

Public interest immunity in protecting informants



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Introduction

The role of informants in an investigation is crucial as the information provided by an informant may be the only piece of evidence or clue available to the law enforcement agencies. So, it is critical that some clarity is drawn in identifying the rights of the informants and how and when the law should protect them. It can be argued that adding clarity to this area of law will inform and motivate informants to facilitate investigations when required. The aim of this essay is to explore the role of law in public interest immunity (PII) to protect informants as a class. As a result, this essay will explore the rights of informants and the role of law in protecting them under the principles of public interest immunity (PII). This essay will explore case law and legislation to critically analyse the role of law in PII to protect informants as a class in the following paragraphs. In doing so, this essay will argue that informants as a class should be protected by the law under the principles of public interest immunity.

Public Interest Immunity (PII)

Generally, there is public interest in protecting the identity of those who provide important information to the police, that is, the informants. As a result, the disclosure of their identity or any material that has the potential to reveal their identity is restricted through case law. However, deriving from English common law, a judge has the discretion to reveal the identity of the informant if it helps establish the fact that the accused in the relevant case is innocent. One of the statutory instruments that applicable is section 21 of the Criminal Procedure and Investigations Act 1996[1](CPIA 1996).

In *R v Chief Constable of the West Midlands ex parte Wiley* [2], it was Lord Templeman who stated that, based on the principles of public interest immunity, the disclosure of information can be denied which is pertinent to the case and also important in the determination of the proceeding in question. Hence, the only reason to deviate from this is if public interest demands for it.[3]Therefore, there must be equality of arms[4]in public interest immunity (PII). The thrust of the principle of public interest immunity to refuse disclosure of relevant material is on the ground that to do so would harm the public interest. However, disclosure can be refused if material might be privileged, material might be lost, and material might be difficult to get hold of. In civil proceedings, the procedure is carried out according to Order 24 of the Rules of the Supreme Court and to withhold is specifically stated in rule 15 which states that,

“ 15. The foregoing provisions of this Order shall be without prejudice to any rule of law which authorises or requires the withholding of any document on the ground that the disclosure of it would be injurious to the public interest.”

[5]

It is clear from rule 15 that public interest is the ultimate factor to be considered in cases of public interest immunity. For conciseness of argument, this essay will solely focus on informants.

In criminal matters where the police refrains from disclosing the identity of the informant to the defendant, there is an overlap between the principles of common law of open justice which requires that maximum disclosure takes place as established in *R v Davis, Johnson and Rowe* [6]and Article 6 ECHR

which is demonstrated in the case of *R v H* [7]. In *R v H*, the House of Lords held that a trial judge should take into account all the information that are available based on the nature of the PII pursued as well as guaranteeing that the complete disclosure process does not reveal more than is required given the context of the case [8]. A similar example is noted in the case of *Al Rawi v Security Service* [9], several men claimed for damages as they have been detained by foreign forces including places like Guantanamo Bay and claimed that the UK Security Service along with others engaged in ill treatment. In return the UK Security Service stated that they refrained from giving access to certain pieces of evidence and would rather be represented by special advocates [10]. It was held in this case that if governmental bodies wanted to rely on the argument of national security, they would need to rely on PII which gives them the right to do so in relation to providing protection for State interests wherever it is required [11]. The case law discussed so far provides a general overview of the attitude of the courts. However, what needs to be considered is when disclosure of the identity of the informant based on interests of justice, the protection towards the informant is still violated despite being justified by any legal reasoning or case law.

Informant Rights and the Role of Law

While discussing the role of informants and the role of law in protecting them, a discussion of criminal matters is warranted. It should be stated that most cases relating to PII involve civil matters even though the principles can also be applied in criminal matters where the applications are generally altered as in the case of *Marks v Beyfus* [12]. In *Marks v Beyfus*, Lord Esher <https://assignbuster.com/public-interest-immunity-in-protecting-informants/>

