IN THE CROWN COURT AT SOUTHWARK

Date: 9 December 2020

Before:

MRS JUSTICE WHIPPLE

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R
- v -
Charles Elphicke

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Hugh Forgan (instructed by **CPS**) for the Crown
Sarah Palin (instructed by the editorial legal departments of **Associated Newspapers Ltd, Times Newspapers Ltd and Guardian News and Media Ltd)** for the Media,
Zoe Johnson QC (instructed by **BCL Solicitors LLP**)
Ian Winter QC and **Rachna Gokani** (instructed by **BCL Solicitors LLP**) for the Defendant
(written submissions only)

Hearing date: Wednesday, 25 November 2020

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RULING ON DISCLOSURE OF CHARACTER REFERENCES

Whipple J:

Background

1. Charles Elphicke was sentenced on 15 September 2020. In advance of his sentencing hearing, the Defence uploaded 34 character references to the digital case system.

2. The Defence invited me to read these references in advance of the sentencing hearing, which I did. The Prosecution did not, as I recall, make any reference to them at the sentencing hearing. Mr Winter QC for Mr Elphicke did refer to them at the hearing, but only in general terms. He did not name any individual referee or read out any content.

3. In my sentencing remarks, I confirmed that I had read the character references. I did not name any referee or refer to any content.

4. After the sentencing hearing, on the same day, I received an email from the Guardian Newspaper requesting sight of the character references. That was followed by a similar request on behalf of the Times Newspaper. As matters have developed, three media organisations have now joined in making the present application for disclosure of the character references (the three are Associated Newspapers Ltd, Guardian News and Media Ltd, and Times Newspapers Ltd, the "Media"). Their application is advanced under Crim PR 5.8(7).

5. I referred the Guardian's request to the Prosecution and Defence for their views. The Defence's initial response from Mr Winter (by email to my clerk dated 16 September 2020) was that the referees "were assured anonymity" and some time was needed to check the position with them. The Prosecution took the view that the references should be disclosed. A few days later, more detailed Defence submissions resisted disclosure for a number of reasons.

6. In light of this difference of opinion, on 18 September 2020 I gave directions for service of skeleton arguments and for the Defence also to provide a confidential schedule identifying, in relation to each reference,

    a. Whether that reference contained confidential information which the Defence suggested should not be disclosed,
    b. What, if any, mitigating measures the Defence suggested to protect that information (for example, redaction of names or content).

7. The Defence skeleton (drafted by Mr Winter and Ms Gokani, trial counsel) was dated 16 October 2020 and was accompanied by a confidential schedule as I had directed. The Defence case was that the references should not be disclosed at all. Alternatively, the Defence submitted that the individual referees should have an opportunity of making submissions. The confidential schedule highlighted what was said to be personal data including sensitive personal data in each reference, and by email dated 19 October 2020 the Defence confirmed that they sought redaction of any highlighted part if the Court was minded to order disclosure. In every case, the redactions extended to the referee's name and address, whether that was a business or professional address or private address, as well as other details.

8. On receipt of these documents, I decided the matter should proceed to a hearing and the application was listed for a half day on 25 November 2020.

9. On 27 October 2020, BCL Solicitors LLP ("BCL) informed me that Mr Elphicke did not wish to be present at the hearing and was content for the matter to be decided in his absence. He was no longer able to fund his defence costs. He also asked me to determine the matter on the papers without a hearing.

10. On 28 October 2020, the Prosecution filed their skeleton. The Prosecution submitted that the character references should be disclosed in line with the principle of open justice.

11. On 3 November 2020, I indicated that the hearing already fixed for 25 November 2020 would go ahead; I considered that there was a serious issue to be determined and the press were entitled to be heard on their application. I excused Mr Elphicke's attendance. I directed BCL, as officers of the Court, to contact each of the 34 character referees to tell them that they were entitled to make written representations about disclosure of their references, if they wished to, by 4pm on Friday 20 November 2020.

12. On 19 or 20 November 2020 (I am unsure precisely when), five of the character referees voluntarily published their character references without any substantive redaction. (The Defence had previously suggested anonymisation and extensive redaction of these five references, but that position was not in the event maintained by the referees.) In this ruling I will refer to each referee by the number they were given on the Defence index, as well as by their names if appropriate. The five who voluntarily disclosed in this way were:

    1). The Rt Hon Theresa Villiers, MP
    2). The Rt Hon Sire Roger Gale, MP
    3). Adam Holloway, MP
    4). Col Bob Stewart DSO, MP
    8). David Anthony Lord Freud.

