectation on the basis that (a) the claimant's identity as the person arrested was "obtained by lawful journalistic enquiries"; (b) the arrest took place in a "high-profile operation" in the course of which, over a 48 hour period, officers could be seen entering, searching, and leaving the claimant's flat; and (c) the claimant had been named locally and there was intense local and national media interest.

(3) As to the public interest, the defendant identified circumstances which, it contended, made it in the public interest (a) for the media, including the defendant "further to investigate and report on the nature and potential significance" of the local police operation; and (b) for the defendant to decide to identify the claimant as the arrested person. It was alleged, as a fact, that anonymous reporting "would have led to a lower level of reader engagement" and "disembodied coverage… which would have lessened the ability of the public to form a coherent understanding of the extent, progress and direction of the investigation…" On this second aspect of the case, the defendant said that the decision to identify was:

> "within the legitimate margins of editorial discretion afforded to the media in its role as the public's watchdog under Article 10."

59. There was, as I have indicated, no defamation claim, but in support of the claim for damages, this was said in paragraph 14(6) of the Particulars of Claim:

> "The manner and scale of the publication the Article has caused serious and substantial damage to the Claimant's reputation. The publication of the fact that the Claimant had been arrested in connection with a terrorist attack led to many people believing that the Claimant had been involved or that there were strong grounds to suspect that he had been involved. The Claimant is

> concerned that this allegation has gained wide currency and will be repeated thus causing serious damage to his relationships and his prospects of obtaining future employment."

60. Paragraph 16(6) of the Defence took issue with the claimant's case on meaning, asserting that the Article "merely reported the fact of the claimant's arrest in the context of ongoing police inquiries to determine whether the bomber had any relevant associates" and that the "overwhelming impression conveyed" was that the claimant was "... unlikely to be implicated in an Islamic terrorist attack". The defendant denied, in any event, that the claimant was entitled to use this action to recover damages for any reputational harm caused by the Article. Having threatened to sue in defamation, but chosen not to pursue that complaint:

> "… he should not be permitted to use the present claim for misuse of private information in order to evade the thresholds and restraints which moderate a claimant's entitlement to recover compensation for damage to reputation in a defamation claim and which serve to ensure that the law draws a proper balance between the right to reputation under Article 8 and the right to freedom of expression under Article 10."

VI. LIABILITY

The overall legal framework

61. By now, this is well-known and uncontroversial. Carrying out the duties imposed by Parliament in ss 2, 3, 6 and 12 of the Human Rights Act 1998 ("HRA"), the courts have developed the law under the influence of Articles 8 (privacy) and 10 (freedom of expression) of the European Convention on Human Rights. The essential legal principles that have emerged can conveniently be taken from *ZXC CA*, where they were - as so often nowadays - largely agreed. Simon LJ, giving the leading judgment, stated the law as follows:

> "40. Liability for misuse of information is determined by applying a two-stage test….
>
> …
>
> 42. … stage one of the enquiry is whether a claimant has a reasonable expectation of privacy in the relevant information? If the answer is yes, stage two involves an enquiry and evaluation as to whether that expectation is outweighed by a countervailing interest …
>
> **Stage one**
>
> 43. At this stage, there must be an objective assessment of what a reasonable person of ordinary sensibilities would feel if he or she were placed in the same position as the claimant and faced with the same publicity.
>
> 44. As Lord Hope of Craighead expressed it in *Campbell v. MGN Ltd* … at [99]:

> The mind that has to be examined is that, not of the reader in general, but of the person who is affected by the publicity. …

45. Before what has been described as the 'threat to the personal autonomy' of an individual is protected, it must attain a certain level of seriousness …. Once this threshold of seriousness is passed, the enquiry is broad and may involve a number of circumstances, … I have enumerated these circumstances for convenience:

> … the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include (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.

46. If there is no 'reasonable expectation of privacy' or 'legitimate expectation of protection' (the tests being synonymous) in relation to the matter of complaint, there is no relevant interference with the personal autonomy of the individual and article 8.1 is not engaged, …. If there is such an expectation, it is for a defendant to justify the interference with the claimant's privacy at stage 2 of the enquiry ….

47. If the information, or similar information, about the individual is in the public domain, it is a matter of fact and degree as to whether that individual can have a reasonable expectation of privacy which the courts should protect.

48. However, the protection may be lost if the information is in the public domain, …

…

Stage two

The law

103. At this point the second question arises: whether in all the circumstances the interests of the owner of the private information must yield to the right of freedom of expression conferred on the publisher by article 10? The fact that this enquiry is commonly referred to as 'the balancing exercise' illustrates that this is primarily a matter for assessment by the trial judge.

104. In striking the balance, the following principles apply.

> 105. First, although article 8 and article 10 contain important rights, both are qualified and neither has precedence. Where their values are in conflict, it is necessary to bring a close focus on the comparative importance of the rights being claimed in the particular case; to take into account the justifications relied on for interfering with or restricting each right; and to apply a proportionality test, in what is sometimes referred to as 'the ultimate balance' …
>
> 106. Second, the decisive factor at stage two is an assessment of the contribution which the publication of the relevant information would make to a debate of general interest …
>
> 107. Third, the court must have in mind the observations of the ECtHR in *Axel Springer v. Germany* [2012] EMLR 15 at [79] …
>
> 108. The Court must not allow itself to be drawn into confining the important rights of the press under article 10, so that it ceases to be the public watchdog of freedoms in a democratic society and becomes the muzzled lapdog of private interests.
>
> 109. Fourth, it will be necessary to weigh in the balance the factors identified by the ECtHR, in the *Axel Springer* case, at [89] and following:
>
> (1) contribution to a debate of general interest …;
>
> (2) how well-known is the person concerned and what is the subject of the report;
>
> (3) the prior conduct of the person concerned;
>
> (4) the method of obtaining the information and its veracity; and
>
> (5) the severity of the sanction imposed: the proportionality of the interference with the exercise of the freedom of expression."

62. I have omitted most of the internal citations. Besides *Axel Springer*, these passages refer to ten well-known cases in this field: decisions of the House of Lords, European Court of Human Rights, Court of Appeal and Supreme Court. In date order they are *Campbell v MGN Ltd* [2004] UKHL 22 [2004] 2 AC 457 ("*Campbell HL*"), *Von Hannover v Germany* (2005) 40 EHRR 1 [2004] EMLR 21, *In re S (a Child) (Identification: Restrictions on Publication)* [2004] UKHL 47 [2005] 1 AC 593 [17], *McKennitt v Ash* [2006] EWCA Civ 1714 [2008] QB 73 [11], *Lord Browne of Madingley v Associated Newspapers Ltd* [2007] EWCA Civ 295 [2008] QB 103 [61], *Murray v Express Newspapers plc* [2008] EWCA Civ 446 [2009] Ch 481 [36], *R (Wood) v Commissioner of Police of the Metropolis* [2009] EWCA Civ 414 [2010] 1 WLR 123 [22], *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439 [2011] 1 WLR 1827 [10], *In re JR38* [2015] UKSC 42 [2016] AC 1131 [85], [87-88], [105] and *PJS v News Group*

Newspapers Ltd [2016] UKSC 26 [2016] AC 1081 [20]. These cases are so familiar that they can readily be identified if I refer to them by shorthand.

Some points of detail about the two-stage test

63. Some of the above points deserve emphasis or elaboration in the context of the present case.

64. *Stage 1: reasonable expectation of privacy*

(1) The test is objective: see *ZXC CA* [43] above and *Murray* [35].

(2) The criteria enumerated at *ZXC CA* [45] are non-exhaustive; the question of whether there is a reasonable expectation of privacy is "a broad one, which takes account of all the circumstances of the case": *Murray* [36].

(3) The extent to which the information was in the public domain is one of those circumstances. But although it is possible for information that began as private to become so well-known that it has entirely lost its private nature, the question of whether that has happened is one of fact and degree (*ETK v News Group* [10(3)], *ZXC CA* [49]). In that context:

> "… there is potentially an important distinction between information which is made available to a person's circle of friends or work colleagues and information which is widely published in a newspaper."

Lord Browne [61] (Sir Anthony Clarke MR, giving the judgment of the Court), cited by Simon LJ in *ZXC CA* [48]. Courts have recognised that the tort of misuse of private information differs from the law of confidentiality; it protects not only the secrecy of private information but also the intrusion associated with its publication, and may apply even if the information is already public to some extent: see *PJS* [57-62] (Lord Neuberger).

(4) The publisher's "purpose" in acquiring or publishing information is a relevant circumstance: see *ZXC CA* [45(4) and (7)]. But "purpose" is not to be equated with "motive" or "intention" or any other subjective state of mind; dishonesty is not an ingredient of the tort, or a relevant factor: *Duchess of Sussex v Associated Newspapers Ltd* [2020] EWHC 1058 (Ch) [2020] EMLR 21 [36-45], ("*Sussex No 1")* applying *Campbell v MGN Ltd* [2002] EWCA Civ 1373 [2003] QB 633 ("*Campbell CA*").

65. *Stage 2: the balancing process*

(1) This too is an objective process, to be conducted without regard to the publisher's state of mind, so that:

> "A media publisher will be held responsible for publication of information which it is wrongful to publish, even if the publisher acts in good faith; and the publisher will be liable for a publication which is not justifiable in the public interest, even if

> it believed that it was so justifiable. Both issues are to be determined objectively."

Sussex No 1, [37].

(2) *In re S* and other authorities emphasise the need to pay close attention to the specific rights being claimed in the individual case. This is known as the "intense focus". As Sir Mark Potter P memorably put it, the balancing test is "not a mechanical exercise to be decided upon the basis of rival generalities": *Re W (Children) (Identification: Restrictions on Publication)* [2005] EWHC 1564 (Fam) [2006] 1 FLR 1 [53], later adopted in *Clayton v Clayton* [2006] EWCA Civ 878 [2006] Fam 83 [58].

(3) Accordingly, the "decisive factor" identified in the authorities is an assessment of the extent to which *publication of the relevant information* makes a contribution to a debate of general interest: see *ZXC CA* [106] above (adopting the same formulation as Nicklin J in *ZCX 1* [110(vii)]) (my emphasis). This process requires the identification of one or more matters of general interest, debate about which might be assisted by the publication of the particular matter, the disclosure of which is in issue.

(4) For that purpose, it is necessary to have regard to the article or publication as a whole, to see the disputed information in its proper context. This is a point on which authority is hardly necessary. Context is always important; and cases concerning media publications invariably require the contested material to be viewed in its context. But authority, in the present context, is to be found in the decision of the Grand Chamber in *Couderc v France* (2015) 40 BHRC 436 [102], [105-106], [115]. The Court decided that in order to determine whether the article was on a subject matter of public interest it was "necessary to assess the publication as a whole".

66. This is not the same process as deciding whether there is a debate on the subject in question, or whether the disclosure of the information at issue makes a contribution to debate on such a matter. I do not accept Mr White's contention that *Couderc* is authority for the proposition that all that is required is for the publication as a whole to make a contribution to a debate of general interest. This is an unappealing submission. It clearly does not reflect the state of domestic law: see the passage I have cited from *ZXC CA*. A broad-brush principle such as that contended for by the defendant would be at odds with the "intense focus". And it would tend to produce illogical and unjust outcomes, in which the propriety of disclosing specific private information would be assessed, and might be deemed justifiable, by reference to the public interest in the publication of other, separate and broader considerations. I do not accept this analysis of the Grand Chamber decision. The legal context is different: in the passages relied on, the Grand Chamber was addressing the "initial essential criterion" identified in the *Axel Springer* criteria (see *ZXC CA* [109(1)], above). The language used does not support the defendant's position. And the phraseology derives from *von Hannover (no 1)* [63], [76] and the earlier cases cited ibid at [60], where the focus was on the specific facts, in their context (in *von Hannover,* "the published photos and accompanying commentaries" [63]).

The role of the media

67. A number of points are clear law.

(1) **An essential role, a duty, and corresponding rights.** The observations of the ECtHR in *Axel Springer* [79], to which Simon LJ referred in paragraph [107] of *ZXC* CA, are these (again, I omit citations):

> "The Court has also repeatedly emphasised the essential role played by the press in a democratic society. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of **'**public watchdog.'"

In other canine metaphors, the press - and more broadly, the media - have been said to discharge "vital functions as a bloodhound" (*Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 205 (Lord Nicholls)), and these roles have been contrasted with that of the "muzzled lapdog of private interests" (*ZXC CA* [108]).

(2) **Obligations and responsibilities.** The passage from *Axel Springer* refers to the duty of the press to impart information "in a manner consistent with its obligations and responsibilities." The word responsibility" reflects the language of Article 10(2), which qualifies the right to freedom of expression. The Strasbourg jurisprudence contains more on this theme. It was summarised in *Axel Springer* at [93]:

> "… the safeguard afforded by art.10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting … on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism."

(3) **Editorial latitude**. The proposition that freedom of expression requires the Court to allow the media a degree of discretion, or latitude, or a margin of appreciation, is another theme of the Strasbourg and the domestic jurisprudence. The nature and scope of this latitude have been described in various ways. It covers techniques of reporting, tone, and to some extent editorial decisions about content: see *Jersild v Denmark* (1994) 19 EHRR 1 [31], *Fressoz & Roire v France* (1999) 31 EHRR 2 [52]. See also, domestically, *Reynolds* (loc cit.), *Campbell* (CA) [62-64], [132-138], *Campbell* (HL) [28-29], [63-65], [112], [143], [169], *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2006] UKHL 44 [2007] 1 AC 359 [51], *Re British Broadcasting Corporation* [2010] UKHL 34 [2010] 1 AC 145 [25], [65]-[66], *Re Guardian News and Media Ltd and others* [2010] UKSC 1 [2010] 2 AC 69 [63], *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB) [85], and *Ali v Channel 5 Broadcasting Ltd* [2019] EWCA Civ 677 [83], [92]. The defendant's submissions mean I shall have to come back to the topic.

"The ethics of journalism"

68. The phrase does not seem to have been explored in any detail in the Strasbourg jurisprudence, but the role and responsibilities of the media are addressed in domestic law by s 12 of the HRA ("Freedom of expression"). The section applies if, as here, "a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression". Section 12(4) provides that:

> "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."

69. The law of misuse of private information would require the Court to take account of the factors specified in s 12(4)(a) in any event: public domain and the public interest have always been recognised as potentially weighty factors. But in the absence of s 12(4)(b), the law would not necessarily require attention to be paid to a "relevant privacy code". Parliament has, however, required the Court to have regard to such a code. The term is undefined, but it is common ground that it includes the Editors' Code of Practice ("the Code"), established by the Editors' Code of Practice Committee, and enforced by the Independent Press Standards Organisation ("IPSO").

70. The Code is described in its Preamble in this way:

> "The Code – including this preamble and the public interest exceptions below – sets the framework for the highest professional standards that members of the press subscribing to the Independent Press Standards Organisation have undertaken to maintain. It is the cornerstone of the system of voluntary self-regulation to which they have made a binding contractual commitment. It balances both the rights of the individual and the public's right to know.
>
> To achieve that balance, it is essential that an agreed Code be honoured not only to the letter, but in the full spirit. It should be interpreted neither so narrowly as to compromise its commitment to respect the rights of the individual, nor so broadly that it infringes the fundamental right to freedom of expression – such as to inform, to be partisan, to challenge, shock, be satirical and to entertain – or prevents publication in the public interest."