stated that it was precisely recognised that it is not generally required by the witness to disclose the identity of a police informant. This is due to the significance of public interested in providing protection and as well as motivating individuals to provide information to the law and enforcement agencies. Hence, witnesses should not be asked about the identity of the informants or questions that have the potential to reveal the identity of the informants[13]. However, there are exceptions in PII. For criminal matters, if the context of the case is such that refraining from disclosing the identity of the informants may jeopardise the integrity of the trial by impacting on the correctness of adjudication in the case and might lead to the innocent being convicted and imprisoned. These types of cases are usually quite rare. This ratio has been given by the House of Lords in the case, *R v Horseferry Road Magistrates' Court, Ex p Bennett*[14]. In *R v Horseferry Road Magistrates' Court, Ex p Bennett*, the House of Lords held that in a situation where a person is charged criminally, if the person does not get justice in relation to the process, then the person should not be tried.[15]As a result, if it requires the identity of the informant to be disclosed in order to establish a defendant's innocence, the court will exercise its discretion and allow the disclosure of the identity of the informant. This case reiterated the principles established in *Makanjuola v. Commissioner of Police for the Metropolis* [16]that "*public interest immunity is not a trump card vouchsafed to certain privileged players to play when and as they wish. It is an exclusionary rule, imposed on parties in certain circumstances, even where it is to their disadvantage in litigation.*"[17]It is submitted that as discussed already in this essay, even though the innocent should get justice but compromising

the identity of the informant is compromising his/her protection and confidence in law and enforcement agencies.

It is a continuing duty of the court to consider the issue of disclosure and decide whether disclosure should be ordered or whether prosecution should offer no evidence which would disclose the identity of the informant[18]. It can be stated that in this kind of a circumstance, the trial judge is put in a complicated situation trying to assess in terms of whether the disclosure of the identity of the informant is actually necessary to establish that the defendant is innocent. If his decision is positive, then the disclosure must be ordered by the judge even though the threshold is quite low. Furthermore, in the case of R v Hallett[19], it was held by the Court of Appeal that a defendant should not be: *"...deprived of the opportunity of casting doubt on the case against him .[20]"* Therefore, according to the court, what is necessary is a real possibility that disclosing the identity of the informant would actually benefit to the defence.

The principles of public interest immunity protect the disclosure of an informer's identity as well as deal with exceptions extends to the premises where the police have undertaken surveillance on a suspected individual[21]. In this kind of a circumstance, the occupier's of the premises may feel uncomfortable, vulnerable, exposed and frightened as their premises may be identify which may victimise them. This may also result in the public refraining from assisting the police with their investigations or letting law enforcement agencies to use people's premises for surveillance purposes. Taking into account the potential danger of the occupiers of the premises, in circumstances where the occupiers do not wish to allow

disclosure, it is not permitted being subject to public interest immunity. However, there can be circumstances where the disclosure of the identity of the informant becomes necessary to test the evidence put forward by the police. In the case of *R v Rankine*[22], the activities of an alleged drug dealer had been under the surveillance of police officers through the use of private premises. It was the decision of the Court of Appeal that these types of cases can be “ indistinguishable” from the ones where police informers are involved[23]. Hence, it is inappropriate to withhold the location of the surveillance point given that restricting such information will not lead to the miscarriage of justice. In addition to this, *R v Johnson (Kenneth)*[24], was further explored by the Court of Appeal. The Court of Appeal held that the required basis for the prosecution to make an application to withhold the location of surveillance point[25]. In this specific case, it was required for an officer to testify that he had visited the premises and ascertained the permission of the occupiers to the potential disclosure of the identity of the premises used. Additionally, an officer with the rank of at least a chief inspector to testify that immediately before the trial he has visited the premises in order to identify and ascertain whether the occupiers has not changed and in any circumstance, their attitude towards the identification of the premises as well as its occupants[26]. Thus, in relation to the disclosure of the identity of informers, a qualitative judgment of the decision by the trial judge is necessary as to when a failure to disclose the location of surveillance risks occasioning a miscarriage of justice even though these types of cases are difficult. Moreover, in relation to the identity of informants, if the police are required to disclose their surveillance point, the police sometimes prefer to offer no evidence instead of comprising their

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source as *Blake v DPP*[27]. In the case of *An Informer v A Chief Constable* [28], the duty of care towards an informant was owed by the police Chief Constable. It was held in that case that the police definitely owed a duty of care to the informant but was not liable for his economic loss. This is also supported by Lord Toulson's statement in *Michael* [29] as he states, " ... an example of a duty of care arising from an assumption of responsibility coupled with reliance by the claimant ... The police conceded that they owed a duty of care to protect his physical well-being, and that of his family. They had assured him that they would do so and he had acted on the faith of their assurances." [30] *In the Matter of A (A Child)* [31] is an important case even though this decision was reversed by the Court of Appeal by ordering disclosure of the documents. By the time, the case has reached the Supreme Court, the disclosure has been made to the mother of the child as well as to the guardian and the Supreme Court decided to dismiss the appeal[32].

