OUTER HOUSE, COURT OF SESSION

2020 CSOH 35

P931/19

OPINION OF LORD DOHERTY

in the cause

(FIRST) THE BRITISH BROADCASTING CORPORATION;
(SECOND) TIMES NEWSPAPERS LIMITED;
(THIRD) NEWS GROUP NEWSPAPERS LIMITED

Petitioners

for Judicial Review

Petitioners: McBrearty QC; Burness Paull LLP
Amicus Curiae: Pirie

19 March 2020

Introduction

[1] On 7 August 2019, in a chapter 33 ordinary cause at Forfar Sheriff Court (FFR-F170/19), the sheriff ("the first respondent") pronounced an interlocutor which included the following order:

> "*ex proprio motu,* in terms of s 4(2) of the Contempt of Court Act 1981, orders that publication of any report of these proceedings, or any part of them, be postponed until the further orders of court."

Neither the interlocutor nor the minute of proceedings contained an explanation of why the order was granted.

The rules

[2] At the time the order was made rule 48.2 of the Ordinary Cause Rules 1993 (Sheriff Court (Scotland) Act 1907, Schedule 1(as amended)) provided that where the sheriff was considering making an order restricting the reporting of proceedings he or she "may make an interim order" (rule 48.2(1)). The other provisions of chapter 48 were in substantially the same terms as the current provisions. The sheriff requires to specify in the interim order why he is considering making an order (rule 48.2(3)); and the sheriff clerk must immediately send a copy of the interim order to any interested person (rule 48.2(2)). Rule 48.3 makes provision for an "interested person" (defined in rule 48.1(2)) to make representations to the sheriff before an order is made. Rule 48.4 ordains that where an order is made the sheriff clerk must immediately send a copy to any interested person and arrange for publication of the making of the order to appear on the Scottish Court Service website. Rule 48.5 provides that a person aggrieved by an order may apply to the sheriff for its variation or revocation.

[3] In the Court of Session, chapter 102 of the Rules of the Court of Session 1994 makes similar provision to chapter 43 of the Ordinary Cause Rules. Prior to 2 March 2020 chapter 102 provided that where the court was considering making an order restricting the reporting of proceedings it "may make an interim order" (former rule 102.2(1)). Chapter 26 of the Sheriff Appeal Court Rules 2015 (former rule 26.2) and chapter 3 of the Summary Application Rules 1999 (rule 3.41.2(1)) were in like terms. Chapter 56 of the Criminal Procedure Rules (Act of Adjournal (Criminal Procedure Rules) 1996 (as amended)) makes similar provision in respect of criminal proceedings.

[4] With effect from 2 March 2020, chapter 102 of the Rules of Court, chapter 48 of the Ordinary Cause Rules, chapter 26 of the Sheriff Appeal Court Rules and chapter 3 of the

Summary Application Rules were amended by the Act of Sederunt (Rules of the Court of Session 1994, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment)(Reporting Restrictions) 2020 (SSI 2020/20). The effect of the amendments was that where a court is considering making a reporting restriction it must now proceed by first making an interim order. Previously (unless the word "may" fell to be construed as meaning "must") the rules were framed in permissive terms which gave the court the option of (i) making an interim order where it was considering making an order, or (ii) making an order without first making an interim order. At present, no such amendment has been made to chapter 56 of the Criminal Procedure Rules.

The procedure following the making of the order

[5] On 7 August 2019 a member of the sheriff clerk's staff intimated the order by email to interested parties including the petitioners. On receipt of that email the first petitioner asked if a reason for the court's imposition of the order could be provided. The staff member's response was "I have no comment". The first petitioner replied explaining that it was difficult for it to give full consideration to the merits of an application for variation or revocation when it did not know why the order had been granted. A depute sheriff clerk took over the correspondence with the first petitioner. She indicated that the requirements of chapter 48 had been complied with and that it would be "inappropriate" to provide further information. The first petitioner continued to press for reasons. On 27 August 2019 the sheriff clerk at Dundee wrote to the first petitioner expressing the view that reasons for the making of the order ought to have been provided. She apologised for the failure and for the inconvenience which had been caused. She intimated:

> "The presiding sheriff has now advised that the order was made due to the involvement of a vulnerable person in the case."