71. The relevant provisions were, at the time of publication, in these terms:

> "2. ***Privacy**
>
> i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications.
>
> ii) Editors will be expected to justify intrusions into any individual's private life without consent. Account will be taken of the complainant's own public disclosures of information.
>
> iii) It is unacceptable to photograph individuals, without their consent, in public or private places where there is a reasonable expectation of privacy.
>
> …
>
> **The public interest**
>
> There may be exceptions to the clauses marked * where they can be demonstrated to be in the public interest."

72. The Code set out a non-exhaustive list of purposes or functions that are in the public interest:

> "1. The public interest includes, but is not confined to:
>
> i. Detecting or exposing crime, or the threat of crime, or serious impropriety.
>
> ii. Protecting public health or safety.
>
> iii. Protecting the public from being misled by an action or statement of an individual or organisation.
>
> iv. Disclosing a person or organisation's failure or likely failure to comply with any obligation to which they are subject.
>
> v. Disclosing a miscarriage of justice.
>
> vi. Raising or contributing to a matter of public debate, including serious cases of impropriety, unethical conduct or incompetence concerning the public.
>
> vii. Disclosing concealment, or likely concealment, of any of the above.
>
> 2. There is a public interest in freedom of expression itself."

73. Next, the Code indicated how IPSO would approach a determination on the public interest:

> "3. The regulator will consider the extent to which material is already in the public domain or will become so.

> 4. Editors invoking the public interest will need to demonstrate that they reasonably believed publication … would both serve, and be proportionate to, the public interest and explain how they reached that decision at the time."

74. Surprisingly, perhaps, there is little authority on the impact of the Code in the context of HRA, s 12. The issue arose in *Douglas v Hello! Ltd* (No 1) [2001] QB 967 and was touched on by Tugendhat J in *Terry v Persons Unknown* [2010] EWHC 119 (QB) [2010] EMLR 400. In *Douglas,* the Court of Appeal was shown the relevant provisions of the then Editors' Code, and considered them to be important. Brooke LJ decided the appeal by reference to those provisions, saying this at [94]:

> "It appears to me that the existence of these statutory provisions, coupled with the current wording of the relevant privacy code, mean that in any case where the court is concerned with issues of freedom of expression in a journalistic, literary or artistic context, it is bound to pay particular regard to any breach of the rules set out in Clause 3 of the code, especially where none of the public interest claims set out in the preamble to the code is asserted. A newspaper which flouts Section 3 of the code is likely in those circumstances to have its claim to an entitlement to freedom of expression trumped by Article 10(2) considerations of privacy."

At [136], Sedley LJ agreed with this analysis, whilst observing that (as is now well-established) the requirement in s 12 to have "particular" regard to factors specified in the section does not give any of those matters pre-eminence. In *Terry* at [70-73], Tugendhat J identified the Code as one of several matters relevant to what he called "an uncertainty in the law of misuse of private information … [as] to the extent to which, if at all, the belief of a person threatening to make a publication in the media is relevant on the issue of public interest."

Information that a person is the object of official suspicion

75. The rationale for the general rule, that an individual has a reasonable expectation of privacy in respect of information that they have come under suspicion by the state, is clear: disclosure of such information is likely to have a seriously harmful impact on the person's reputation, and thus their private life. This is clear from *ZXC CA* [82], and from a number of earlier judicial observations cited by the Court in its review of the authorities: see, in particular, [58-61].

76. The notion that information about official suspicion engages an individual's Article 8 rights, because of its reputational impact, appears to me to have been firmly established at the highest level over a decade ago.

(1) On 17 June 2009, the House of Lords gave judgment in *Re British Broadcasting Corporation.* The first main issue for the House was whether it had any basis for making an order conferring anonymity on an individual (D) who had been tried and convicted of rape, but acquitted by the House on appeal. The BBC wished to broadcast a programme suggesting that retained DNA gave grounds for considering whether (under newly introduced statutory provisions) he should be re-tried. The

House held that it had the jurisdiction in question, and was entitled in principle to exercise it to, protect D's Article 8 rights. The House acknowledged that the trial and conviction were in the public domain. But, at [22], Lord Hope identified the DNA information as an aspect of D's private life, and observed that publicity for the link between this and the rape:-

> "… will inevitably suggest that he is guilty of the offence. … His reputation, his personality, the umbrella that protects his personal space from intrusion, will just as inevitably be damaged by it. The conclusion that broadcasting this information will engage his right to respect for his private life seems to me to be inescapable."

(2) On 27 January 2010, the Supreme Court gave judgment in *Re Guardian Newspapers Ltd*. Before the Court were appeals by three brothers who challenged asset freezing orders made by the Treasury under Article 4 of the Terrorism (United Nations Measures) Order 2006 (SI 2006/2657). The express basis for these orders was that the Treasury had reasonable grounds for suspecting that the individual was, or might be, a person who facilitated the commission of acts of terrorism. The Court made anonymity orders protecting the brothers, which were then challenged by the media. The challenges were successful, but the Court made clear that its starting point was that the prospect of serious reputational harm and consequent interference with the appellants' private life if they were named meant that their Article 8 rights were engaged: see, for instance, [37-42]. It followed, as Lord Rodger said in a well-known passage at [52], that:

> "…the question for the court accordingly is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies M to justify any resulting curtailment of his right and his family's right to respect for their private and family life."

77. Recognition of the reputational harm that could result from publicity for the fact of official suspicion, and concern about such harm, developed as the decade wore on. Some of the developments were traced by Lords Kerr and Wilson in their joint judgment in *Khuja v Times Newspapers Ltd* [2017] UKSC 49 [2019] AC 161 [49-51]. As they noted, the case of Chris Jefferies aroused considerable concern. In late 2010, Mr Jefferies was arrested on suspicion of the murder of Joanna Yeates in Bristol. He was wholly innocent. But in the meantime, he faced extensive media coverage of a prejudicial kind. Some of this was found, in July 2011, to be in contempt of court: see *Attorney General v MGN Ltd* [2011] EWHC 2074 (Admin) [2012] 1WLR 2408. The press coverage was described by Sir Brian Leveson, in his report of November 2012, as "a protracted campaign of vilification" (Part F, Chapter 1, para 3.25). Sir Brian's recommendation was that, save in exceptional and clearly defined circumstances, the police should not release the names or identifying details of those who are arrested or suspected of a crime (Part G, Chapter 3, para 2.39). A joint paper dated 4 March 2013, submitted on behalf of the senior judiciary by Treacy LJ and Tugendhat J in response to a Law Commission Consultation, endorsed that recommendation after writing of the "irremediable damage" pre-charge publicity could cause.

78. By May 2013, as noted in *ZXC CA* [78], the College of Policing had issued Guidance on Relations with the Media which contained (at para 3.5.2) the following passage, reflecting the developments just mentioned:

> "save in clearly identified circumstances, or where legal restrictions apply, the names or identifying details of those who are arrested or suspected of crime should not be released by police forces to the press or public. Such circumstances include a threat to life, the prevention or detection of crime or a matter of public interest and confidence . . ."

79. On 14 August 2014, there was a notorious and well-publicised instance of widespread publicity following the release, contrary to this Guidance, of information about a police search conducted at the home of Sir Cliff Richard. The South Yorkshire Police gave advance warning to the BBC, who gave prominent coverage to the matter. Sir Cliff sued the Chief Constable and the BBC for misuse of private information. Developments over the following three years supported his claim. They were summarised by Mann J in para [234] of his judgment after trial as follows:

> "The question of whether the existence of a police investigation into a subject is something in relation to which the subject has a reasonable expectation of privacy … has been the subject of judicial assumption and concession in other cases. In *Hannon v News Group Newspapers Ltd* [2015] EMLR 1 it was held to be arguable; it was not necessary to decide it. In *PNM v Times Newspapers Ltd* [2015] 1 Cr App R 1, para 37 Sharp LJ acknowledged "a growing recognition that as a matter of public policy the identity of those arrested or suspected of a crime should not be released to the public save in exceptional and clearly defined circumstances", but she did not actually decide the point. In *ERY v Associated Newspapers Ltd* [2017] EMLR 9, para 65 Nicol J said that there was a reasonable expectation of privacy in the information that a person was being investigated by the police, but he did so on the back of a concession that the fact that that person had been interviewed under caution attracted a reasonable expectation."

80. Three points about *ERY* may be noted: (i) The judgment of Nicol J was handed down on 24 November 2016; (ii) the defendant which made the concession in *ERY* is the defendant in the present case; (iii) what Nicol J said at [65], having recorded the defendant's concession, was this:

> "If the Claimant has a reasonable expectation of privacy in the fact that he has been interviewed under caution, I struggle to see why he does not also have a reasonable expectation of privacy in the information that he is being investigated by the police."

81. On 19 May 2017, Sir Cliff Richard's claim against the Chief Constable of South Yorkshire Police was compromised: the Chief Constable accepted liability, apologised, made a statement in open court accepting liability, paid Sir Cliff damages of £400,000,

agreed to pay his costs and paid £300,000 on account of that costs liability: see *Richard* (above) at 171F-G and [3].

82. On 24 May 2017, the College of Policing Guidance was re-issued in the following updated wording:

> "**Respecting suspects' rights to privacy**
>
> Suspects should not be identified to the media (by disclosing names or other identifying information) prior to point of charge except where justified by clear circumstances, e.g. a threat to life, the prevention or detection of crime or a matter of public interest and confidence
>
> …
>
> **Naming on arrest**
>
> Police will not name those arrested, or suspected of a crime, save in exceptional circumstances where there is a legitimate policing purpose to do so. This position is in accordance with recommendations and findings of the Leveson Inquiry (part 1), the Information Commissioner and the Home Affairs Select Committee.
>
> …
>
> This approach recognises that, in cases where the police name those who are arrested, there is a risk of unfair damage to the reputations of those persons, particularly if they are never charged."

83. On 29 May 2017, the Article of which the claimant complains was published.

84. On 19 July 2017, the Supreme Court gave judgment in *Khuja* (on appeal from *PNM v Times Newspapers Ltd*). The claimant/appellant was one of several men arrested in the course of a police investigation into sexual crimes. He was never charged, but others were prosecuted. Mr Khuja was named at the trial, but protected by a reporting restriction order. He brought proceedings in the High Court seeking an injunction to maintain the anonymity conferred by the trial judge. The Supreme Court upheld the lower courts' refusal of such an injunction, holding that on the facts Mr Khuja did not enjoy a reasonable expectation of privacy. But again the Court recognised that the impact which publication would have on the private and family life of the appellant was such that his Article 8 rights were engaged: see, for instance [34(2)] (Lord Sumption).

85. Since then, a general rule in favour of pre-charge anonymity for suspects has been affirmed in the High Court by Mann J in *Richard* (18 July 2018) and Nicklin J in *ZXC1* (17 April 2019), and confirmed by the Court of Appeal decision in *ZXC* (15 May 2020). In *ZXC CA* the Court made clear that whilst the College of Policing Guidance is not law, its content is a factor that may be taken into account when deciding whether a reasonable expectation of privacy existed. Simon LJ went on at [84] to hold that the reasonable expectation is not in general dependent on the type of crime being investigated or the public characteristics of the suspect, because "To be suspected of a crime is damaging whatever the nature of the crime: it is sensitive personal

information". That last observation may have been intended to reflect the fact that for 25 years data protection law has classified personal data relating to "the … alleged commission by [the data subject] of any offence" as "sensitive personal data" or, "special category" personal data, the processing of which requires additional justification: see the Data Protection Act ("DPA") 1998, s 2(g) (implementing Article 8(5) of Directive 95/46/EC) and DPA 2018 s 11(2)(a).

86. In all three of these decisions, the Court has made clear that there may be exceptions to the general rule, which stands "not as an invariable or unqualified right to privacy during an investigation but as the legitimate starting point": see *Richard* [251], *ZXC1* [124], *ZXC CA* [81] (the source of these words). Factors that might defeat the legitimate expectation were identified in *ZXC*. They included "the public nature of the activity under consideration (rioting for example or, Mr White's example, electoral fraud)" (*ZXC CA* [84]), a decision by the police to release the suspect's name, or the conduct of a bank robber holding customers and employees hostage in a televised three-day siege (*ZXC1* [124], approved *ZXC CA* [85]). When referring to the public nature of the activity Simon LJ clearly had in mind the decisions of the Supreme Court in *Kinloch v HM Advocate* [2012] UKSC 62 [2013] 2 AC 93 and *In re JR38,* to both of which his judgment refers. In *Kinloch*, the Court held that the conduct of a person who carries a bag of criminal monies in a public place, open to public view, is "not an aspect of his private life that he was entitled to keep private". It was an occasion "when a person knowingly or intentionally involves himself in activities which may be recorded or reported in public, in circumstances where he does not have a reasonable expectation of privacy." See [19-21], Lord Hope. In *re JR38,* the Court held that taking part in a street riot was not an activity that constituted an aspect of private life that engaged the protection of Article 8, although it concerned a child. This approach appears consistent with data protection law, which permits the processing of sensitive personal data where the data have been "manifestly made public" by the data subject: see the discussion in *NT1 v Google LLC* [2018] EWHC 799 [2019] QB 344 [110-113].

Applying the law to the facts

Did the claimant enjoy a reasonable expectation of privacy in relation to the Information?

87. Put another way, the question is whether the general rule applies in the circumstances of this case. In my judgment, it does. There are good reasons in this case to adhere to the normal starting point. The case does not feature anything close to any of the factors I have just identified. It does have a component which was not discussed in detail in any of the cases cited: the defendant was not the only one to identify the claimant; others published the same or similar information about him on the same day. But in my judgment that cannot be said to defeat or even significantly to undermine the claimant's legitimate expectation that MailOnline would not publish his identity as a suspect.

88. I start with the *Murray* criteria. A review of their application to this case shows that the factors that support the view that this claimant had a reasonable expectation of privacy are strong, and the countervailing factors are relatively weak. It is convenient to address the criteria in reverse order. (7): The defendant acquired the identifying details in pursuit of the legitimate aim of reporting to the public on the conduct of a major police investigation; and it did so as a result of lawful investigative activities by freelance journalists whom it retained, and observation of what others were reporting. (6): But

the likely effect on the claimant of a MailOnline report identifying him as a person suspected of involvement in the heinous crimes perpetrated by Abedi was, plainly and obviously, very serious indeed. (5): The claimant did not consent to the reporting of his arrest. He had no opportunity to express a view, but it was objectively obvious that he would not have agreed if asked. (4): The reason is plain: disclosure to the general public of the fact that the claimant was suspected of involvement in the worst terrorist offence for a decade would represent a serious interference with the claimant's private life. So, although the "intrusion" involved in publication pursued the same legitimate aim I have identified, and the defendant's purpose was to fulfil its function of reporting news, the intrusion was of an especially grave nature. (3): The places where the relevant events happened were private. The phone call with Abedi was a private one. The arrest took place in the claimant's home, in the small hours, with a single member of the public as a witness. (2): The claimant had not engaged in any criminal activity, let alone in public. Nor had he behaved in such a way as to bring suspicion upon himself. He had done nothing other than accept a phone call from a stranger, and discuss and then decline a commercial transaction. (1): The claimant was in no sense a public figure, nor had he taken any relevant steps to place his private life in the public domain. Until the arrest, and the publication of his identity as a suspect, he was a young man of unimpeachable conduct and character, living an ordinary, rather quiet life in a seaside town in Sussex.