13. Later on 20 November 2020, I received the representations provided by other referees to BCL. Three character referees consented to disclosure, apart from wishing to have sensitive personal information such as personal contact details removed. I commend these three for their openness. Apart from sensitive personal information, their references will be disclosed in full. They are:

    19). Elaine Newton
    20). James Fitt
    30). The Revd Jonathan Aitken.

14. That left 26 character references subject to the Media's application. Of those 26, 4 authors made no individual representations. The rest (that is, 22) did make submissions which covered a range of views. At one end, some expressed a strong objection to disclosure as a point of principle, a few saying that they had been given express assurance that their references would be confidential. Others were willing for their

references to be disclosed as long as their own identity and sensitive passages from the references were removed.

15. On 23 November 2020, I received written submissions from the Media, setting out their case that the character references were not confidential documents and that the default position was disclosure, but that a fact-specific balancing exercise needed to be conducted to determine whether the whole or any part of the reference should be excepted. The Media have not, of course, even now seen the character references to which their application relates, so their submissions were necessarily general in nature.

16. I heard the application on 25 November 2020. Ms Palin represented the Media. Ms Johnson QC represented BCL in that firm's own right. Mr Forgan represented the Prosecution. The Defendant was not present or represented. I am grateful to all counsel and solicitors for their submissions, in writing and at the hearing.

Adjournment

17. By email dated 16 November 2020, the Defence (by BCL) invited me to delay the hearing because BCL had not been able to take Mr Elphicke's instructions on the Prosecution skeleton. I declined that invitation. These were my reasons for so deciding:

    a. I had already excused Mr Elphicke from attending the hearing, at his request.
    b. I had already received submissions from his representatives, so his position was known.
    c. The dispute lay between the Media and the character referees. Mr Elphicke was not central to its resolution.
    d. The Media applied for disclosure of these references on 15 September 2020, some weeks ago. Finality of litigation and certainty of outcome was needed.
    e. If I was to decide that open justice required disclosure of these references, then open justice should not be delayed longer than it needs to be. If on the other hand the references are not to be disclosed because they are private, then the individuals should be put out of their anxiety as soon as possible.
    f. The interests of justice and the overriding objective favoured resolution of this matter as soon as possible.

The general position

18. The Media and the Prosecution submit that character references are a form of evidence, like any other evidence adduced before the Crown Court. There may be differences of presentation because character references are often submitted in letter form, as they were here, but they can still in an appropriate case be challenged and the referee can be brought to Court to face questions. The same basic rules apply to character references as to any other type of evidence put before the Court.

19. Further, they say that if there are parts of a character reference which the referee does not wish to go into the public domain the correct course is for the defence to make an application to the Court in advance of the sentencing hearing. That was not done in this instance, and it should have been.

20. They note that these character referees were all volunteers to the cause of Mr Elphicke's defence; none of them was under any obligation to provide a reference. If the Court had not been willing to grant anonymity or to protect certain parts of the reference as confidential, if that had been raised in advance, that referee could simply have declined to give the reference. Instead the references were simply put before the Court at a public hearing. That makes them public documents.

21. They rely on *R (Guardian News and Media Ltd) v City of Westminster Magistrates Court* [2012] EWCA Civ 420, which held that the default position where documents have been placed before a judge and referred to in the course of proceedings is that the media are entitled to have access in accordance with the open justice principle. The case is cited in the Judicial College publication entitled "Reporting Restrictions in the Criminal Court" (revised in May 2016, see paragraph 5.2). They draw to my attention a recent statement of the principle in *Dring v Cape Intermediate Holdings Ltd (Media Lawyers Association intervening)* [2019] UKSC 38. The headnote at [2020] AC 629 states:

> "(2) … the default position was that the public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents which had been placed before the court and referred to during the hearing; that, however, a non-party did not have a right to be granted access under the inherent jurisdiction but would have to explain why he sought access and how granting him access would advance the open justice principle; that the court would then have to carry out a fact-specific balancing exercise …"

22. So, argue the Media and the Prosecution, the open justice principle applies. The contrary is not supported by any authority. The character references are not confidential and the default position is disclosure.

23. Further, Ms Palin said that this was not a novel application. The Media had been successful in securing disclosure of a character reference in another case, where the reference was written by an MP (Kate Osamur) for her son's sentencing hearing; the names of other referees were ordered to be disclosed also.