Deriving from these cases, it can be stated that even though the fact that a duty of care by the police owed to the defendant is clearly established, the potential of injustice as a result of nondisclosure of information and/or identity of the informant will not be undermined in the process. It is submitted that informants as a class should be protected at any case. Where the courts are faced with the dilemma of justice to the accused who is potentially innocent and putting the information provided by the informant to test by disclosing the identity of the informant, the courts and the police put the informants in a vulnerable position.

Conclusion

This essay aimed to explore the role of public interest immunity in protecting informants as a class. It can be concluded from the discussion that this is quite a complex and challenging area of law. The general rule is, disclosure is necessary if it is necessitated by the interests of justice. However, as evidenced in the case law that has been considered in this essay that there are factors that need to be taken into account. In answering the question whether law should protect informants as a class under the principles of public interest immunity, the answer is definitely yes but what is also essential to take into account is considering the balance between the necessity to restrict disclosure of the identity of the informant and the possibility of injustice towards the defendant. This is a question best left for the courts in the United Kingdom (UK).

[1]Criminal Procedure and Investigations Act 1996, accessed 20 February 2017.

[2] *R v Chief Constable of the West Midlands ex parte Wiley* [1994] 3 All ER 420.

[3]Ibid, *R v Chief Constable of the West Midlands ex parte Wiley*.

[4]International Review, “ The principle of equality of arms is a jurisprudential principle issued by the European Court of Human Rights and is a part of the right to a fair trial written in the (European) Convention for human rights and fundamental freedoms.” accessed 22 February 2017.

[5] Order 24 of the Rules of the Supreme Court < [https://www. supremecourt. uk/docs/uksc_rules_2009. pdf](https://www.supremecourt.uk/docs/uksc_rules_2009.pdf)> accessed 19 February 2017.

[6] *R v Davis, Johnson and Rowe* [1993] 1 WLR 613-614.

[7] *R v H* [2004] UKHL 3, accessed 21 February 2017.

[8] *Ibid*, *R v H*.

[9] *Al Rawi v Security Service* [2011] UKSC 34 accessed 22 February 2017.

[10] *Ibid*, *Al Rawi v Security Service*

[11] *Ibid*, *Al Rawi v Security Service*

[12] *Marks v Beyfus* (1890) 25 QBD 494

[13] *Ibid*, *Marks v Beyfus*.

[14] *R. v. Horseferry Road Magistrates' Court, ex p. Bennett* (No. 2) [1994] 1 All E. R. 289, D. C.

[15] *Ibid*, *R. v. Horseferry Road Magistrates' Court, ex p. Bennett*.

[16] *Makanjuola v. Commissioner of Police for the Metropolis* [1992] 3 All E. R. 617, C. A. (Civ. Div.)

[17] *Ibid*, *Makanjuola v. Commissioner of Police for the Metropolis*.

[18] Public Interest Immunity, Research Paper 96/25, 22 February 1996, < [http://www. researchbriefings. files. parliament. uk/documents/RP96-25/RP96-25. pdf](http://www.researchbriefings.files.parliament.uk/documents/RP96-25/RP96-25.pdf)> accessed 21 February 2016.

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[19]R v Hallett [1986] Crim LR 462.

[20]Ibid, R v Hallett.

[21]Ibid, Research Paper 96/25.

[22]R v Rankine (1986) 83 Cr. App. R. 18

[23]Ibid, R v Rankine.

[24]R v Johnson (Kenneth) [1988] 1 W. L. R. 1377.

[25]Ibid, R v Johnson (Kenneth).

[26]Ibid, R v Johnson (Kenneth).

[27]Blake v DPP [1993] 97 Cr. App. R. 169.

[28] *An Informer v A Chief Constable* [2013] QB 579.

[29]Michael v The Chief Constable of South Wales Police [2015] UKSC 2.

[30]Ibid, Michael v The Chief Constable of South Wales Police.

[31] *In the Matter of A (A Child)* [2012] UKSC 60.

[32]Ibid, *In the Matter of A (A Child)*.