89. The defendant's case relies on what are largely, though not exclusively, public domain arguments. In opening, Mr White made much of what were said to be the circumstances on the ground in Shoreham-by-Sea on 29 May 2017, at and after the time of the claimant's arrest. He submitted that the arrest took place as part of a "high-profile and publicly visible operation", in which the police took no steps to disguise what they were doing or to protect the claimant's identity. It was witnessed, he said, by individuals who lived in the surrounding area and "quickly became a topic of discussion and interest" locally, becoming "general knowledge within the… area". The defendant's editorial staff sought to make similar points in their written evidence. Mr Duell said that "intrinsic to my reporting was my belief that someone arrested in a high-profile police operation in the middle of a small town would stand little expectation of privacy given the speed at which a story like this would spread around local residents." Ms Partasides' evidence was that by 6pm she "knew" that Messrs Keevins and Narain had "spoken to numerous local residents … who had confirmed the identity of the individual arrested", and that this contributed to her view "that the claimant's identity as the individual arrested was circulating in the public domain".

90. This line of defence was not borne out by the evidence. As I have noted, the arrest itself was in a private place, and went almost unnoticed given the time of day. The only witness appears to have been Mr Foss, who could not name the claimant. The case is quite distinct on its facts from *Axel Springer*, on which Mr White relied. In that case (at [100]) the Court attached some importance to the public nature of an arrest. But this was a public figure arrested in a tent at the Munich beer festival. That fact was considered significant in the balancing exercise; it was not said to deprive the arrested man of any Article 8 rights. Moreover, the public interest identified by the Grand Chamber was limited to the arrest, and "did not extend to the description and characterisation of the offence" (possession of cocaine, of which he was later convicted).

91. For similar reasons, Mr White's reliance on *Hannon v News Group* seems to me misplaced. He points to paragraph [101], where Mann J remarked on a "potentially key distinction" between the cases of the two claimants. Ms Hannon was a passenger on an aircraft, who was arrested in public, for conduct which took place in a public place, in the passenger compartment, in the presence of a number of others. In contrast, her co-claimant Mr Dufour was a pilot, arrested after a breathalyser test, "in the privacy of the aircraft cockpit", after which he "left discreetly in an unmarked police car". Not only are these provisional, *obiter*, observations; it seems to me that the circumstances of the claimant's arrest are closer to those of Mr Dufour, of which Mann J said, "There was nothing public about what happened to Mr Dufour".

92. There was certainly highly visible police activity outside the claimant's flat, later on 29 May 2017 and during the search. But the claimant was long gone, and the police did nothing else that would tend to identify the claimant as the object of their suspicion. The evidence made clear that, so far from this being general knowledge, there were few in the locality who had made the link. Under cross-examination, it became clear that Mr Keevins spent at least 6½ hours on the scene, vigorously investigating, before he was able to establish the claimant's identity. He got lucky by encountering Mr Crump, which eventually led to the identification. Otherwise, he spoke to a handful of people - none of whom could tell him the claimant's name - and made several failed attempts to obtain information from other sources. Mr Narain, who arrived on the scene at 10:25, was also energetic but similarly unable to confirm the claimant's full name until 18.00. The overall effect of the evidence is that the claimant was known locally to some, but not by many; few knew as much as his first name; even his nearest neighbours could not name him to the media when asked.

93. In any event, there is clearly a distinction to be drawn between a situation in which facts are known to a few locals, and the public disclosure of those facts on what (as Ms Partasides accepted) is "a very successful website … with about 15.6 million unique browsers per day and 200 million daily page impressions". The point is made in a number of authorities, some of them cited at [64(3)] above, but perhaps never better than by Eady J in *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB) [24]:

> "It is fairly obvious that wall-to-wall excoriation in national newspapers, whether tabloid or broadsheet, is likely to be significantly more intrusive and distressing for those concerned than the availability of information on the Internet or in foreign journals to those, however many, who take the trouble to look it up. Moreover, with each exposure of personal information or allegations, whether by way of visual images or verbally, there is a new intrusion and occasion for distress or embarrassment."

It may accordingly be too much for a person arrested at his home to expect his neighbours to stay silent, and not to gossip amongst themselves about what they have witnessed, and yet entirely reasonable for that same person to expect that a media publisher will refrain from reporting his identity as a suspect online, in permanent form, to tens of millions of strangers.

94. It is further argued by Mr White that there was a high degree of media interest that was "entirely predictable", and that the defendant obtained information about the arrest and the claimant's identity by lawful and proper means, including speaking to members of

the public. These points are not disputed, as propositions, but there is very little in them as arguments against a reasonable expectation of privacy. The fact that media interest is predictable cannot count for much, if the claimant has done nothing to provoke it. And, as Mr Tomlinson points out, it is one thing to acquire information in a lawful and proper manner, but quite another to publish it. A similar point was made by Lord Hoffmann in *Campbell* (HL) at [74]: "the fact that we cannot avoid being photographed does not mean that anyone who takes or obtains such photographs can publish them to the world at large." Where private information is unlawfully acquired, that may support a claim that it should not be made public; but the fact that information is lawfully obtained does not mean that its subsequent publication will also be lawful.

95. A separate and distinct strand of the defendant's argument involved reliance on third party publication in the media. Mr White submitted that "significant information about the claimant and his arrest" was placed in the public domain throughout the course of the day, "including online and via other local and national media outlets." By 18.00, it was said, the claimant's "full name had also already been published by at least one other major national media organisation and was therefore readily accessible to internet users". This was a reference to the Guardian article of 17:09. Understandably, given the way the evidence came out, Mr White's closing submissions focused on this aspect of the case.

96. To the extent that this argument relies on local media reports, it again fails to distinguish appropriately between segments of the public. Moreover, as the analysis at [42] above shows, the local media did hardly anything to identify the claimant prior to 18:59. Reliance on national media publication may have greater weight. But the defendant's 12:47 version of the Article provided MailOnline readers with a name and two other items of identifying information that had not been published anywhere before. Within the hour, The Times, The Daily Telegraph and The Independent had published the other two items of information. I accept Mr Tomlinson's submission that, on the balance of probabilities, the key items of information in the Telegraph article were taken from MailOnline, and in any case, none of these publishers gave a name. On the evidence, nobody but the defendant had given the arrested man a name before 17:09.

97. I accept the defendant's contention that the Guardian's identification of the claimant, as Ala Zakry, was independent of anything done by MailOnline. But Mr White overstates the position when he submits that this publication had "profound implications" for the claimant's reasonable expectation of privacy in the fact of his arrest. This case is not brought against the Guardian. But it must follow from what I have said so far that, in my judgment, the claimant had a reasonable expectation that the Guardian would not publish his identity as a suspect either. That expectation was not fulfilled. But it does not follow that the claimant could no longer have a reasonable expectation that the defendant would refrain from doing the same thing.

98. The Guardian article represented mass media publication online, which does mean the information was generally accessible. But a person's privacy rights are not defeated by the mere fact that information is accessible. It is trite law that accessibility is not the same as actual knowledge. Granted, the fact the information was there to be found means that it could be located by using a search engine and appropriate search terms. But there is no evidence about what actually happened in that respect, and I cannot guess at the answer. There is evidence about the readership of MailOnline, which is enormous. And it is common knowledge that the readership of the Guardian is

considerably lower than, and has minimal overlap with, that of MailOnline. So, the fact that information was published by the Guardian does not establish that it was known to the world at large, or even to any readers of MailOnline. I agree that the analysis of the defendant's conduct, from 17:09 onwards, must take account of what had been already done by the Guardian, but I do not consider the Guardian article brought an end to the claimant's otherwise reasonable expectation that the defendant would not publish the Information. There was still ample scope for MailOnline to engage in additional, objectionable intrusion.

Did the rights of the defendant and others to disseminate and receive information on matters of public or general interest outweigh the claimant's expectation of privacy?

The approach

99. This is a simplified version of the issue. As is common ground, stage 2 calls for a dual, or parallel analysis. On the one hand is the question posed above. Put another way: was the curtailment of the claimant's rights that resulted from his identification as a terror suspect justified by some "sufficient, general public interest"? On the other hand, is the question of whether the claimant's privacy interest is weighty enough to override the right of the defendant to impart, and the rights of the public to receive, information without interference. At the heart of each balancing process is the question of what is "necessary in a democratic society", as explained in the human rights jurisprudence. The principles are well-known. I summarised them recently, in *Scottow v Crown Prosecution Service* [2020] EWHC 3421 (Admin) [35]. In short, an interference with a Convention right can be justified only if it pursues a legitimate aim and is convincingly shown to be justified by, and proportionate to, a "pressing social need".

100. The relevant legitimate aims are exhaustively listed in Articles 8(2) and 10(2) respectively. One aim identified in Article 10(2), that may justify restricting what is said about someone at or after the time of his arrest, is "maintaining the impartiality of the judiciary". Once a person has been arrested, proceedings are "active" for the purposes of the Contempt of Court Act 1981, and a publisher is strictly liable for anything that gives rise to a substantial risk that the course of justice in the proceedings will be seriously impeded or prejudiced. *AG v Jefferies* illustrates the point. But that is not a matter that has been debated before me. In this case, the relevant aims are "the protection of the rights and freedoms of others", mentioned in paragraph (2) of each Article.

The defendant's case

101. The defendant's case is that the claimant's rights were already "substantially curtailed" by the local and national publicity that was given to his identity by others, and clearly outweighed by the "substantial public interest" in the publication of the fruits of its investigations. I do not accept the first part of this equation, for reasons that largely mirror those I have already given when dealing with stage 1.

(1) The claimant's initial reasonable expectation is, on the facts of this case, one that counts for a great deal, given the nature of the suspicion and the likely consequences of publicity.

(2) The defendant's case about the extent of local knowledge and local publicity has not been borne out by the evidence. Such matters would count for little anyway, when compared with the vast reach of MailOnline.

(3) It was the defendant that first published identifying information about the claimant. The Guardian article did not appear until over 4 hours later.

(4) The Guardian article had an impact on the claimant's legitimate expectation of anonymity as a terror suspect. From the time that article was published, the claimant's name was "out there" for others to find. That made "inroads" into the claimant's privacy (to quote Lord Mance in *PJS* at [45]). But as I have held, it does not follow that the private fact was universally known, nor did it mean it was open season for anyone else who cared to repeat what had been said by one newspaper. On the contrary, the claimant retained a reasonable expectation that others, including the defendant would not make things worse.

(5) The defendant's conduct represented a real and significant interference with that reasonable expectation. It is worth recalling what Lord Neuberger said in *PJS* at [57]:- "There are claims that between 20% and 25% of the population know who PJS is, which, it is fair to say, suggests that at least 75% of the population do not know the identity of PJS". On that footing, the Supreme Court restrained wider disclosure of the name. Here, MailOnline has an enormous readership that overlaps, at best, only modestly with that of the Guardian.

(6) The consequences that could be expected to flow from the defendant's additional publication mean that the interference should continue to carry substantial weight in the balancing exercise. Indeed, in *CTB v News Group Newspapers Ltd* [2011] EWHC 1334 (QB) [3] (in a passage cited and approved in *PJS* [62]), Tugendhat J regarded the fact that "tens of thousands of people have named the claimant on the internet" as confirming rather than undermining the argument that the claimant needed protection from intrusion into his private life.

102. One line of argument advanced by Mr White was to the effect that the process of arrest is subject to the common law open justice principle. That is how it was put in closing. The point was put even more widely in the written opening submissions, as follows:

> "It is submitted that just as the open justice principle is based in part on the need for the media to be able to enter any courtroom in order to act as the eyes and ears of the public, so also must the media be able to attend, investigate and report on any local event of public importance as the eyes and ears of the public. In relation to the open justice principle this point was explained by Lord Judge CJ in *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2011] QB 218 at [38]: '*The public must be able to enter any court to see that justice is being done in that court … In reality very few citizens can scrutinise the judicial process: that scrutiny is performed by the media, whether newspapers or television, acting on behalf of the body of citizens.*' The same rationale requires the media to be free to investigate and report on visible local events of interest to the public."

103. In fairness, this was only rather faintly pressed in Counsel's oral submissions, and then in the more restricted version I have mentioned; but I should make clear that I regard it as entirely misconceived. With respect, the argument is confused, and the analogy is without foundation. Court proceedings are, as a rule, open to the public and reportable. But it is impossible to draw any meaningful analogy between what takes place in court and "visible local events of interest to the public". The rationale for the principle identified by Lord Judge CJ is clear: the Court is exercising the judicial power of the state, determining rights and obligations; its workings need to be transparent and open to scrutiny and criticism. That specific and hallowed rationale plainly cannot be transposed wholesale to "any local event of public importance". In general, as already noted, there is a clear distinction between the ability and right of the media to attend, watch, listen, and investigate, and its right to report what it finds out. The fact that things can be found out does not mean they can always be reported. Nor is there any presumption or general rule in favour of a right to report things that happen in public. A much more nuanced approach is required.

104. The narrower version of the argument must also be rejected. Although an arrest also involves the exercise of state power, it is an executive act of a provisional nature, entirely different in character from a civil or criminal trial or other court proceeding. It is clear from the authorities that different rules apply: see *CPR 39.2*, the *Master of the Rolls' Practice Guidance* [2012] 1 WLR 1003 at 9-14, *Mohamed, Khuja, NT1 v Google llc* [166(2) to (3)], *Duchess of Sussex v Associated Newspapers Ltd (No 2)* [2020] EWHC 2160 (Ch) [36(1)], [55-57] and *R v Wright* [2020] EMLR 3 [39]. These show that, (1) as a rule, legal proceedings are held in public; hearings in private are the exception, and require specific justification; (2) the starting point is that the names of the parties and witnesses are made public; and (3) where information is disclosed in legal proceedings held in public, the starting point is that a person will not enjoy a reasonable expectation of privacy in respect of it. *ZXC CA* establishes that, as a matter of English law, the starting point in relation to information identifying a person under arrest is the opposite. Where the arrest is public, that could weaken or even destroy any reasonable expectation of privacy; but it would not supply or support a public interest or free speech argument of the kind advanced by the defendant.

105. The public interest, identified by the defendant, is the "interest of the public in being informed about the progress of a high-profile criminal investigation into a major terrorist attack". That is an extremely broad formulation, to which many exceptions can easily be identified. Would it justify a police officer tipping off journalists about who was being interviewed, and what they had said? And self-evidently, this formulation does not address the core question of why it was in the interest of the public to know the claimant's identity.

106. The chief factors, specific to this case, which are identified by the defendant as contributing to the public interest in knowing that information can be listed: (i) the nature and importance of the investigation that followed the bombing; (ii) the acute public concern about the attack; (iii) the fact that the claimant's arrest had taken place over 250 miles away from the scene of the bombing, which is said to represent "an important and ostensibly alarming shift in focus"; (iv) the consequent public interest in the media investigating further and reporting on "the nature and potential significance of the police investigation in Shoreham-by-Sea"; (v) the importance of names as a way of ensuring reader engagement; (vi) the fact that – it is said – "disembodied coverage

… would have lessened the ability of the public to form a coherent understanding of the extent, progress and direction of the investigation"; and (vii) the contribution that such reporting would make to reducing the unprecedented sense of threat and fear which hung over the UK following the Manchester atrocity. In support of point (v), Mr White refers to the well-known passage in Lord Rodger's judgment in *Re Guardian News and Media Ltd* [63]:

> "'What's in a name? 'A lot', the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature... A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive."