[6] On 29 August 2019 the first petitioner's Principal Solicitor, Rosalind McInnes, sent the following email reply:

> "...
>
> Thank you for your response. I am afraid that it takes us no further forward.
>
> 1. Please advise who the vulnerable person is.
> 2. Please advise the nature of the vulnerability.
> 3. Please advise the evidence which the sheriff has available which would justify the removal of the very strong presumption in favour of open justice articulated in Re S [2004] 4 All E R 683.
> 4. If the vulnerable person is a child, why has s 46 of the Children and Young Persons (Scotland) Act 1937 not been used?
> 5. Since s 4(2) of the Contempt of Court Act 1981 can only ever function to postpone reporting, not to prohibit it permanently, in what way can it assist a vulnerable person?
>
> The involvement of vulnerable people in court actions is not exceptional. Abrogation of open justice is, or should be, as the Inner House made clear as recently as *MH v The Mental Health Tribunal for Scotland* [2019] CSIH 14.
>
> ..."

[7] The sheriff clerk communicated the first petitioner's concerns to the first respondent the same day. Later that day she replied to Ms McInnes advising that the first respondent did not intend to provide any further reasons. She suggested that an appropriate remedy would be for a hearing to be assigned. Ms McInnes responded:

> "...
>
> If we don't have this information, we cannot effectively make representations. Nor can we know if we need to have a hearing.
>
> ..."

Contempt of Court Act 1981

[8] Sections 4 and 11 of the Contempt of Court Act 1981 provide:

"**4.— Contemporary reports of proceedings.**
(1) Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.
(2) In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.

...

11. Publication of matters exempted from disclosure in court.
In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

Children and Young Persons (Scotland) Act 1937

[9] Section 9 of the Children and Young Persons (Scotland) Act 1937 provides:

"**46.— Power to prohibit publication of certain matter in newspapers.**
(1) In relation to any proceedings in any court, the court may direct that—

(a) no newspaper report of the proceedings shall reveal the name, address, or school, or include any particulars calculated to lead to the identification, of a person under the age of seventeen years concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness therein;
(b) no picture shall be published in any newspaper as being or including a picture of a person under the age of seventeen years so concerned in the proceedings as aforesaid; except in so far (if at all) as may be permitted by the direction of the court.

..."

The petition

[10] This petition for judicial review was served by the petitioners on the first respondent and the Scottish Courts and Tribunals Service (the second respondent). The petition seeks the following declarators:

> "(i) Declarator that by intimating to the petitioners the order granted by the First Respondent under section 4(2) of the Contempt of Court Act 1981, dated 7 August 2019, without contemporaneously intimating reasons for the grant of the order which would have been adequate to allow the Petitioners to make an informed decision as to whether to seek the variation or revocation of the order, the Respondents acted in breach of the Petitioners' rights at common law, *et separatim* in breach of the Petitioners' rights under article 10 of the European Convention of Human Rights, *et separatim* irrationally.
>
> (ii) Declarator that the reasons intimated to the Petitioners by way of letter dated 27 August 2019 as to why the First Respondent had granted the order ...were inadequate for the purpose of enabling the Petitioners to make an informed decision as to whether to seek the variation or revocation of the order, with the result that the Respondents acted in breach of the Petitioners' rights at common law, *et separatim* in breach of the Petitioners' rights under article 10 of the European Convention of Human Rights, *et separatim* irrationally."

Procedure to date

[11] On 27 November 2019 I granted permission to proceed in so far as the petition was directed against the first respondent, but I refused permission in so far as it was directed against the second respondent. I considered that the complaint against the second respondent had no real prospect of success. The decision to impose the section 4(2) order without specifying why it was made was the first respondent's decision, and the reasons which were subsequently given were his reasons. The second respondent merely acted as a conduit in communicating those reasons to the petitioners. If there was a duty to give reasons it was the first respondent's duty, and if the reasons which he gave were inadequate

it was his failure. The petitioners did not challenge the refusal of permission to proceed against the second respondent.

