

# Open part of Attorney General's interim injunction application to be heard in public (HM's Attorney General v BBC)

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**Information Law analysis:** This was a preliminary hearing in the claim by the Attorney General (AG) for an interim injunction sought against the BBC in relation to a proposed broadcast concerning serious allegations of misconduct about an MI5 agent. This hearing was to determine whether the 'open' part of the hearing of the AG's application should take place in public or in private. It was common ground that part of the substantive hearing would be proceeding 'in closed' (without the BBC or its team) pursuant to the provisions of the Justice and Security Act 2013 and CPR Part 82. The AG's argument that the 'open' part of the hearing should be conducted in private failed, the court having not been satisfied that there was a sufficiently compelling reason to depart from the open justice principle. This was because there was no apparent legal basis to seek such an order and some of the materials had been published in the press and it could therefore be inferred that the source thereof was a government source. This conclusion was also supported by the judge's analysis of the balance to be found between national security interests and the legal context of the case, and between the open justice principle and the other public interests at stake in this case. Written by Mathilde Groppo, senior associate at Carter-Ruck Solicitors.

*Her Majesty's Attorney General for England and Wales v British Broadcasting Corp* [\[2022\] EWHC 380 \(QB\)](#)

## What are the practical implications of this case?

Applications for the hearing of an application seeking interim relief on the basis of claims such as misuse of private information and breach of confidence to be heard in private are common practice in the media and communications list. However, they often occupy a short initial part of the substantive hearing, and there have been no recent examples of such applications failing.

This judgment is a reminder that the court will scrutinise applications for a private hearing, and that general submissions and concerns about the publicity of a hearing will not be sufficient for a claimant to convince the court it can be satisfied that an order for a hearing to proceed in private is strictly necessary in the interests of justice.

The general rule is that hearings are carried out in public and judgments and orders are public. Derogations are only justified in exceptional circumstances, when they are strictly necessary to secure the proper administration of justice.

In making its decision, the court gives regard to the respective and sometimes competing rights of the parties under the European Convention on Human Rights (ECHR), and ensures that any ultimate vindication of Article 8 ECHR, where that is engaged, is not undermined by the way in which the court has processed an interim application: [Practice Guidance on Interim Non-Disclosure Orders, s 14](#).

The court's refusal to allow the AG's application that the open part of the hearing be heard in private gave specific regard to the parties' rights under the ECHR. In reaching its decision, the court noted that there was no apparent legal basis in the AG's Particulars of Claim for restraining the publication of the proposed broadcast, insofar as it did not propose to name the source, and therefore that there was no apparent reason to hold the interim relief hearing in private provided the source was not named. This, and the fact that the AG's evidence was considered to be insufficient to meet the conditions in [CPR 39.2](#), led the judge to refuse the AG's preliminary application.

## **What was the background?**

This was a preliminary hearing, preceding the hearing of an application for an interim injunction to restrain the publication, by the BBC, of a broadcast concerning allegations of serious misconduct and abuse by an unidentified MI5 agent.

The claim was brought by the AG on grounds of breach of confidence or false confidence, risk to the life, safety and private life of the individual at the centre of the documentary, and damage to the public interest and national security.

The present hearing was not concerned with the substance of the interim injunction application, and instead dealt purely with the application for the hearing to be heard in private. The effect of the AG's application was to seek an order that the public be told nothing about the nature of the proposed broadcast or the proceedings beyond the fact that the AG was seeking an injunction on the grounds that the broadcast would damage national security and breach ECHR rights, without sufficient countervailing interest.

There was a dispute between the parties regarding the appropriateness of the relief sought by the AG, which included a proviso permitting publication with the express written consent of the AG, the effect of which would be to allow the BBC to publish a story about MI5's use and management of agents, or about the alleged misconduct of the agent, without identifying him as an MI5 agent. The BBC objected to this on the grounds that the AG's pleadings failed to identify the confidential information whose publication the AG is seeking to restrain. This was relevant to this preliminary hearing because there was nothing in the AG's pleadings to suggest that the fact that the BBC proposes to publish the identity of the agent unless restrained by the court was itself confidential or, if that was alleged, why.

## **What did the court decide?**

The court rejected the AG's application that the open part of the interim injunction hearing be held in private, on four main grounds:

- there was no apparent legal basis for the AG to seek to restrain the BBC from publishing the proposed broadcast without identifying the agent. Nothing in the AG's pleadings or evidence suggested that doing so would breach his rights to life, safety or private life under the ECHR. Further, the AG had failed to identify a general legal obligation to justify restraining the publication of information about the operation of the security or intelligence services which would damage national security. There was therefore no reason for the open part of the hearing to proceed in private, provided nothing was said which directly or indirectly identified the agent
- some elements of the story had already been published in the press earlier this year, and it could be inferred from the article that the source was a government source. The AG's evidence was insufficient to suggest that source was acting without due authorisation. This was relevant to the hearing in private application in two ways: first, the court considered it would be unfair to allow the government to put its own 'spin' on a case without allowing the BBC to put before the public even the basic factual elements of its defence. Second, some of the information said by the AG to be confidential was already in the public domain (although the court accepted the proposed broadcast would add to it)
- the invocation of risking causing real damage to national security was not in itself conclusive and depended on the legal context. In this case, the AG's evidence dealt almost entirely with the risks which would arise from the naming of the agent, not the risks of publishing the fact of the BBC's intention to identify the agent unless restrained by the court (this being the point of the preliminary hearing)
- on the basis of the above, the court's assessment was that the AG had not discharged the burden of proving that a significant derogation from the principle of open justice (as would have been involved in this case, preventing the public from understanding the context and correctness of the arguments made and of the decision reached) was justified

## Case details

- Court: Media and Communications List, Queen's Bench Division, High Court of Justice
- Judge: Mr Justice Chamberlain
- Date of judgment: 24 February 2022

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