107. Mr White makes four further points about the decision to name the claimant:

(1) He emphasises, in this context also, that the information was obtained by lawful enquiries, and submits that the defendant was (in the language of *Axel Springer*) "acting in good faith and on an accurate factual basis … providing reliable and precise information in accordance with the ethics of journalism."

(2) He submits that the decision whether to "illustrate" an article, on the topic of public interest I have identified, with information about a named individual is a matter for editorial judgment. Relying on the passages I have mentioned from *Ali v Channel 5, Re British Broadcasting,* and *Re Guardian News and Media,* he argues that where there is a rational view by which publication can be justified in the public interest a court must give full weight to editorial knowledge and discretion and be slow to interfere. Here, it was within the ambit of rational editorial decision-making to name the claimant "so as to engage readers' attention and avoid a 'disembodied' report."

(3) Counsel points to the state of the law at the time the defendant made its decision, before the decisions in *Richard* and *ZXC.*

(4) He warns against the court confining the rights of the media so that they become – in the striking phrase employed by Simon LJ - the "muzzled lapdog of private interests."

108. The defendant has not explained how this metaphor could apply to the facts of this case. Several of the defendant's witnesses were keen to make clear how objectionable they would think it, if the press were confined to reporting what the police thought fit to disclose. But the police are not "private interests", nor have the police or anybody else suggested that their decisions bind or "muzzle" the press. Nor, on the other hand, has it been submitted that MailOnline was acting in this case as a bloodhound, sniffing out misconduct, or as a watchdog, guarding the public interest against some wrongdoing by a public authority. In my judgment, this case can and should be resolved by reference to its particular facts, without further reference to dogs.

109. But I should first address some points of principle relating to the other three topics I have listed.

The state of the law at the time

110. Mr White's submission that the balancing process should take account of the state of the authorities at the time of publication cannot assist the defendant. As a matter of fact, the state of the authorities made it clear, then, that the publication of information identifying a suspect was liable to be held a misuse of private information: see [76-80] above. The long-standing policy of the police, and the reasons for that policy, grounded in considerations of law, were in the public domain at all material times. The Chief Constable had conceded Sir Cliff Richard's claim only days before the publication of the Article. And as a matter of principle, the law was then as now declared in *ZXC CA*; the common law does not change.

Editorial latitude

111. It is for the Court to determine whether a particular topic or subject is or is not a matter of public or general interest, and whether an individual publication relates to such a subject. In this case, there is no difficulty about that. The general subject-matter of the Manchester bombing, the subsequent police investigation, and its progress were plainly matters of public or general interest, on which it was not only legitimate, but the function of the media to report. The Article related to those matters. But it is obvious that the fact that an article is on, or about, a matter of public interest cannot be enough to justify the inclusion in that article of any item of private information that has some relationship with the subject-matter. These are conceptually separate questions: see s 4 of the Defamation Act 2013, *Rudd v Bridle* [82]. Nor can publication be justified by the mere fact that the information has been lawfully obtained. All depends on the specifics of the case.

112. It is, in my judgment, clear law that the task of striking the appropriate balance between competing rights in any individual case is also one for the Court, and not the media. That was the conclusion drawn by Eady J in *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) [2008] EMLR 679 [135], having taken account of what was said in *Reynolds* and *Jameel.* No previous or subsequent authority has held otherwise. It has not been submitted, nor do I consider it to be the law, that the task of identifying and weighing the privacy rights of an individual is one to be left to the media. Those are not areas for editorial discretion. They are matters of law, or mixed law and fact, in respect of which the media have no specialist expertise. Nor is it for the media to determine what are the facts of a given situation.

113. Properly understood, the authorities on the topic of editorial latitude are concerned with factors on the other side of the balancing exercise: the importance of the free speech rights at stake, and – in particular - the appropriate way to give practical effect to those rights. That is why the Strasbourg authorities refer to "tone" and to the "*methods* of objective and balanced reporting", the "*technique* of reporting" and the "*form* in which" information and ideas are conveyed": see *Jersild* [31]. Similarly, in *Fressoz & Roire* [54] the Court stated that article 10 leaves it for journalists "to determine what *details* it is necessary to reproduce to ensure credibility". (The emphases here are mine). The broad proposition that can be drawn from the authorities is that in assessing whether, in the particular circumstances of the case, the imperatives of free speech are such that the

privacy rights which the Court has identified must be overridden, the Court should show an appropriate degree of deference to the professional expertise and judgment of the publisher. As Lord Bingham put it in *Jameel* [33], in the context of *Reynolds* privilege:

> "Weight should ordinarily be given to the professional judgment of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless manner."

114. As this reference to "weight" makes clear, the Court does not abdicate or delegate its function. The task is objective, as I have stated; and an overall conclusion on the weight to be given to free speech will be influenced by factors which are for the Court to assess, and not for editorial evaluation. For example, the need to take account of plurality of opinion (discussed, for instance, in *Terry* [104], and *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) [64]) which may count in favour of, or against, disclosure. The degree of latitude or weight to be given to editorial decision-making will depend on the circumstances, including the subject-matter, the nature of the information at stake, the context in which the defendant wishes to use it, and the extent to which the individual defendant can be seen to have relevant knowledge and expertise.

115. The defendant relies on what Lord Hope said in *Re BBC* [25]:

> "The BBC are entitled to say that the question whether D's identity needs to be disclosed to give weight to the message that the programme is intended to convey is for them to judge…. Judges are not newspaper editors … the issue as to where the balance is to be struck between the competing rights must be approached on that basis".

But these, and other observations relied on by the defendant, must be understood in their context. When viewed in that way, I think it clear that they are consistent with my analysis above, and do not support Mr White's argument that it is, as a matter of law, purely a matter for editorial judgment whether to "illustrate" an article with a name so as to engage readers' attention.

116. In each of *In re S, Re British Broadcasting Corporation,* and *In re Guardian News and Media Ltd*, the context in which the issue of identification arose was that the media wished to name individuals, who were parties to legal proceedings held in public, in reports on or about those proceedings. In the first two cases, the individual whose anonymity was in question was the defendant in criminal proceedings. In the third, the individuals were terror suspects challenging asset freezing orders. In each case, the Court undertook a scrupulous balancing exercise and reached its own conclusion. In each case, that balancing exercise was being undertaken prospectively: the general nature of what the media wished to publish was known, but no draft article or script or programme was before the Court. In each case, the Court acknowledged the norm is party identification; recognised the importance of freedom of speech and debate in relation to legal proceedings; and identified a risk that anonymity would harm these public interests: see *In Re S* [34] (Lord Steyn), *Re BBC* [26-27] (Lord Hope) *In re Guardian* [52], [64] (Lord Rodger). Hence, the Court (1) refused to prohibit the press from identifying, in reports of a murder trial, the defendant mother who had killed her son; (2) discharged an order that would have prevented the BBC from naming – in a documentary programme inspired by the removal of the "double jeopardy" rule - a man

whom DNA evidence implicated in the anal rape of a 66-year-old woman, but who had been acquitted as a result of an erroneous ruling on the admissibility of that evidence; and (3) refused to continue an anonymity order that would restrict reports of the legal proceedings challenging the asset freezing orders.

117. The specific context in which Lord Hope used the words on which the defendant relies is also to be noted. They were part of a passage explaining why "the BBC should not be required to restrict the scope of their programme" by omitting the name. In other words, the question was whether it had been convincingly shown that the alleged rapist's privacy right was so strong as to make it necessary for the Court to exercise a form of advance editorial control by imposing a blanket prohibition on identification, whatever form the programme might ultimately take.

118. It seems to me that the above analysis corresponds with that of the Court of Appeal in *Ali v Channel 5* [83], another case about identification, where Irwin LJ said this:

> "… editorial discretion cannot render lawful an interference with privacy which cannot logically or rationally be justified by reference to the public interest served by publication. But that where there is a rational view by which public interest can justify publication, particularly giving full weight to editorial knowledge and discretion, then the court should be slow to interfere."

This formulation (repeated verbatim at [92]) again refers to the Court giving "weight" to editorial knowledge and discretion. It does not support Mr White's broad proposition. Nor does it mean (and Mr White did not submit), that the test is akin to the *Wednesbury* test for judicial review of administrative action. That would be untenable, particularly in a human rights context. Nor does the formulation mean that the publication of particular information will be defensible on the basis of a reasonable editorial belief that it was in the public interest.

119. It follows that it would not be correct to speak of an editorial "discretion" to take a view about the balance between competing rights which is not the view of the Court: to publish information which, on an objective Convention-compliant analysis, should not be published. Editorial latitude will be an integral part of the Court's reasoning. But ultimately, as the Court of Appeal concluded in *Campbell (CA)* [68], "the media must accept responsibility for their decisions" on such matters.

The ethics of journalism

120. The applicable tests being, by universal agreement, objective I wondered about the relevance of some of the evidence called by the defendant from its editorial staff. Some of that evidence explained how events unfolded, and what the editorial decision-makers knew, which is plainly relevant and admissible. Other aspects of the evidence appeared to be inadmissible advocacy, or statements of opinion, about how the Court should resolve the issues before it. The following was, for instance, to be found in the witness statement of Mr Savage:

> "I do not believe that suspects arrested by police should generally have their names protected …

> I would like to stress my belief that the media should not be prevented from publishing the names of subjects of police investigations where circumstances merit such a step. It is an important editorial issue. A general prohibition would significantly restrict news reporting today and the ability of the press to keep the public informed"

In cross-examination, Mr Savage made clear that he had not played any editorial role in the publication of the Article. But even if he had, his opinions or beliefs about how the Court should resolve these issues could never have lent support to the case for the defendant.

121. It does seem to me, however, that reliable evidence of the actual thought-processes of editorial decision-makers is capable of being probative in a number of ways. It could help the Court to identify whether there was a rational basis on which the public interest might be thought to justify disclosure of the disputed information. It could bolster the defendant's case about the decision actually made. A publisher might be able to adduce evidence from editors or others, with experience and expertise not possessed by the Court, to explain and prove (for instance) how articles without names attract less interest from readers. And evidence of the editorial process could clearly go to the questions of whether (in domestic law) the defendant's conduct matched the standards of a "relevant privacy code" and was therefore (in the language of Strasbourg) "in accordance with the ethics of journalism."

122. I must beware of an overly textual analysis of the Code, given its preamble. But some things about the letter and the spirit of provisions cited above seem clear. A distinctive feature is that the Code requires proof that the public interest was actually considered: it places the onus of proof on a publisher, to "demonstrate" certain things. The provisions cited recognise that the question of whether an interference with privacy is justified is an objective one ("exceptions … where they can be *demonstrated to be* in the public interest"). At the same time, they identify a "need" for editors to (a) "demonstrate" that they believed that publication would serve, and be proportionate to, the public interest (b) "explain" how they reached that decision "at the time"; and (c) "demonstrate" that their belief was a reasonable one. There is some comparison to be drawn with the journalism exemption in data protection law: see *Rudd v Bridle* [78]. It is not easy to see how the defendant could make good its case, that the claimant's private information was published in accordance with the ethics of journalism, if the criteria prescribed by the Code are not shown to be met.

Striking the balance

123. In my judgment, the balance comes down firmly in favour of the claimant.

124. Reports that an arrest had taken place in Shoreham-by-Sea in connection with the Manchester bombing made a material contribution to public understanding of the police investigation into the Manchester bombing. There was much to be said in favour of publicity for a report of that fact, not least because it had been publicised for the information of the public by the police. The disclosure had little or no bearing on the claimant's privacy rights, and none that was objectionable in the overall context. Details such as the claimant's gender and age, and the street where the arrest took place, would enable some to identify him but again, there is no suggestion that the publication of that

information represented an unjustified interference with his rights in all the circumstances. There is no dispute, and I have no doubt, that reporting of that information was legitimate. Publication beyond that requires separate justification. That is not to say that the police set the boundaries of what can legitimately be reported. It is to say that reliance cannot be placed on any privilege, or immunity, for reporting facts deliberately made public by a public authority.

125. I do not see that the identification of the claimant made, or was capable of making, any contribution to any public debate about the Manchester bombing, or the investigation that followed. This case is very different from *In re S, Re BBC,* and *In re Guardian.* There had been no public court process, and it could not be known at the time the Article was published whether there would or would not be proceedings in the future, involving this claimant. In any event, there was no discussion afoot about the rights and wrongs of any such process, or about the conduct of the police in effecting the arrest, nor was there any reason to believe there was any such discussion to be had. This is not a case about scrutiny of the merits of official action.

126. Neither of the factors, listed at [106(i) and (ii)] above, supports the view that disclosure of the claimant's name, and other identifying details, made any contribution to the public interest. Factors (iii) and (iv) are broad and lacking in focus. There was another side to the "ostensibly … alarming" development represented by an arrest far away from Manchester: it might have proved a false trail, as indeed it did. The defendant was in no position at the time to assess, and inform its readers about, the true significance of the development. Naming the claimant was not capable of contributing to that aim. The proposition that there was a public interest in reporting on "the nature…of the police investigation in Shoreham" is too broad to be meaningful for present purposes. The answer would inevitably depend on what the nature of that investigation was, and what details were being reported. The "potential significance" of that investigation was, in a broad sense, obvious. It might have resulted in additional charges of involvement with the bombing. But it might equally have emerged that the investigation had (as it proved) gone up a blind alley, involving the arrest – however justified in legal terms – of an entirely innocent man. Factor (vii) is similarly unfocussed. Reporting of an arrest, without a name, would tend to reassure the public that the police were doing their job. It is unclear why the identification of the arrested man, or the provision of additional details about his occupation, or nationality, should be thought to provide additional reassurance. If – as is my opinion – the provision of those additional details tended to suggest that he might be guilty, that might be reassuring but at the same time, and more importantly, it would tend to undermine the public interest by publicly prejudging a potential criminal process, with no evidential basis for doing so.

127. The real nub of the defendant's case lies in factors (v) and (vi): the "What's in a name?" point. In the abstract, and as a general point, this is important but uncontroversial. There is no need for evidence to establish that in general anonymised reports are less interesting and attractive to readers than those that give names and personal information about an individual such as his age, nationality, address, occupation, appearance, and details about how he lives his life and his relationships with others. But (whatever Mr Savage believes) it does not follow that naming those arrested is always justified. The focus must, as ever, be on the specifics of the case.

128. Did the objective of engaging the interest of the public in the subject-matter and content of the Article amount to a pressing social need that made it necessary to override this

claimant's expectation of privacy in respect of the Information? I see no reason to think that it did. The claimant's name undoubtedly did make for rather more interesting coverage, but it achieved no other public interest purpose. It cannot be said that the inclusion of the name was crucial, or anything close to it, when it comes to engaging the interest of the public. The Article contained a great deal about other aspects of the Manchester bombing story, and a large number of photographs. The topic was of absorbing public interest, even without all the names. The proposition that "disembodied coverage" would have made it harder for readers to understand what was going on in the investigation cannot be sustained. This seems to me to be both condescending and illogical. The defendant and others published reports of the arrest without the claimant's name or identifying details (and without the names of many other arrested persons). These reports made clear the relevant aspects of the "extent and progress" of the investigation: the police were conducting a thorough investigation, beyond the boundaries of Manchester, which had led them to make an arrest in Shoreham. The naming of the claimant could not aid an understanding of the "extent, progress and direction of the investigation".