24. For BCL, Ms Johnson contended that character references were confidential to the Court. She drew my attention to Crim PD 5B which deals with access to information held by the Court and defines certain categories of documents, including "Confidential Documents" at paragraph 5B.19-20; she submits that character references are similar to pre-sentence reports, medical reports, victim impact statements and confiscation summaries which paragraph 5B.20 identifies as confidential documents under this heading. She argued that it was a reasonable assumption for anyone to make, in advance of this application and the close scrutiny now applied to it, that the character references in this case would be received in confidence by the Court and would be kept confidential by the Court. Neither she nor those who instruct her have any experience of the press applying for disclosure of character references as has occurred here. There is a risk that this case will set a precedent and will break a long-established practice. That will serve to frustrate the general expectation that character references will not become public.

25. The Defence submission (on paper) is that these are confidential documents in the sense that the Press has no right to see them, either in law (because it is said that Article 10, which protects freedom of speech, does not apply) or by convention (because the Press do not usually ask to see them); alternatively, that I should decline disclosure even if otherwise permitted because of the likely chilling effect. Further, the Defence relied on Article 8 ECHR (right to private life), the General Data Protection Regulation (GDPR) and Data Protection Act 2018 (DPA 2018), and the common law position which safeguards an individual's right to or expectation of privacy. They argued that there was no public interest in any of the references.

26. I accept the submissions of the Media and the Prosecution. Character references are evidence, like any other evidence. The evidence is received by the Court for the purposes of passing sentence, at a public hearing. "*All evidence communicated to the Court is communicated publicly"* (see *AG v Leveller Magazine Ltd* [1979] AC 440 at 450 cited in *Khuja v Times Newspapers Ltd* [2017] UKSC 49 at para 16). The open justice principle applies. The guidance in *Cape Holdings* and *Guardian Newspapers* is binding on me. The default position is that the public should be allowed access.

27. Crim PD 5B does not refer to character references, but if anything, it supports the Media's case because character references are akin to witness statements which are read or summarised in whole or in part, which the PD classifies as documents which generally should be made available on request (paragraphs 12-16).

28. These character references were before the Court at a public hearing. Either party, or the Court, could have referred to the references, including naming the referees, during the course of the public hearing. If that had occurred, the press could have reported that freely. This application is in effect an extension of the reporting at that sentencing hearing. There is no practice that character references are confidential to the Court, far from it. This application does not break new ground.

29. Contrary to the Defence submissions, Article 10 is engaged, and the balancing exercise – which I will come on to - involves weighing that Article (and Article 6, the right to fair trial which includes open justice) against the individual's rights under Article 8.

30. GDPR and the DPA 2018 are not relevant, given that there is no general expectation of privacy in relation to personal data which is processed by the judiciary exercising judicial functions: see Crim PD 5B paragraph 4 which refers to the exemption under s 35 of the Data Protection Act 1998. GDPR is disapplied by s 15 of the DPA 2018 read with Schedule 2, Part 1 para 5(2) and 5(3). The effect of these provisions is explained in the privacy notice held on the judiciary website under the heading "Judiciary and Data Protection".[1]

31. I doubt that there will be a chilling effect. Open justice is ultimately a safeguard for individual rights, it does not threaten them, see again *Khuja* at para 16 where the Court (Lord Sumption JSC) stated that:

[1] https://www.judiciary.uk/about-the-judiciary/judiciary-and-data-protection-privacy-notice/

> "press reporting of legal proceedings is an extension of the concept of open justice, and is inseparable from it. In reporting what has been said and done at a public trial, the media serve as the eyes and the ears of a wider public …"

If people understand the role that a character reference plays in the sentencing process, informing the Court of the wider picture, I doubt that many will walk away. To the contrary, disclosure will ultimately promote confidence in the criminal justice system, in which such referees play a part.

32. The character references as a class are not confidential documents. They were put before a public hearing as evidence. The open justice principle applies and the default position is disclosure.

The Balancing Exercise

33. It is necessary, however, to conduct a "fact-specific balancing exercise" (*Cape Holdings, Guardian, Khuja)* in relation to each reference before determining whether, and if so in what form and to what extent, it should be disclosed. I complete the quote from *Cape Holdings* above. That exercise involves:

> "… weighing the potential value of the information sought in advancing the purpose of the open justice principle against any risk of harm which its disclosure might cause to the maintenance of an effective judicial process or to the legitimate interests of others."

34. Crim PD 5B, paragraph 5.9 puts the burden on the Media to justify their request for access. A non-exhaustive list of criteria is set out. Of particular relevance here are: v. the value of the documents in advancing the open justice principle, vi. the risk of harm to the legitimate interests of others, and vii. reasons for resisting disclosure and representations received from affected parties.