[12] The first respondent did not enter appearance. Since there would have been no contradictor, and the subject matter of the petition might raise matters of some importance, the court appointed Mr Pirie as *amicus curiae*. At Mr Pirie's request the Keeper of the Rolls obtained from Forfar Sheriff Court the initial writ and a note which the first respondent had prepared following the interlocutor of 7 August 2019. Those documents were lodged as productions. The sheriff court proceedings have been brought by the grandparents of an infant child against the child's sole surviving parent. The parent is a convicted prisoner serving a lengthy sentence of imprisonment. In terms of the initial writ the grandparents seek a residence order and parental rights and responsibilities in respect of the child. The hearing on 7 August 2019 was the first hearing in the case. The first respondent granted the grandparents an interim residence order and interim parental rights and responsibilities. The first respondent's note contained no discussion of the section 4(2) order. Mr Pirie was advised by the sheriff clerk that the court had been closed to the public during the hearing.

[13] In advance of the substantive hearing counsel for the petitioners and Mr Pirie lodged notes of argument. I am grateful to them for the considerable assistance which I have obtained from their written and oral submissions.

Counsel for the petitioners' submissions

[14] Mr McBrearty submitted that the importance of the open justice principle had been explained in *A* v *Secretary of State for the Home Department* 2014 SC (UKSC) 151, *Dring* v *Cape Intermediate Holdings Ltd* [2019] 3 WLR 429 and *MH* v *Mental Health Tribunal for Scotland* 2019 SC 432. In modern times the media's constitutional role in ensuring open justice was more

important than ever. When the court made an order imposing reporting restrictions it exercised a statutory power which permitted it in appropriate circumstances to derogate from the open justice principle. Where reasons for imposing reporting restrictions were not given the media were left completely in the dark as to whether to seek variation or revocation. News had a limited lifespan. It was essential that the media were given contemporaneous reasons for the imposition of an order if they were to perform their constitutional role properly. That was the position at common law in Scotland (a proposition for which tentative support could be derived from *British Broadcasting Corporation, Applicants* 2013 SLT 324, per Lord Glennie at para 43), and it was the position in England and Wales (*Birmingham Post & Mail Ltd* v *Birmingham City Council* (1994) 158 LG REV 523) (although it was accepted that in that jurisdiction the matter was governed by practice directions). The provision of contemporaneous reasons was also necessary if the article 10 rights of the media were to be practical and effective. In that regard reference was made to *Loizidou* v *Turkey* (1995) 20 EHRR 99, at para 72; *Artico* v *Italy* (1981) 3 EHRR 1, para 33; *Plattform 'Artzte fur das Leben'* v *Austria* (1991) 13 EHRR 204, at para 32; and *Magyar Helsinki Bizottsag* v *Hungary,* Case 18030/11, 8 November 2016, at paras 149-156. In addition, it would be irrational in a *Wednesbury* sense to provide aggrieved persons with a statutory right to apply for variation or revocation but to deny them the basic information which they required to decide whether there was a proper basis for making an application.

[15] By not providing reasons when he made the order the first respondent breached the petitioners' common law right to contemporaneous reasons *et separatim* their article 10 rights, and his decision to make an order and give no reasons was irrational. In any case, even if the first respondent had not been obliged to provide contemporaneous reasons for

his decision, he must have been obliged to provide reasons as soon as the first petitioner requested them.

[16] When, after much pressing, a response from the first respondent was eventually provided it was inadequate. It did not explain why the order was necessary to avoid a substantial risk of prejudice to the administration of justice in the proceedings or in any other proceedings. The statement that "the order was made due to the involvement of a vulnerable person in the case" did not assist in identifying what the substantial risk of prejudice to the administration of justice was, or why it was said to arise. Even now, with the benefit of the information which had been obtained by Mr Pirie, it remained impossible to discern the first respondent's thinking. It was very hard to see why it was thought that publicity about the proceedings would present a substantial risk of prejudice to the administration of justice. If the concern was that the child should not be identified then that could have been addressed by making an order in terms of section 46 of the Children and Young Persons (Scotland) Act 1937.

[17] Reasons need only be very brief, but they had to clarify why it was that an order was necessary to avoid a substantial risk of prejudice to the administration of justice. That was the purpose of the specification required when an interim order was made. Informed by that specification, interested parties were able to make appropriate representations as to whether or not an order should be made; and if an order was made any aggrieved person had the benefit of the specification when considering whether to seek variation or revocation of an order.

[18] The first respondent had breached the petitioners' common law right to adequate reasons *et separatim* their article 10 rights, and the inadequate reasons issued had been unintelligible and irrational.