129. Looking at the matter from the Article 10 perspective, the legitimate aim of protecting the claimant's privacy rights is one that – as I have said – carries real and significant weight. The reasons that justify the general rule in favour of protection are clear and convincing, and the factors that count in favour of applying that rule in this case are strong. This legitimate aim could only be achieved by maintaining the claimant's anonymity in reports of his arrest. No lesser measure would have been practicable or effective. The self-restraint involved would not have impaired the defendant's free speech rights, or the rights of the public to be informed, to an unacceptable or disproportionate degree. The defendant was free to report on the investigation generally, with the addition of some basic details about the claimant. Had the claimant been charged, his anonymity would have come to an end.

130. It is easy to see the value to a newspaper publisher of naming individuals involved in matters that are of interest to the public. It makes for livelier copy, and if other publishers are naming the person it will enhance the publisher's competitive position to do the same. But these are commercial imperatives or, at best, general factors in favour of a general rule that people can be named in newspapers. Setting them aside, and applying to the facts of this case the test identified in *Ali v Channel 5,* I find it hard to identify a logical or rational basis for the view that the public interest required the naming of this claimant, by this defendant, in this Article.

131. The evidence of the defendant's editorial staff has not helped me, or the defendant, in that respect. In my judgment, the evidence falls well short of what the Code requires. It does not demonstrate that those responsible held a reasonable belief that identifying the claimant would serve and be proportionate to the public interest, or how such a belief was arrived at. What the evidence has proved is that the opinions expressed by Mr Savage and cited above represented the general view of the relevant editorial staff at the time: they all thought that, as a rule, the identities of those arrested by the police should be published. The defendant has not demonstrated that there was, as a matter of fact, any editorial decision-making process that led to a decision to name this claimant in this Article. There is no documentary evidence to support such a conclusion, and it is clear that there never was any such evidence. There is no reliable evidence, either, that there was even a conversation on the matter. I do not believe that Ms Partasides,

or anyone else, ever actively made a decision about that question. I accept the point, made in evidence and submissions, that such decisions do not need to be made formally, or minuted, or recorded. But if there is no record, and nobody can recall when or how it happened, a defendant may find it hard to "demonstrate" any of the things which the Code requires to be demonstrated.

132. In my judgment, on the evidence adduced at this trial, the claimant's rights were not considered and weighed against other considerations. His identification was mainly a consequence of the automatic application to this case of the general rule in which the editorial staff believed, coupled with the fact that the defendant was able to find out the claimant's name and other personal details. He was named as soon as the editorial staff were confident that the details they had obtained were accurate. The decision to identify was partly influenced by what the editorial staff thought about the extent to which the name was already in the public domain. But this was not an evaluation of whether the claimant's privacy rights had been eroded by publication elsewhere. It is not a case of concluding that disclosure was justified because the name was already out there. The defendant was the first to name. The Guardian article encouraged the publication of the full name, but I do not consider this was a matter of editorial discretion or judgment. The inference I draw is that this was driven by competitive considerations, or herd instinct. Adherence to the general rule in the circumstances of this case was, in all the circumstances, unreasonable.

133. In these circumstances, the issue of editorial latitude or deference to editorial judgment barely arises on the facts. The decision to name the claimant in the Article was not a bespoke exercise of considered editorial judgment as to whether the inclusion in the Article of sensitive personal information about this claimant served, and was proportionate to, a public interest imperative to make sure readers took an interest in reporting of the police investigation. It was more in the nature of an automated or knee-jerk process, applying a rigid default rule without regard to the claimant's rights or the particular circumstances of the case. That does not appear to be in conformity with the Code. But even if there are cases, in which the Code's requirements can be satisfied by simply following a general rule, this cannot be one of them. Here, the default rule was the opposite of the legal starting point. Its application was partly a result of ignorance. It is evident that the senior editor was ill-informed about the Code, and that she and others were ignorant of the College of Policing Guidance, and its stated rationale.

134. My conclusions on the facts are based on what the contemporary documents do and do not show, and my assessment of the written and (in particular) the oral evidence of the four editorial witnesses. It is unnecessary to identify exhaustively the material which underpins my findings, but I refer in particular to the following evidence of Ms Partasides, who was the senior and effectively the sole decision-maker.

(1) In ¶12, she identified the reasons for not publishing the name "Anadin" at or after 08:22: "Because we had not had the opportunity to corroborate this information… It was too early to make a proper assessment of the information." In ¶15, she stated that she was concerned "about the need to be able to accurately and adequately inform the public,". In the same paragraph she stated, "I do not think that anonymous coverage … would have remained accessible to the public". But she did not state that this is something she considered at the time. In ¶20, she told of the processes she undertakes when "considering whether to name an individual whose

identity is in doubt." Her email exchanges with Barry Keevins are all about accuracy, and the process of establishing the facts, as are her emails to Ms Williams.

(2) At ¶29, she gave details about the point, at around 18:00, when she knew the Guardian article had been published and she had "a number of ostensibly genuine and verified sources" for the claimant's name. She says this:

> "By this point, I took the view that that the Claimant's identity as the individual arrested was circulating in the public domain and that in all the circumstances I was convinced of the public interest in identifying him in the Article. The Article was therefore updated at 6.00pm to include the Claimant's full name."

She does not identify the public interest, or offer any further explanation. What she says appears to equate the public domain with the public interest.

(3) In ¶¶30-33, Ms Partasides gave further explanations about the way she satisfied herself of the accuracy of the identification. At ¶33-35, she made several assertions, weaving together what happened on the day, the beliefs she did or did not hold then, and what she feels, or believes now, with hindsight. This includes the following:

> "33….. *I believed* that the public interest in reporting on the claimant's arrest in a way which was accessible and informative to readers was very high …
>
> 34. Although *I accept* that there are circumstances in which an arrested individual might be entitled to expect that the fact of their arrest would be kept private, I *did not* believe this to be the case here…. … *I feel* that the enormous public interest in the public being able to obtain an understandable, accessible and up to date-account *justified publishing the story*….
>
> 35. For the above reasons *I believe* that including the full name of the claimant … was fully justified."

Little of this amounts to a clear statement of fact about things she did believe, and the reasoning processes she undertook on the day. In substance, all she says with clarity is that she believed the name was very important to make the report "accessible, informative and understandable". She does not say when, or how, she arrived at that conclusion, or identify anyone with whom she discussed the matter. She does not identify any balancing process. She does not even say that she knew or believed, at the time, that there were circumstances in which an arrested person could legitimately expect to remain anonymous.

(4) Ms Partasides' account of her thinking at the time is unsupported by any contemporary document, or any other evidence, and in my judgment it is not reliable. The passage from Ms Partasides' cross-examination which I have cited at [46] above clearly suggests she was in no position to recall, in November 2020, what she thought at the time of publication in May 2018. It is not easy to accept that

she was able to do so when she made her statement on 23 April 2020. Moreover, when her evidence was tested in cross-examination she said the following:

(a) It was her intention, at 06.00, when she first became involved, to publish the name "after other hurdles had been cleared".

(b) She could not remember a time when the police had named a suspect. Asked if she knew the police had taken a decision not to do so because of the damage it causes to be people who may turn out to be innocent, she said she did not know why the police don't name people. She said that she had not read the policy document. She then said that she was aware of the policy reason for not naming suspects but that "there are different decision-making processes", hers evidently being different (the transcript is at Appendix A to this judgment).

(c) Asked how identification of the claimant would benefit the public or assist the public's understanding, she was unable to provide any coherent explanation. The relevant passages are also at Appendix A.

(d) Asked about the public interest she said she thought it was in the public interest to name the claimant because the police had arrested him and "wherever we can, we should let them know who it was", and this was in accordance with "our IPSO guidelines". She evidently meant the Code.

(5) I asked her about whether there was any time, on 29 May 2018, at which she alone, or with others, devoted attention to the question of whether they should identify the claimant as the person who had been arrested. Her answer was in substance that it "evolved and was in my mind throughout the day". The relevant extract is at Appendix A. Asked why there was no reference in her statement to her thinking, on the day, about the interests of the claimant, her answer was "I think it's because it was so clear in my mind that it was a public interest decision that that is what has been focused on here." This is clearly a vague and unsatisfactory answer. Her evidence was that she could not remember taking, or thinking about taking, legal advice.

(6) My conclusion is that the limited evidence given Ms Partasides about her decision-making on the day is in substance a reconstruction. I am confident that she now believes what she says, and the contrary was not suggested. But the reality, in my judgment, is that she did not engage in even the limited evaluation she has now asserted.

135. The evidence of Amanda Williams about the public interest had defects similar to those of Mr Savage's statement, quoted above, and Mr Partasides' written evidence.

(1) In ¶25 Ms Williams said, "*I believe* that a suspect arrested in these extraordinary circumstances could claim to have only a limited expectation of privacy" and offered reasons for that belief. These included the following passage, taking her state of mind from the present to the past tense:

> "Further, even if there might arguably *be* some limited expectation of privacy in these circumstances, *there was no doubt in my mind* that it would be overridden by the undeniable

> public interest in publishing details of a major incident in the frantic police investigation which had followed the bombing and doing so in a way which would allow the public to understand and follow what was happening during an enormously challenging period."

(2) The lawyerly character of this passage is at odds with Ms Williams' presentation as a witness and her background and training (she has been a journalist for 15 years, and no other work experience was identified in her statement). The reliability of this evidence is undermined further by the fact that Ms Williams was not a decision-maker, and by her ¶26, which asserts that:

> "*I believe* that by 6pm we *would have been* sufficiently certain of the claimant's identity, and sufficiently sure of the public interest in reporting the identity, so as to include the claimant's full name in the article… Together, these factors *led me to believe* that by 6pm the Claimant could claim little privacy in the fact of his arrest."

Earlier in Ms Williams' statement she had made clear that "I finished work at around 5pm, which is the time people go into conference." I pointed this out, and she confirmed that she was not involved in what took place at 6pm:

> "Q: So when you say that you believe that 'we would have been sufficiently certain of the claimant's identity…', actually, you were not part of that?
>
> A: No, I would be talking on behalf of the company there, I suppose".

In other words, presenting a case.

(3) Ms Williams' statement asserted that it "would be hugely difficult to report" on the investigation without identifying the individuals, but this of course is what the defendant (and many others) did do, for many hours, before the first iteration of the Article that is complained of, at 12:47. This was one or many passages in her witness statement which presented arguments, rather than statements of fact about what she did or said or thought on 29 May 2017. The clear impression I formed, when she was challenged in cross-examination about those arguments, was that they were not matters she had in mind at the time, and she had not thought them through.

136. Mr Duell's evidence had flaws that reflected those I have already identified.

(1) His statement contained no details of how or when any view on the public interest was arrived at. The main passage dealing with privacy and the public interest was the one from which I have quoted at [89] above. The impression given, if this evidence is to be accepted as reliable, is that Mr Duell thought that the expectations of privacy of an arrested person were defeated, or reduced to little, by news spreading "around local residents". In addition to asserting that a person in the claimant's position "would stand little expectation of privacy", Mr Duell went on:

> "I also considered that any limited expectation of privacy would undoubtedly be overridden by the huge public interest in allowing the public to understand this apparent major development in a crucial story, which demonstrated that there were possible terror links to people in other parts of England."

The public interest identified is "allowing the public to understand". And again, the language is lawyerly, bearing a striking resemblance to that in Ms Williams' statement.

(2) Asked in cross-examination what he knew about police practice in relation to the naming of suspects, Mr Duell said he was aware they did not name in general, but described this as a "convention of theirs". "It doesn't necessarily mean it's right." He was not aware of a specific reason why the police didn't name the claimant. Asked about if the fact that the police were not naming the claimant gave him "pause for thought about the privacy rights and why they might be doing it, to protect Mr Sicri's privacy rights", he answered. "No, it wouldn't." Later, he said, "I don't think that we – that I – considered the police were not releasing it specifically because of the privacy rights of the individual".

(3) His evidence was that no records were made of any consideration of the public interest. He did not recall any discussions with Ms Partasides or anyone else on the day. He did not think he had any telephone conversations about the public interest. He was asked about whether there were any face-to-face discussions, and he could not recall any, or say that they discussed the privacy rights of the individual. The relevant passage of the transcript is at Appendix B.

(4) It was put to him that the editorial staff had been concerned about accuracy, not privacy rights, and that the written evidence I have quoted above was justification with hindsight. He denied it, but that is the view at which I have arrived.

VI. DAMAGES

137. For the reasons that follow, my award of damages is £83,000, comprising two elements: (1) general damages to compensate for the wrongful disclosure, the consequent loss of status, and the distress, anxiety and other emotional harm that this caused, in the sum of £50,000, and (2) special damages for financial losses caused by the wrongful act, in the sum of £33,000. The award of general damages includes aggravated damages, but not compensation for injury to reputation, or for distress caused by such injury. It is intended to compensate for the fact and consequences of this defendant's publication, in isolation from the conduct of others; but it is not reduced because other publishers disclosed the same or similar information.

General principles

138. The aim is to compensate the claimant for material and non-material loss or damage sustained by him as a result of the tort. It is for the claimant to prove the fact, causation and amount of the harm. Certain general principles are clear and uncontroversial.

(1) When assessing whether special damages should be awarded and, if so, how much the Court applies the principles that govern financial loss claims in tort generally.

(2) General damages for misuse of private information may be awarded to compensate for distress, hurt feelings and any loss of dignity (or indignity) caused by the wrongful disclosure. Damages may be increased by other conduct of the publisher which is related to that wrongful act and aggravates the injury to the claimant's feelings. An award may also be made for the commission of the wrong itself, in so far as it impacts on the values protected by the right, provided that the purpose of such an award is compensatory, rather than having deterrent or vindicatory in nature. Such compensation in reflects the loss or diminution of a right to control private information. These are the main principles that I draw from the main authorities cited by Counsel: *Mosley* [212-223], *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 [2012] 1 AC 245, *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch) [2016] FSR 12 [111-145] (Mann J) affirmed [2015] EWCA Civ 1291 [2017] QB 149 [45-48] (Arden LJ) ("*Gulati CA"*).

139. In *Richard v BBC* [350(a)-(b)], Mann J identified some additional heads of harm that were compensatable "in this case". I emphasise them in the citation:

> "(a) Damages can and should be awarded for distress, *damage to health*, invasion of … privacy (or depriving him of the right to control the use of his private information) and damage to his dignity, *status and reputation …*
>
> (b) The general *adverse effect on his lifestyle* (which will be a function of the matters in (a)."

140. There would certainly seem to be no reason why, on appropriate facts, a claimant should not recover damages for injury to his health, and the point of principle is not in dispute. The Particulars of Claim allege, in support of the claim for damages, that "the claimant has been diagnosed with a depressive illness which is attributable to the damage caused by the publication of his name in relation to his arrest." In opening, Mr Tomlinson relied on this point. But he did not press it in closing, and I make no award under this head.