35. To the extent that any derogation from open justice is warranted, it should be no greater than necessary.

Proper Journalistic Purpose

36. Ms Palin explains the Media's interest in this material. She says that there is a legitimate public debate about the conviction of an elected member of the legislature and a member of the executive, as Mr Elphicke was at the time of some at least of his offending. The public is entitled to know what was said to the Court about Mr Elphicke by friends, colleagues and constituents, because that informs public discussion about his offending and conduct, and about society's attitudes to politicians and others in public life who commit offences. This is primarily a political discussion which carries significant weight under Art 10.

37. Ms Johnson doubts the relevance of some of the individual character references to this stated journalistic purpose.

38. The Defence submissions (in writing) asserted that there was no public interest in any of these references.

39. In my judgment the Media are obviously pursuing a proper journalistic purpose. There is a legitimate public interest in knowing how the Court arrived at sentence in this case, and in knowing what was said about Mr Elphicke by those who know him. The public interest is stronger in relation to character referees who are themselves in public life but it exists even for those who are private individuals.

Representations by Character Referees

40. Many referees did not object to disclosure so long as information personal to them (including their names) was withheld. The most commonly cited reason for wanting to remain anonymous was the fear of press intrusion, particularly by the tabloids, if they were now associated with this case; some also feared being denigrated by their peers or associates for offering support to a convicted sex offender. These sorts of reasons have nothing to do with the content of the references, or with any personal or sensitive information contained in the reference. They are more to do with the fact that the references were given in a case involving a former politician which has attracted a great deal of interest in the press and amongst the public.

41. Some referees had particular, personal reasons for seeking anonymity and/or confidentiality, relating to the content of their references (for example, details about medical conditions).

42. Four of the referees suggested that they had been given express assurances that their letters would remain confidential in their entirety. I asked Miss Peart, partner at BCL with conduct of Mr Elphicke's defence, if she knew how this had come about. She did not. She told me that no one at her firm had given those assurances. I accept what she said. I cannot take the matter further. I can only say that if such assurances were given, they were false assurances which were misconceived in law for reasons outlined above. Such references do not, of course, bind the Court.

43. No referee suggested they had been promised anonymity, specifically, so I put Mr Winter's early email to the Court to one side.

44. Bearing these representations in mind, I approach the balancing exercise on the basis that, however it came about, most of these referees did not understand when they gave their references that those references could be disclosed or published. That is a factor to weigh in the balance in this case.

45. But it is not a trump card. It has to be balanced against the usual rule that witnesses are named as they give their evidence. This is not just a formality: if the Court is to accept and act on evidence provided for sentence, the Court needs to know that the witness is prepared to stand up before all the world and provide that reference. If the witness is not so willing, that might reduce the value of the evidence to the sentencing judge. A similar point was emphasised in *Khuja* where it was said that the identity of a person should be known where it was not a "peripheral or irrelevant feature" of the particular story and should be disclosed despite the "collateral impact" that would have (at para 34(2) and (5)). The attendant publicity may be unwelcome and itself may interfere with private life (see, as a further example, *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47), but that is part of the open justice principle at work.

Media's Approach

46. In submissions, Ms Palin said the Media's main interest related to those referees who occupied a role in public life. She said it was important that those individuals' names should be known. They held a position in the local community, some were elected officials whose electorate were entitled to know about the reference and its contents, others were local business and spiritual leaders who similarly should be identified because of their public, representative role. This was strongly in the public interest and in relation to this cohort Article 10 applied with some force. Confidential and personal details could be redacted if necessary.

47. Ms Palin accepted there was a sliding scale. Elected officials and other public figures who represented their communities were at one end; ordinary private individuals who were constituents were at the other end. In relation to the latter group, concerns about press intrusion weighed more heavily. For constituents (and employees, short of civil servants or political advisors) the balance could best be drawn by anonymising the character references (ie redacting names and passages which could identify the author) but otherwise allowing disclosure of the content. This would permit discussion of the substance of the references without risking harm to the private lives of these individuals.

48. Mr Forgan agreed with this approach and was in line with the Media when it came to considering which side of the anonymity line each reference fell on.

49. Ms Johnson did not fundamentally disagree with this approach. She accepted that elected officials should in principle be named. She did not accept that non-elected officials should necessarily be named. She drew the line in a slightly different place from Ms Palin and Mr Forgan, and argued that anonymity should be conferred on nearly all these referees.

50. The Defence written submissions did not address this issue.

51. I have considered each reference individually, alongside the submissions from the various legal teams and the representations provided to me by the referees themselves. I accept the general approach advocated by all Counsel present at the hearing. I accept the agreed positions at each end of the scale for the referees in this case (one end for elected officials who should be named and the other for private individuals as constituents who may be anonymised). I have focussed particular attention on the referees falling somewhere between those two bookends.