[19] It was erroneous to suggest that the statutory right of an aggrieved person to seek variation or revocation of an order was an effective alternative remedy in the circumstances. Where the media were not told why an order had been made their grievance was that they ought to have been told. It was wrong to expect that they should have to incur the risk and expense of challenging an order in order to discover whether or not there was a proper basis for the order being made. It was also wrong for the media to be unable to consider the justification for the order in advance of making a challenge. It was wrong too that they were unable to prepare properly for the hearing with full knowledge of the factors which the judge making the order had considered to be material.

[20] There was a further reason why judicial review was appropriate. The practice of giving no reasons or inadequate reasons for reporting restrictions was a serious and pervasive problem. The first petitioner had analysed all reporting restriction orders published on the Scottish Courts website in the period from 1 April 2015 to 31 December 2018. During that period 346 orders had been made, 80 of which had been interim orders. In 50 of the interim order cases no reasons were given for the grant of the order. While 217 (final) orders were made, reasons were provided in only 11% of those cases. Where reasons were given they were often inadequate, eg "on cause shown"; "risk of prejudice to the administration of justice"; "possibility of future trial proceedings"; "to protect the privacy of the pursuer"; "to protect a vulnerable person". It was clear that reasons were not being given in many cases, and that often inadequate reasons were being given. It was also clear that when interim orders were made there was non-compliance, and inadequate compliance, with the statutory requirement to specify why the court was considering making an order.

Mr Pirie's submissions

[21] Mr Pirie submitted that there was a persuasive argument that the petitioners had an alternative statutory remedy which they had not exhausted. The court ought to be wary of trespassing on the jurisdiction of another court which was competent to determine the matter at issue. Reference was made to *MIAB* v *Secretary of State for the Home Department* 2016 SC 871, per the Opinion of the Court delivered by the Lord President at para 73 (and the authorities there discussed). In an application under OCR 48.5 a sheriff could consider whether the order ought to be varied or revoked. Since the process was not one of appeal or review, the success or failure of the application would not turn on the first respondent's reasons for granting the order. Rather, success or failure would depend upon whether the test in section 4(2) was satisfied at the time of the application. It followed that an application to vary or revoke would be an effective remedy. In *A* v *Secretary of State for the Home Department, supra,* where a section 11 order had been granted without reasons being given, the Supreme Court had nevertheless been satisfied that the ability of the media to apply for variation or revocation of the order was an effective remedy for the purposes of article 10 ECHR (per Lord Reed JSC at paragraphs 13 and 77). The petitioners would also have been entitled to obtain from the court the information which Mr Pirie had obtained had they asked for it (for the reasons explained in *Dring* v *Cape Intermediate Holdings Ltd, supra,* at paragraphs 34 and 41 of the judgment of the court delivered by Baroness Hale of Richmond PSC if the information was sought before an application was made; or, if it was sought after the application was made, because as litigants they would be entitled to access all material relevant to their application). Getting information in that way might be less convenient than having the first respondent's reasons, but the mere inconvenience of a statutory remedy did not make it ineffective (*MIAB* v *Secretary of State for the Home Department*, *supra,* at

paragraph 73). In any case, since reasons were directed at the informed reader, the petitioners were always going to have some inconvenience ascertaining the background circumstances themselves.

[22] The rules make provision for specification to be given when an interim order is made, but it is doubtful whether there is a common law right to be provided with reasons for the making of orders restricting reporting. There is no general common law duty on a decision-maker to give reasons (*R (CPRE Kent)* v *Dover District Council* [2018] 1 WLR 108, at para 51). Reasons do not require to be given for every judicial decision (*English* v *Emery Rheimbold & Strick Ltd* [2002] 1 WLR 2409, at paragraphs 6-7, 12-13 and 15). It was arguable that the provision of reasons is not essential where a section 4(2) order is made. The media can ascertain the relevant circumstances and judge for themselves whether the requirements of section 4(2) are met. It was arguable that neither procedural fairness nor open justice required more than that. It was implicit in the Supreme Court's reasoning in *A* v *Secretary of State for the Home Department, supra,* that it did not consider that there is a common law duty to give reasons. Lord Justice Mann's observations in *Birmingham Post & Mail Ltd* v *Birmingham City Council* had not been necessary to the court's decision. Whether there was a common law obligation to give reasons in the circumstances had not been an issue in that case.