141. Claims of this kind in media cases are not unknown, but they are unusual. When advanced they will normally require expert evidence, and – being claims for personal injury - the requirements of Practice Direction 16D and Part 35 would seem to be applicable. Here, no medical report has been served, there is no expert evidence, and the evidence of fact is very limited. It is contained in Mr Sicri's witness statement, which says that in February 2018 he was feeling depressed, discussed it with his doctor, was prescribed citalopram, and recommended to see a psychologist. This evidence was not challenged, but it is at best hearsay evidence, without identifying the practitioner, and with no permission to adduce expert evidence. Moreover, it does not identify an illness or assert a diagnosis, or a prognosis, and I have been shown no medical records. I do not regard the evidence as sufficient to prove the pleaded case, or to justify any award for a recognised psychiatric illness, as distinct from severe upset, distress, anxiety, and depression – as those terms are understood outside the medical field. I note that damages for injury to health were claimed, but not awarded, in *ZXC1*.

142. The broad proposition that a person whose private information has been misused is entitled to compensation for the "effect on his lifestyle" is not in dispute. But it is related

to the other matters I have highlighted – the effect on the claimant's "status and reputation" - which are controversial. I shall address these when considering issue 3(a).

143. Three considerations relevant to the assessment of damages were identified by Mann J in *Richard* [350], and adopted and applied by Nicklin J in *ZXC1* [147], [155]. I shall apply them likewise:

> "(c) The nature and content of the private information revealed. The more private and significant the information, the greater the effect on the subject will be (or will be likely to be). In this case it was extremely serious. It was not merely the fact that an allegation had been made. The fact that the police were investigating and even conducting a search gave significant emphasis to the underlying fact of that an allegation had been made.
>
> (d) The scope of the publication. The wider the publication, the greater the likely invasion and the greater the effect on the individual.
>
> (e) The presentation of the publication. Sensationalist treatment might have a greater effect, and amount to a more serious invasion, than a more measured publication".

144. Any award of general damages must be proportionate in amount; it must be no more than is necessary to achieve the aim of compensation. The Court should have regard to the levels of award in claims for personal injury, ensuring some reasonable relationship between the two to maintain coherence and uphold confidence in the impartiality of the justice system: *Mosley* [218-221] and *Gulati CA* [61-62] (Arden LJ), citing *John v MGN Ltd* [1997] QB 586. Whether the right course is to make a single award or multiple awards depends on the facts, and is a matter for the Judge's discretion; but a single global award is likely to be appropriate for a single wrongful act: *Gulati CA* [68-69].

Can the claimant recover damages for injury to his reputation? (Issue 3(a))

145. The claimant relies on *Richard* as authority that he can. Mr Tomlinson points out that Article 8 confers rights to the protection of an individual's reputation, and the reputational impact of disclosure is the reason for protecting information of this kind in the tort of misuse of private information. He submits that it would be anomalous to deny compensation if the claimant proves a wrongful disclosure causing reputational damage. The defendant relies on *ZXC1* as authority to the contrary. Mr White also submits that there are good reasons of principle and practicality why this claimant should not be permitted to use his claim in misuse of private information as a vehicle for claiming damages for harm to reputation. To do so would be to circumvent the regime for balancing reputation and free speech that has been carefully crafted by Parliament and the common law, via the tort of defamation.

146. Having carefully scrutinised the judgments in *Richard* and *ZXC1*, I am left unpersuaded by the arguments of Counsel, that I must choose between two inconsistent approaches. These are two decisions, in a developing field of jurisprudence, that were very different

on their facts and raised different issues. It is necessary to identify with some care what each decided.

Richard v BBC

147. The submission advanced to Mann J in *Richard* was that "in so far as Sir Cliff's claim was based on damage to reputation then that could not be the subject of a privacy claim; loss of reputation [is] the sole province of defamation" ([334]). The Judge's decision was to "reject this attempt by the BBC to limit the scope of the damages to which it is liable" [346] and to hold that Sir Cliff was entitled to be compensated for reputational harm [350(a)]. In summary, Mann J rejected the defendant's argument that the proposition they advanced was already established or implicit in the authorities; identified a number of authoritative pronouncements that privacy law may, and does, protect reputation; and reasoned (at [345]) that "If the protection of reputation is part of the function of privacy law then that must be reflected in the right of the court to give damages which relate to loss of reputation." He held that the facts of the case before him were "a very good example":

> "Mr Millar submitted that the facts of the present case 'vividly' demonstrate why damage to reputation must be excluded from a claim in privacy, because the facts (that Sir Cliff was being investigated for historic sexual abuse involving a minor) were true and the freedom of the press to report those true facts should not be undermined by the award of damages for misuse of private information. I think the exact opposite is the case. The facts of this case (on the footing that the public interest in reporting does not outweigh Sir Cliff's privacy rights) vividly demonstrate why damages should be available for an invasion of privacy resulting (inter alia) in damage to reputation."

148. The limited nature of the defence submission recorded in this passage is notable. It is well-established in defamation law, that (1) the ordinary reader will normally understand a statement that a person has been arrested for a crime to mean that there are reasonable grounds for suspecting him of that crime; (2) accordingly, such a statement can only be defended as true by proving that there were objectively reasonable grounds for suspicion; (3) the grounds to be relied on must focus on some conduct of the claimant by which he brought suspicion on himself; and (4) proof of the mere fact of suspicion or investigation cannot be an answer to a claim: see Gatley on Libel and Slander 12th ed paras 11.18, 30.8, and cases there cited; *Miller v Associated Newspapers Ltd* [2014] EWHC 3721 (QB) [13-15] (Sharp J, DBE). In *Richard*, it was only the bare fact of an investigation that the BBC was asserting to be true. Put another way, the defendant was not asserting that the information was true in any natural and ordinary, defamatory meaning. Nor was the BBC asserting that any defence or answer other than truth would have been available to them, had a libel action been pursued.

149. Against this background, the ratio of this aspect of Mann J's decision can I think be encapsulated as follows: (1) neither authority, nor general principle, leads to the conclusion that compensation for reputational harm may never be claimed and awarded in a claim for misuse of private information; (2) the mere fact that, in an individual case, the information is true in its literal meaning is not a good reason for refusing to make such an award; (3) on the facts of *Richard*, the literal truth of the information could not

afford a reason to withhold this category of compensation; it was, instead, a good reason for awarding it. *Richard* is not authority for the proposition that the claimant in a misuse claim can recover damages for reputational injury caused by a defamatory allegation even if, or regardless of whether, that allegation is substantially true.

ZXC1

150. In *ZXC1*, the claimant advanced his case on the express basis that the truth or falsity of the underlying information was not a relevant issue. Nicklin J held that, in those circumstances, "whilst he can legitimately rely upon the distress and embarrassment that he has felt as a result of the publication of the Information, he cannot be awarded any element of purely reputational damages": [152]. The Judge did not conclude that awards in misuse of private information cases can never include damages for reputational injury. He reasoned (at [149-152]) that it would "ordinarily" be wrong in principle to award damages for (a) damage to reputation, or (b) to vindicate reputation, whilst at the same time holding that the truth or falsity of the information is irrelevant. His reasoning was that it is a fundamental principle of defamation law that reputations should not be vindicated on a false basis, but the truth or falsity of the information is generally irrelevant in a claim for misuse. The Judge was not, here, addressing literal truth, but rather the truth of the ordinary defamatory meaning of the information. That is clear from the following further passages at [150(iii)] and [151]:

> "(iii) if a claimant wishes to seek an award of damages that reflect elements (a) and (b), then a defendant would have to be permitted to defend as true any underlying defamatory allegations that fall within the claim for misuse of private information (or advance any other defence that would have been available had the claim been brought in defamation: cf. *Rudd v Bridle & Another* [2019] EWHC 893 (QB) [60(5)] *per* Warby J);
>
> …
>
> 151 … in a misuse of private information claim a person cannot be awarded any element of compensation for harm to/vindication of reputation caused by the publication of defamatory statements if the defendant is not given the opportunity to defend the statements as true."

151. Again, I would attribute a relatively narrow ratio to this decision. *ZXC1* is not, in my view, authority for the proposition that a claimant suing for misuse can never recover damages for reputational harm. That would be inconsistent with *Richard*, and is not what Nicklin J said. In my judgment, the core principle of law for which *ZXC1* stands is encapsulated in the passage I have cited from [151]. Applying that principle to the facts, the Judge held the claimant had disentitled himself to damages for reputational harm by conducting the case on the footing that truth was irrelevant. That was not the position in *Richard*. *ZXC1* is distinguishable from *Richard* on other grounds. Evidently, in *Richard*, the BBC had, and took, the opportunity to assert the truth of the information, in its narrow literal meaning. There is no indication that the BBC was denied the opportunity to advance any wider defence. There is no reason to suppose that, if sued in defamation, the BBC could have advanced any defence of truth that complied with

the established principles to which I have referred. It is clear that they did not suggest as much to Mann J. There was no basis for concern that Sir Cliff might be awarded compensation on a false factual basis, in contravention of the policy considerations identified by Nicklin J.

Damages for reputational harm from false private information

152. *Richard* is not the only recent case in which compensation has been awarded for reputational harm in a tort other than defamation. In *Aven v Orbis Business Intelligence Ltd* [2020] EWHC 1812 (QB), it was conceded that such an award could be made under DPA s 13, and I made one, in respect of processing of information about two claimants in breach of the statutory duty imposed by DPA s 4. However, that was information which the claimants had proved to be false, which I held to be "seriously defamatory", and I proceeded on the basis that, in such a case, the Court should identify the meaning of the information and assess compensation according to established defamation principles. In short, the case was treated for these purposes as if were a successful claim in defamation. The reason was that, otherwise, the law would lack coherence. I am not sure Mann J took the same approach in *Richard,* but nor do I think he said anything inconsistent with this.

153. In *Aven v Orbis* I said that "The issue might deserve closer attention in different circumstances": see [196]. The present case calls for a further look.

154. Neither *Richard*, nor any other authority, holds that an individual can recover, in a misuse claim, damages for reputational injury caused by the publication of information that is defamatory but substantially true. The common law has prohibited this for centuries, and in 2013 Parliament put that prohibition on a statutory footing via s 2 of the Defamation Act 2013, if the claim is brought in defamation. I see no principled justification for allowing any such claim to be maintained in the newly discovered tort of misuse of private information. The facts that the information is private, and that its publication represents a misuse of the information, do not appear to me to be relevant, or sufficient, reasons for doing so. Nor does the fact that the rationale for protecting the information is the reputational harm that disclosure might cause.

155. The attractions of the syllogism relied on by Mr Tomlinson are obvious: the disclosure is wrong because of the reputational harm it might cause; Article 8 requires English law to provide a remedy for that wrong; so that should be done by awarding damages for reputational harm in the very tort that protects the individual against the disclosure. But the argument begs the question of what reputational consequences are required to be actionable; and bypasses the fact that the Convention does not require the remedy to be provided through any particular domestic cause of action. I see force in the submission of Mr White, that the existence of two parallel regimes to govern overlapping claims would be unsatisfactory, "for practical reasons underpinned by principle".

156. The example I raised in the course of argument was an obvious one: what of the terror suspect whose identity as such is wrongfully disclosed, in breach of his privacy rights, but who is later charged and rightly convicted? It would surely be offensive to long-cherished notions of justice to award him compensation on the footing that all the reputational harm caused by disclosure between arrest and charge was unwarranted? That could not happen if the claim was brought in defamation. I do not believe it should happen in misuse of private information. In order to avoid that result, it would be

necessary – so it seems to me – to import the relevant legal principles from defamation. That would be a cumbersome process. One may ask why should it be regarded as necessary in a democratic society to do this, or – more generally – to interfere with freedom of speech by affording a remedy for reputational harm by means of this emergent tort, when another, mature tort is available for the purpose? It seems hard to answer this question. When Parliament has so recently legislated in this field, it becomes harder.

157. Over the years, the Court has repeatedly resisted attempts to use causes of action, other than defamation, to prevent publication of defamatory statements, or to recover damages for reputational harm after the event. Mr White refers to cases where claimants have attempted to get round s 4A of the 1980 Act by suing for "interference with rights" rather than libel or malicious falsehood, such as *Cornwall Gardens Pte Ltd v RO Garrard & Co Ltd* [2001] EWCA Civ 699. Other examples could be multiplied, but they include a well-known list of failed attempts to circumvent the rule against prior restraint, in *Bonnard v Perryman* [1891] 2 Ch 269, by suing in other torts (such as unlawful interference with contract, malicious falsehood, breach of confidence, trespass, copyright: see *Bestobel Paints Ltd v Bigg* [1975] FSR 421, *Microdata Information Services Ltd v Rivendale Ltd* [1991] FSR 681 (CA), *Service Corporation v Channel Four* [1999] EMLR 93 (Lightman J), *Tillery Valley Foods v Channel Four* [2004] EWHC 1075 (Ch) [21] (Mann J)). In the misuse case of *McKennitt v Ash*, at [79], Buxton LJ identified the mischief:

> "If it could be shown that a claim in breach of confidence was brought where the nub of the case was a complaint of the falsity of the allegations, and that that was done in order to avoid the rules of the tort of defamation, then objections could be raised in terms of abuse of process."

158. For all these reasons, it does seem to me that there remains a good deal to be said today for the principle, identified long ago by the Court of Appeal in *Lonrho v Fayed (No 5)* [1993] 1 WLR 1489, that reputational damages are only available in defamation and limited other torts which are premised on the falsity of the information. In *Richard,* that case was distinguished by Mann J, but even putting that authority aside, there would in my opinion be merit in a general rule that a claimant who seeks to clear his name of a defamatory imputation arising from a wrongful disclosure of private information, and to recover damages for reputational harm, should be required to bring a claim in defamation.

Defences other than truth

159. Similar reasoning seems to me to apply to other defences or justifications that might be available in answer to a claim in defamation – what Mr White calls the "wider safeguards for freedom of expression" contained in defamation law. These encompass other statutory provisions, including the threshold of "serious" reputational harm in s 1 of the Defamation Act 2013, the public interest defence provided for by s 4 of that Act, and the unique limitation regime provided for in defamation and malicious falsehood. I have already mentioned s 4A of the 1980 Act and s 8 of the 2013 Act. Also relevant, in the present case, is s 32A of the 1980 Act, by which the Court has a power to disapply the 1-year limitation period where that is just and equitable.

160. It is not part of the ratio of *ZXC1*, or that of *Rudd v Bridle*, that the defendant in a misuse claim must always be allowed to advance any other defence that would have been available had the claim been brought in defamation. *Rudd v Bridle* was a data protection claim seeking, among other things, compensation under s 13 of the Data Protection Act ("DPA") 1998 for "unwarranted" processing of personal data that were alleged to be false. I formed and expressed the view that legal coherence would require consideration of issues that would arise if the case had been brought in defamation: defamatory meaning, whether the statements were fact or opinion, and in either case whether they were defensible as honest opinion or publication on a matter of public interest, under ss 2 or 4 of the Defamation Act 2013. I indicated my view that the statements of case were not in a fit state to allow a fair trial of such issues, and the claimant dropped the claim. The passage cited by Nicklin J in *ZXC1* [150(iii)] is part of an explanation of how that came about, and the issue did not arise in *ZXC1*. So, what was said in both cases was *obiter*. But the issue is now more directly relevant.