Conclusion

52. Those who are elected to public office, and who give references inviting the Court to take note of their elected position should be named, for the sake of open justice and transparency. There are two such individuals in this category. One, however, advances strong personal reasons of a medical nature which engage Art 8 and lead me to conclude that person should not be named. The other should be named. That other, who made no representations to me to suggest his reference should not be disclosed, is:

    33). Nigel Collor

53. Four referees speak about their knowledge of Mr Elphicke including during periods when they were elected officials (one a Mayoress, one a district councillor, two as town councillors). Three of these appear to have retired from local politics. The position of the fourth is not clear and I have given that person the benefit of the doubt. Thus, I approach these four on the basis that they were not in elected office when the references were given. For that reason, on balance, they go into the category of those whose references will be anonymised, as will details which would clearly lead to identification of those individuals to the public generally. Where possible, the fact that they formerly held elected office has not been redacted.

54. Other referees are public figures, although they are not elected officials.

    a. Fr Cridland is a church leader. I have considered carefully his reasons for not wishing his name to be exposed. But he wrote his reference on headed parish notepaper, and thus invited the Court to give it weight because it came from a person with community connections and some influence. His parishioners have a right to know that he has provided a character reference for Mr Elphicke and he must be named.
    b. Mr Wiggins speaks of his association with Mr Elphicke on projects relating to the Port of Dover, which entity has national strategic and political importance. He speaks of being appointed as a community director on the Board of the Port of Dover in 2014 and my understanding is that he is still on the Board, with a particular role to represent the local community. This puts him in a category analogous to elected officials and other community representatives. He asserts that he provided a reference on the "explicit understanding" that it would not be made public and that it was written "in confidence"; I have addressed that above, he should not have been given that assurance, but the fact that he was or may have been misled about the status of his reference does not outweigh the strong reasons for it now to be disclosed on a named basis.
    c. Mr Single was Mr Elphicke's agent in 2017 and at the time of writing the reference was a past treasurer and current chairman of the Dover and Deal Conservative Association. This gives him a public profile, he represents the local party members and thus a section of his local community. His name should be disclosed along with his reference.
    d. Mr Foley writes on headed notepaper of the Dover District Chamber of Commerce of which he is the Chief Executive. He is a public figure in the locality of Dover and Deal. Mr Foley has not made any representations to me. Given the important role he occupies in his local community, he should be named.

55. References provided by the four individuals referred to in the preceding paragraph will be disclosed with their names revealed.[2]

56. To the extent not specifically dealt with above, the remaining references come from private individuals. Here too there is a range, from private constituents to others who

[2] By reference to the index, they are numbers 7). Fr Jeff Cridland, 9). Neil Wiggins, 21). Keith Single, 26). David Foley

perform some role in the community falling short of being public figures or community representatives. The value in disclosing these references lies in being able to see the content of their references. Naming them will add little to the debate and risks some harm to the individuals concerned. The balance therefore comes down in favour of releasing the references with the author's name redacted, as well as information which could easily lead to identification. Drawing the line between information to be redacted as personal or identifying, while leaving unredacted the content and substance of the reference, is not always straightforward. I have drawn the balance in each case applying principles outlined above. Into this category fall the remaining 21 references.[3]

Summary

57. The character references provided for Mr Elphicke were not provided in confidence to the Court. If any referee was told that their reference would remain confidential, that referee was misled. If any referee understood that would be the case, that was a misapprehension on their part.

58. The correct position is that the references were put before the Court at a public hearing. Any part of any reference could have been referred to openly at that hearing and reported by the press. The present application is an extension of reporting from Court.

59. The default position is that the references should be released. This is not to create any new law or break any existing convention or practice. It is to apply well-established principles which confirm that criminal justice must be open.

60. Before ordering disclosure, however, the Court must conduct a fact-sensitive balancing exercise weighing the value in disclosure against the risk of harm to justice or to the individual. This balancing exercise will determine whether the reference should be disclosed at all and if so, whether it should be subject to any redaction.

61. In this case, I conclude that all the character references should be disclosed. The value of disclosure, in promoting open justice, outweighs the risk of harm.

62. All sensitive personal information has been redacted.

63. Some referees are to be named. That is appropriate where the referee consents to that course, or where the referee is a public figure or holds a representative position in society or the local community.

64. Other references should be redacted to remove the name of the individual referee and any information which might easily lead to identification of that referee.

65. On the terms outlined above, this application is granted.

[3] By reference to the index, numbers: 5). 6). 10). 11). 12). 13). 14). 15). 16). 17). 18). 22). 23). 24). 25). 27). 28). 29). 31). 32). 34).