161. The same two questions arise: (1) is a claimant in misuse to be awarded damages for reputational injury, without regard to the defences that would or might have been available had the claim been brought in defamation? And (2) if not, what justification can there be for importing the defamation principles into the tort of misuse, rather than leaving a claimant to sue in the "natural" cause of action? Again, my answers would be "no", and "no sufficiently compelling justification". The reasons are, in substance, those that I have given, but the facts of this case provide a specific illustration of why no is the right answer to my question (1). If the claim for reputational loss had been pursued by means of a claim in libel it would have been time-barred, and it is clear the defendant would have taken the point. An application to disapply the limitation period might have been made, but the claimant would have had to overcome the strong rule, in the authorities, that such applications should only rarely succeed. He would also have had to persuade the Court that it was just and equitable to make an order that would negate the "single publication rule" in s 8 of the 2013 Act, by which Parliament sought to protect publishers from rolling liability for online content. To allow the same loss to be claimed by reliance on a different tort would remove any such obstacles, and so far from being necessary in a democratic society would seem to be inconsistent with the manifest intention of Parliament.

162. Consideration of question (2) leads me to the same conclusion as Mr White: to allow privacy actions to be fought as if they were defamation actions would be "a recipe for legal and procedural chaos". He referred to the risk of claims for damage to reputation descending into "satellite libel actions" but without the normal procedural and statutory safeguards applicable to such claims. Perhaps a better analogy is shadow libel actions.

Application to this case

163. For the reasons I have given I would, if necessary, hold that damages for injury to reputation are not available in a claim for misuse of private information. A claimant who wishes to recover such damages must sue in defamation or one of the other torts in which it is established that reputational harm is compensatable. These conclusions are not inconsistent with *Aven v Orbis,* where the claim was in data protection. I do not consider them to be at odds with the decision in *Richard,* either: on the face of it, Sir Cliff would have had an unanswerable claim in libel. The arguments in this case have been different from those considered and rejected by Mann J, and my reasons invoke

distinct considerations. But if and to the extent that my conclusion is contrary to the reasoning of Mann J, I must respectfully disagree.

164. Having said all this, I believe I can decide the issue in this case on the narrower basis that it would not be just, in all the circumstances, to award compensation for reputational harm. In my judgment, I could only do so by reaching a conclusion on meaning, defamatory tendency and defamatory impact, and then asking what defences would be available and reaching conclusions on whether any of them are made out on the evidence. The statements of case and arguments of the parties do not equip me to do that, in a way that is just to both parties.

165. In fairness to the claimant, I should say that he clearly has a reasonable argument on the meaning of the Article, and he plainly did not conduct himself in such a way as to give rise to reasonable suspicion. Suspicion fell on him for other reasons. I have concluded that the Article was in breach of the claimant's privacy rights, not justified in the public interest. I have also made some findings of fact that would be relevant in a defamation case, for instance, if a s 4 defence were to have been run. But that is not enough.

(1) The claimant's case on meaning is not pleaded or advanced in compliance with defamation law and practice; the defendant has never pleaded a case on meaning. There has been no argument on meaning.

(2) I cannot be sure what substantive defences would have been advanced. Truth and public interest were mentioned in correspondence, but that is not the same thing as pleading them. The defence of public interest is but a shadow. It is not obvious that it would fall with the corresponding argument in misuse, as Mr Tomlinson asserted. There has been no discussion of that.

(3) I am sure the defendant would have relied on limitation, and it seems clear (and is not disputed) that the primary limitation period expired before the claim was issued. But those issues have not been addressed fully in the statements of case or the arguments.

(4) These shortcomings cannot fairly be laid at the door of the defendant, or the defendant alone.

(a) The claimant identified the potential for a defamation claim, and expressly advanced it in correspondence, then abandoned it, having delayed beyond the expiry of the limitation period, for reasons that are explained only by the need to find legal representation.

(b) When the defendant stated its general position (in the way set out at [60] above), no attempt was made to bring about a "shadow" defamation trial, with issues crystallised in a state fit for resolution. The claimant proceeded on the basis that this was not the appropriate course.

(c) It has not been pleaded or argued, in answer to the shadow limitation defence, that if it had been raised a s 32A application would have succeeded.

166. In all these circumstances, I believe that the claim for compensation in respect of reputational harm is – in the technical sense – an abuse of process. By that I mean that it involves the use of a cause of action for an inappropriate purpose, and in a way that obstructs the court's ability to do justice.

Should there be an award of aggravated damages? (Issue 3(b))

167. Aspects of the claimant's case on damages are uncontroversial, as a matter of principle. Factors that are admitted, or I find, to be relevant include, of course, the nature of the information. They also include (a) the scale and extent of publication; (b) the fact that the defendant is not responsible for any distress caused by the fact of being arrested, being held in custody and questioned on suspicion of terrorism, which is to be discounted; (c) the fact that the claimant was unaware of, and hence unaffected by, publication that took place whilst he was in custody; (d) the distress he was caused by learning, upon release, that he had been publicly named as a terror suspect; (e) the fact that he was unwillingly thrust into the public eye as a result of being named; (f) the effect of these matters on his lifestyle, including his inability to return home for 10 days on advice from the police, the need to move to a new town, and repeated unwanted contact by media organisations, which compelled him to change his mobile number; and (g) the fact that the defendant continued to publish the Article, unamended, until February 2018.

168. There are four main issues for consideration. The defendant complains that:

(1) reputational harm and distress about it, is "the predominant feature" of the claimant's case on damages;

(2) there is an illegitimate attempt to obtain damages for separate articles, not sued upon;

(3) reliance on foreign publication is impermissible; and

(4) there are fundamental problems of causation.

I shall come to causation when I deal with the rule in *Dingle*, and take the other three matters in turn.

Reputation

169. I agree that distress, due to reputational injury, is a feature of the pleaded case on aggravated damages. I do not award damages for the adverse impact which any defamatory imputation conveyed by the Article had on the attitudes of others towards the claimant – matters such as (in the classic terminology), holding him in contempt, shunning, or avoiding him, *because* his reputation had been lowered in their estimation, or for the impact on the claimant's feelings of being defamed, and being treated with contempt or shunned or avoided *for that reason*. This means that I leave out of account several of the matters pleaded in paragraph 14 of the Particulars of Claim, including those at 14(6) (quoted at [59] above), 14(7) (fear of being attacked post-release), and 14(8) (abusive Facebook messages, one suggesting the claimant should commit suicide, and another that he should be "banged up for life"). Any attack would necessarily have been motivated by a belief in guilt. The messages are grossly offensive and upsetting

in nature, but it is doubtful that they resulted from the Article, and I find that, if they did, they were highly unreasonable conduct based on an inference of guilt. I add that a belief in, or inference of, guilt would have been wholly unreasonable.

170. In my judgment, however, this is a different matter from the impact of the Article on the claimant's dignity, or standing, and distress resulting from that. The distinction may be difficult to draw in practice, but it is real. In this case, the Article led or contributed to the claimant's public status becoming a deeply undignified one: he became, in the eyes of millions, the 23-year-old Libyan trainee pilot who had been arrested and held in custody under suspicion of involvement with the Manchester terrorist attack. In my judgment, the evidence justifies the conclusion that this caused or made a material contribution to others distancing themselves – shunning him - regardless of what they took to be the truth of the matter. These matters led to distress and anxiety, and all of this was damage of a kind that was reasonably foreseeable.

171. I therefore take account, in my award, of some of the disputed allegations pleaded in paragraph 14 of the Particulars of Claim, which I find proved to this extent: (10) the closure of the claimant's PayPal and NatWest accounts in July 2017 caused him distress; (13) the termination of the claimant's employment or engagement by ELH caused him distress. Both of these matters were, in my judgment, caused (or materially contributed to) by the loss of standing consequent on the disclosure of the Information. In the case of the accounts, that is a matter of inference based on the well-known approach of financial institutions. In the case of ELH, it is clear, on the evidence, that the company terminated the claimant's employment because of the publicity, rather than the reputational impact of publication.

Other Mail articles

172. The claimant complains, in aggravation of damages, that the defendant "republished the Information" in two further articles: the shortened hard copy version of the Article, published on 30 May 2017, and an online article on www.dailymail.co.uk. Mr White takes objection, submitting that this is an improper approach. The claimant should either sue on those articles, separately, or not rely on them at all. Mr White relies on *Collins Stewart Ltd v Financial Times* [2005] EWHC 262 (QB) [2006] EMLR 5 [24]-[27] (Gray J) and observations of mine in *Sussex (No 1)* at [69], [74].

173. The principles are not in doubt, but they are only partly engaged on the facts of this case. The pleaded case is that the defendant caused him more distress by publishing the same information in later articles, and there is some evidence to support that case. I see no difficulty with taking that into account. The defendant had a full opportunity to advance a case that this was justified. In my judgment it has in fact advanced such a case, and failed to make it good; no reason has been advanced for distinguishing those later articles from the one that is sued upon, in this respect. What the claimant cannot do is claim aggravated damages for the publication in later articles of different defamatory or private information. His evidence that the article of 31 May contained "the very hurtful and damaging allegation that I was a supporter of ISIS" relies on reputational harm, falls outside the pleaded case, is therefore inadmissible, and (for good measure) offends the principles relied on by Mr White.

Foreign publication

174. Complaint was made of the impact of "global" publication, and it is pleaded that the claimant's family in Libya suffered great distress, which in turn upset the claimant. I accept the claimant's evidence of the distress his parents suffered at learning of his arrest, and the "reflex" distress which that caused him. But these aspects of the claimant's case troubled me, as a matter of law. Misuse of private information is not one of those torts governed by the common law rule of double-actionability. At the relevant time, the rules as to applicable law were those of the Private International Law (Miscellaneous Provisions) Act 1995 or, arguably, the Rome II Regulation 864/2007/EC: see the discussion in The Law of Privacy and the Media 3rd ed (2016) para 13.84 - 13.92. Here, there was no attempt to address the issues of foreign law that would seem to arise, and could be one of real significance: an English court should not award damages in respect of conduct that would not be wrongful according to the law that applies by those rules.

175. I make no award in respect of the impact of foreign publication. The issue has fallen away, for several reasons. Mr Tomlinson conceded that damages could not be recovered for reputational harm abroad, but maintained (in my view, questionably) that consequent distress was recoverable as it was sustained in England. I have found that neither reputational loss nor consequent distress can be claimed for. The evidence is that the Article was read and accessed in Libya by, at most, 29 readers, so the scale of publication there is minimal, or at least very modest indeed. The claimant has also failed to prove his case that his reflex distress was a consequence of publication or foreseeable re-publication in Libya of the Article or its gist.

Causation, publication by others, and the rule in Dingle *(Issue 3(c))*

176. The fact that others published similar information about the claimant at or about the same time has played a prominent role in the argument. I have dealt already with the defendant's arguments to the effect that third-party publications had the effect of defeating, or reducing to little, the substantive rights the claimant would otherwise have enjoyed. The issue re-emerges in the context of damages.

177. The claimant's case, as presented by Mr Tomlinson, is that a case such as this is comparable to a libel action, where there are several publications by different persons to similar effect. The distress and reputational harm may be indivisible, and each will be liable in full. Mr Tomlinson cites *Dingle*, and its endorsement by the Supreme Court in *Lachaux v Independent Print Ltd* [2020] AC 612 [24], as supportive of this approach. Mr White submits that this is misconceived. The defendant can only be liable for damage caused by its own wrongdoing, and the claimant must identify that damage and "disentangle" it evidentially from that caused by other publications. He relies on *Trimingham* and *Ali*, and a passage in *Couderc*. *Dingle*, he submits, is relevant only in libel, as a bar on the use of third-party defamation as a means of proving a pre-existing bad reputation.

178. In my judgment, the right approach lies between these two extremes, and depends on the nature of the damage or alleged damage that is under consideration.

(1) As Mr Tomlinson points out, the general principle in tort law is that a defendant is liable for damage of which its wrongful conduct was a material cause. As Devlin J put it in *Heskell v Continental Express* [1950] 1 All ER 1033, 1047:

> "Where the wrong is a tort, it is clearly settled that the wrongdoer cannot excuse himself by pointing to another cause. It is enough that the tort should be a cause and it is unnecessary to evaluate competing causes and ascertain which of them is dominant."

(2) So, if the evidence establishes some identifiable item or category of damage which is indivisible, and that the defendant's wrongful conduct was "a cause", the defendant will be liable in respect of the whole of that damage. Any risk of injustice to the defendant falls to be dealt with by means of a claim for contribution against the joint tortfeasor(s) who were also responsible for the whole: *Rahman v Arearose Ltd* [2001] QB 351 [19] (Laws LJ).

(3) But this principle does not apply in a case where the evidence shows that (a) each tortfeasor caused some part of the damage, but (b) neither caused the whole, and (c) the claimant would have sustained some part (but not all) of the damage if only one of the torts had been committed, but (d) on the evidence, it is impossible to identify with any precision what part or element of the damage has been caused by which defendant. In such a case:

> "The fact-finding court's duty is to arrive at a just conclusion on the evidence as to the respective damage caused by each defendant, even if it can only do it on a broad-brush basis which then has to be translated into percentages."

Rahman v Arearose [21-23] (the citation is from [23]).

(4) This is also the approach that must be adopted, in my view, to a claim for general damages for libel or misuse of private information where the evidence shows that several publishers simultaneously published the same, or similar, content and the Court is seeking to identify an appropriate figure for the overall, or general impact, of the wrong committed by one of those publishers. This is not a case of a single indivisible item or head of loss or damage caused by concurrent tortfeasors, for reasons explained by Laws J in *Rahman v Arearose*. The harm is non-material and cannot, in itself, be observed. Usually, the right inference will be that some publishers caused some damage by defaming the claimant, or wrongfully conveying his private information, to one group of readers; and other publishers caused other damage by traducing the claimant, or exposing his private information, to different or additional readers. The evidence is likely to suggest such a conclusion, but without enabling the court to be precise.

(5) But the position is different when it comes to specific items of loss, or particular events that are relied on as evidence of damage. These are subject to the general rule above: the claimant is entitled to succeed if he establishes that the defendant's wrongdoing was a cause of the item or event, but if the evidence shows that it was not, or he fails to persuade the court that it was, that aspect of the claim will fail.

(6) The rule in *Dingle* has no bearing on the above. It is a rule of evidence or case management, grounded in pragmatic considerations. Its ratio is that, whilst the defendant to a claim in defamation may prove, in mitigation, that the claimant had a pre-existing general bad reputation, this may not be done by relying on other publications to the same or similar effect: see my decision in *Lachaux* at first instance [2016] QB 402 [74]ff, and the passage cited above from the judgment of Lord Sumption when the case reached the Supreme Court. I note that Jay J has recently reached essentially the same conclusion in the libel case of *Napag Trading Ltd v Gedi Gruppo Editoriale SpA* [2020] EWHC 3034 (QB): see [51]ff esp. [55-57] and [60].

(7) Consistently with the above, the rule in *Dingle* does not relieve the Court of the duty of "isolating" the damage caused by the defendant tortfeasor from any harm that others may have caused to the same interest of the claimant.

(8) Points (5) and (7) above often arise in conjunction in cases where the claimant has been the subject of defamation or other injurious publication by two or more persons, and proves that he was taunted or abused, or shunned or avoided, by people who formerly enjoyed his company. In such a case, the Court must review causation to determine whether to compensate the claimant on the basis that such taunts and so forth were a consequence of the defendant's tortious behaviour: A case in point is *Barron v Vines* [2016] EWHC 1226 (QB) [24], [44-50].

179. It is on this basis that I have approached the issues on damages. The points at [178(5) and (7)] above explain my conclusion ([175] above), that the reflex loss claim fails on the facts. The claimant's case is that his family learned of his arrest as a result of reporting in Arabic in Libya by the news channel Alhadet Al-Arabiya. His evidence was to the same effect. But I accept the submission of Mr White that Al-Arabiya's reporting cannot be traced to anything published by the defendant. On the contrary, there is positive evidence that Al-Arabiya relied on other sources. I have before me a translation of the full version of the article, which expressly refers to reporting in the Guardian, Telegraph, Sun and Mirror but makes no reference to MailOnline. The claimant accepted, in cross-examination, that his mother had seemingly been contacted in Libya by representatives of the Guardian and BBC. On the balance of probabilities, the Article was not a cause of this head of loss.

180. Other specific items of loss or damage that were pleaded, and supported by evidence, have fallen by the wayside as a result of my decisions on foreign publication and "depressive illness". Failure to obtain employment as a pilot is a matter best dealt with under the heading of special damage, but I can say now that the evidence did not establish the fact or causation of that head of damage. Other allegations that the claimant has suffered financially will also be dealt with in that section of this judgment.

181. Turning to the general issue of harm to the interests I have identified, the first point is that my decision to rule out damages for reputational harm means that I am not concerned with the rule in *Dingle*. Mr Tomlinson is right to submit that the defendant cannot escape liability by reference to what others did, nor can it mitigate the compensation due for the harm it caused by providing that others caused other harm. I do not accept Mr Tomlinson's submission that the damage caused to the claimant on 29 May 2017 is "indivisible". For reasons I have given above, that is not what the evidence suggests. The defendant is liable for the harm of which its wrongdoing was a

cause, and not liable for any damage to which its wrongdoing made no contribution. I must isolate the former from the latter, applying the approach described by Laws LJ in *Rahman.*

182. It is impossible to be precise, but helpful indicators of the scale of publication come from the defendant's disclosure and oral evidence. Disclosure shows that the Article had a total of 189,518 unique visitors in England and Wales on 29 and 30 May 2017 and a total of 224,573 article views. The oral evidence shows that the Article was also previewed on the MailOnline homepage. The previous could be read without clicking through onto the Article itself. This suggests a larger number of views. Of course, it is only later versions of the Article that are complained of. But the scale of publication was very substantial. It is reasonable to infer a degree of "percolation", that is – republication or dissemination by readers of MailOnline. I have already sufficiently indicated my conclusions about the extent of any overlap between the readership of MailOnline and the Guardian. It is unnecessary to consider the point in relation to other newspapers or online publications. Mr White has sought to exploit a passage in the claimant's witness statement, saying "*all the major newspapers were reporting that I had been arrested",* but that is not what the evidence shows. They were reporting the arrest but without the name.

What sum should be awarded in general damages? (Issue 3(d))

183. Applying the principles identified above, the appropriate sum in general damages, for the heads of loss and damage I have recognised as meriting compensation as a matter of law and fact, is £50,000.

184. In reaching that conclusion, I have taken account of the inherently serious nature of the disclosure, and the claimant's convincing evidence of its impact on him. He was, I am satisfied, very upset at the defendant's determination to publish his name, and shocked at its failure to take down or amend the Article once it knew of his release. His evidence was corroborated by that of Mr Elazoumi, who described the claimant as paranoid, and refusing to leave the house, in the wake of publication. I have taken account of my findings on the financial loss claim (below), to assess what should be awarded for the distress of job loss. I have reviewed the Judicial College Guidelines for the assessment of General Damages in Personal Injury cases, focussing on awards for psychiatric injuries and those affecting the senses. I have also taken account of everything submitted on each side, whether or not I have dealt with it specifically in what is already a lengthy judgment.

185. I should mention three further matters.

(1) The defendant's written opening pointed to the 6-month delay between publication and the initial complaint by Bindmans. This was said to be "inexplicable" if the Article was in fact causing damage of the type and gravity alleged. This is a point that some media defendants make, from time to time, in an attempt to cast doubt on the sincerity or merit of a claim, but it rarely meets with success. I do not find it persuasive in this case. I am not sure the defendant itself was particularly convinced by the point, as Mr White did not confront the claimant about it when it came to cross-examination. In my judgment, the claim was and is sincere, and even after discounting as much as I have, the damage alleged is genuine and substantial. The award is no more than is necessary to compensate for the injury caused.

(2) I have noted the award by Nicklin J in *ZXC1* of £25,000 and what was said about that in *ZXC CA* [143-144], [151]. I take the Court of Appeal's observations at face value: they meant no comment either way on the award below, which was not under challenge by either side. Moreover, the facts of that case were very different from those of the present case.

(3) I have also noted the scale of the awards in *Gulati*. Although the wrongdoing there was different, and did not always involve publication, that tends to support a more generous approach to compensation where the gist of the wrong lies in wrongful disclosure. Mann J awarded one claimant, Mr Yentob, £85,000 without evidence of any misuse arising from publication. The other claimants were awarded substantially more.

What if any award of special damages should be made? (Issue 3(e))

186. I have already indicated that the claimant has satisfied me that he suffered financial loss as a result of his identification as a terror suspect, and that the publication of the Article was a cause of such financial loss. The bigger issue is how much of the pleaded claim has been established, taking account of what emerged in cross-examination, and the contents of the documentary evidence.

187. There are two heads of claim: (1) loss of earnings; and (2) the cost of procuring the removal of re-publications by others, or "take-down". The first head of claim is for direct consequential loss. The second head can be categorised as the cost of reasonable steps in mitigation of damage. It has two elements: costs incurred and costs of steps which have yet to be taken. The defendant does not dispute the validity, in principle, of either head of claim. The fate of each depends on the facts. My findings are that the claimant has not established any loss of earnings, but he is entitled to £33,000 to cover the reasonable cost of steps taken and to be taken to secure "take-down". I can explain these findings quite shortly.

188. As to loss of earnings:

(1) The unchallenged evidence of Mr Mooney and Ms Vernall is that they read the defendant's publications and ELH terminated the claimant's employment because of the media coverage. This was not because they assumed he was guilty. On the contrary, Ms Verrall's evidence is "I assumed Alaedeen was innocent as he was released and had not been told to leave the country … the only reason we had to let him go was the media coverage".

(2) At that time, his annual earnings from ELH were modest, varying between £656 (2014/15) to £3,610 (2015/16) and £2,336 (2016/17). The claimant maintains that he would have earned much more in future years. I accept that he would probably have improved his earnings, as he was popular with ELH, hard-working and had secured refugee status. Ms Mooney's evidence was that the replacement employee earned £12,000 a year. I do believe, however, that the claimant's estimates of his prospective earnings are overstated. They were originally based on erroneous and overstated assumptions about what he had actually been earning. His evidence about how he would achieve the levels of earning he claimed was unconvincing.

(3) My best estimate of the gross earnings he would have obtained, but for his dismissal, are that these would have been in the region of £1,274 for the remainder of 2017, and £4,000 a year from January 2018. It may be that he would have improved on this by 2020, had he remained with ELH. But in September 2019, he left the job he had then secured, to help a family member in Turkey. He accepts that this would have brought an end to whatever job he was then doing. That yields a gross sum by way of lost earnings of about £8,274. I consider any claim for loss after September 2019, to be speculative and unproven, particularly in the light of the pandemic, which would surely have had an adverse impact independently of the effect of the Article.

(4) The claimant has not established that he lost any work as a pilot as a result of the publication complained of. He had never obtained any such work before. His case is that he had been interviewed and had received a verbal offer to start work as a First Officer with Airtime Aviation in Bournemouth in the summer of 2017. The evidence about the status of "Airtime Aviation", and the nature of the prospective job, is vague. It is not clear that there was ever anything amounting to an offer, as opposed to (at most) discussion of a possible job. The evidence about the withdrawal or termination of the "offer", does not persuade me that the Article was causative. A run of text messages, disclosed by the claimant, leads me to the conclusion that the job offer, in so far as there ever was one, was probably withdrawn or dropped for reasons that had nothing to do with the Article. In the circumstances, it is unnecessary to say more about the evidence on quantum, but I can see force in Mr White's criticisms of this. It turned out that the figure on which the calculations was based was not contained in any offer document, but rather an assessment by the claimant of a market rate for the job.

(5) I accept the claimant's case, that the sum he has actually earned since the publication of the Article is £17,037 gross. This is more than twice what he would have earned from ELH, so there is no award under this head. It is to be noted that this conclusion would follow even if I had accepted the claimant's case on his likely earnings from ELH, which was that they would have been at the rate of £5,000 a year for 2018 and 2019.

189. As for the costs of take-down, this claim has been whittled down through agreement. Some of the articles originally relied on proved to have resulted from other publications, notably the Guardian.

(1) The claim for incurred costs was in the sum of £5,400, being Bindmans' costs of writing to five publishers. The claim for future costs is in the sum of £126,650, being an estimate of the costs which Bindmans will have to incur in future to achieve removal.

(2) I allow the claim for incurred costs, as to four of the five publishers. Contrary to Mr White's submissions, the overall sum of £3,000 is a reasonable one for the investigation of each of those matters, the preparation of a template letter, and its adaptation to the facts of each of the four cases. The fifth letter related to the Al-Arabiya article, which did not result from the Article.

(3) The claim for future costs presents greater difficulty. It must be dealt with now. It cannot be put off until the actual costs are known. There are many uncertainties.

The basis of calculation includes £500 for each letter to non-foreign publisher that has already been contacted, £750 each for those who have yet to be contacted, and £5,000 for each foreign publisher. Mr White extracted a concession from Ms Allen that this last sum was "partially arbitrary". I am not sure she meant this in the way that Mr White has taken it. But it is, to some extent, inevitable that these matters cannot be precisely calculated. It is unreasonable for the wrongdoer to expect as much. More problematic are the estimates of £10,000 to contact each search engine to request the delisting of the claimant's name and up to £30,000 in the event of a refusal. Mr White submits that these are "manifestly disproportionate" and probably unnecessary to achieve take-down by responsible ISPs that operate "well-known and very accessible takedown portals which are designed to be used by members of the public acting without legal assistance."

(4) Ms Allen has experience of the process, but even so it seems to me that it is improbable, following this judgment, that there will be protracted litigation over any take-down requests, the costs of which the claimant will need to look to the defendant to meet. In the end I am driven to a somewhat broad-brush approach. Avoiding speculation, but seeking on the one hand to avoid a disproportionate award and to avoid under-compensation, I allow a further £30,000.

(5) Interest will be recoverable on the compensation for incurred costs, from the time of payment to the date of judgment.

VII. CONCLUSIONS AND DISPOSAL

190. In summary, I have found as follows. The claimant had a right to expect that the defendant would not publish his identity as the 23-year-old man arrested on suspicion of involvement in the Manchester Arena bombing. By 12:47 on 29 May 2017, the defendant had violated that right; it had no, or no sufficient public interest justification for identifying the claimant. It continued to do so. Later, another publisher did the same or similar. But the claimant's right to have the defendant respect his privacy was not defeated or significantly weakened by the fact that others failed to do so. He is entitled to compensation. The appropriate sum is £83,000 in general and special damages.

APPENDIX A

Cross-examination of Ms Partasides (extracts)

Q. Have you never looked at the police -- chief police officer's media guidance on --

A. No.

Q. -- why suspects are not named?

A. I understand that, but that's also been evolving, hasn't it?

Q. But as it was in force at the time, they were not naming suspects because of the damage potentially caused to them if their names were published and they turned out to be entirely innocent. That's right, isn't it?

A. That's not why -- that is not the process that I go through in decision-making, though.

MR JUSTICE WARBY: Well, sorry, I think we need to get an answer to the question. Were you aware at the time that the police had made a policy decision not to name suspects because of the damage it does to people who may turn out to be innocent?

A. Yes.

MR TOMLINSON: But you thought you knew better; is that right?

A. I don't think I knew better. I think that there are different decision-making processes.

Q. You cared less about the damage to the person than the police did; is that the position?

A. No, that is not the position. I cared about making sure

that information was flowing.

Q. Did you care at all about the damage that might be caused to the person if they --

A. Yes.

Q. -- turned out to be innocent?

A. Yes.

Q. And how did you factor that into your decision-making?

A. Well, we didn't publish in haste. We published once we had cleared other hurdles.

Q. Sorry, forgive me, that's not an answer.

The person is likely to be damaged if you publish their name because people will think there is no smoke without fire, here is a man arrested for a serious terrorist offence, he must have done something wrong. You accept that?

A. I accept that lots of people were arrested in the course of the investigation and that he was innocent until proven guilty and it is a statement of fact that he was arrested.

...

Manchester. But how does the identity of the claimant help the public to understand anything?

A. I think it is part of the bigger picture, the fuller picture.

Q. How does it help to reassure the public that significant progress is being made to prevent follow-up or copycat attacks to tell them the claimant's name?

A. Because I think that as much information as you can give is more helpful.

Q. Regardless of the fact that that causes the claimant damage; is that your evidence?

A. I think the country was incredibly interested in how the police investigation was going and I think that that was a part of the information that we could give them about the police investigation.

Q. But it was not information about the police investigation. The police investigation was what they were doing in looking at the telephones and tracking the perpetrator's network of contacts and so on, none of which you knew anything about. But the name of the claimant was not any part of the police investigation, was it?

A. It is the identity of the claimant. This is the man that they have arrested and it helps form part of his identity.

Q. How does that help the public to understand the police investigation?

A. Well, I think there was so much happening so quickly that the more information we could give the better. The more facts there were to create the picture of the story, the better.

...

A. No, I thought this is in the public interest because the police have arrested someone and, wherever we can, we should let them know who it was. This was in the context of that investigation.

Q. So wherever you can. So it doesn't matter how damaging it will be to him, wherever you can, you put his name in?

A. No, there is a context and there are sliding scales.

Q. It's difficult to imagine something more damaging than identifying to the public someone suspected of horrific -- involvement in a horrific terrorist attack, isn't it?

A. But I still think, given the decision-making processes that we went through at the time and according with our IPSO guidelines and how we always report these stories where we can that it was the legitimate response.

...

Mr JUSTICE WARBY:

Was there a time of the day when you either alone or with others devoted your attention to the question specifically of whether you should identify the claimant as the person who had been arrested?

A. I don't remember having -- I don't remember specific discussions. There will have been ongoing discussions.

MR JUSTICE WARBY: So it wasn't a question of going into a separate office and sitting down and saying, "This is a big deal, we have to work out whether it's the right thing to do"?

A. I don't remember that we did that, no.

MR JUSTICE WARBY: Was there a single occasion on which you either alone or with others formed that conclusion, or was it something that evolved or was in your mind throughout the day?

A. I think it evolved and was in my mind throughout the day, yes.

MR JUSTICE WARBY: Did you at any stage make any note or record of the decision-making process?

A. No.

APPENDIX B

Cross-examination of Mark Duell (extract)

Q. No. And did you discuss the privacy rights of the claimant by telephone with the others or face-to-face?

A. It's possible we'd have done it face-to-face, I can't be sure.

Q. It's possible that it didn't happen at all?

A. I know we would have discussed the public interest in relation to it. Whether or not we specifically talked about the privacy of the individual, I'm not clear but I know that that is a factor when you consider the public interest, that's part of it.

Q. This story was telling the public nothing more than the fact that a young hand man had been arrested. It didn't need his name.

A. I disagree. I think it did. There's an overriding public interest to report on this person's name and to tell the public that this was suddenly not just that someone had been arrested but this identity of the person had been arrested. We can't just leave it up to