[23] The petitioners' argument that the lack of contemporaneous reasons breached their article 10 rights was superfluous. The common law required reasons if they were necessary to make practicable the right to challenge a judicial decision that interfered with a Convention right. Further, the Supreme Court had said in *A* v *Secretary of State for the Home Department, supra,* that the ability to seek prompt revocation of an order forbidding publication was an effective remedy for any breach of the media's article 10 rights.

[24] In any case, in the whole circumstances the petitioners should not be granted the remedies which they seek because they had not been prejudiced by the absence of contemporaneous reasons or by the inadequacy of the reasons eventually provided, and because the declarators sought would serve no practical purpose.

[25] Mr Pirie marshalled what he saw as being the best arguments against his submissions. First, the decision on an application for variation or revocation would not determine whether the first respondent had been obliged to provide contemporaneous reasons. Whether or not he was so obliged might be seen as an important point of law, clarification of which would be in the public interest, justifying resort to the supervisory jurisdiction (*R (Willford)* v *Financial Services Authority* [2013] EWCA Civ 677, at para 37; *R* v *Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450, at p 457). Second, even if there was not a common law obligation to give contemporaneous reasons for making a section 4(2) order in every case, it might be argued that there had been a duty to give reasons in the present case because without them the decision to make the order appears aberrant. Third, a ruling might help to ensure that orders restricting reporting of proceedings were made in accordance with the law (cf *Taylor* v *Scottish Ministers* 2019 SLT 288, at paragraphs 15 and 18). However, Mr Pirie suggested that these arguments would have had greater force before the changes made by SSI 2020/20. As proceeding by way of an interim order is now mandatory, with the court having to specify why it is considering making an order, the media ought always to have the benefit of that specification before they made representations, and (if despite representations the order is made) before they seek variation or revocation.

Decision and reasons

The current procedure

[26] I find it convenient to begin by explaining my understanding of how the current procedure for making orders prohibiting publication of reports of civil proceedings ought to operate. If a court considers that there are grounds for making an order, it makes an interim order. In the interim order the court has to specify why it is considering making an order. The specification need not be elaborate, but in my opinion it must make clear why it is that the court considers that the requirements of the provision empowering the making of the order appear to be satisfied. The interim order is intimated to all interested parties. It informs them why the court is considering making the order. They have an opportunity to make representations if they are of the view that the order ought not to be made. If an order is made, interested parties and any other aggrieved parties may apply for variation or revocation. Even if further reasons are not provided at the time the order is made, the specification in the interim order will have indicated why the court was considering making the order.

[27] The factors which a court considering making a section 4(2) postponement order must address were discussed by Lord Burnett CJ in *In re British Broadcasting Corporation* [2018] 1 WLR 6023 at parasgraphs 30-36:

> *"(3) The proper approach to a section 4(2) postponement order application*
>
> 30. ...
>
> (i) The first question is whether reporting would give rise to a substantial risk of prejudice to the administration of justice in the relevant proceedings: see para 32 below. If not, that will be the end of the matter.
>
> (ii) If such a risk is perceived to exist, then the second question arises: would a section 4(2) order eliminate it? If not, there could be no necessity to impose such a ban. On the other hand, even if the judge is satisfied that an order would achieve the

objective, he or she would still have to consider whether the risk could satisfactorily be overcome by some less restrictive means. If so, it could not be said to be "necessary" to take the more drastic approach: *Ex p Central Television plc* [1991] 1 WLR 4, 8D–G, per Lord Lane CJ.

(iii) If the judge is satisfied that there is indeed no other way of eliminating the perceived risk of prejudice, it still does not necessarily follow that an order has to be made. The judge may still have to ask whether the *degree* of risk contemplated should be regarded as tolerable in the sense of being "the lesser of two evils". It is at this stage that value judgments may have to be made as to the priority between the competing public interests; fair trial and freedom of expression/open justice: *Ex p The Telegraph plc* [1993] 1 WLR 980 , 986B–C.

(a) Substantial prejudice

31. The word "substantial" in the section does not mean "weighty". It means "not insubstantial" or "not minimal": *Attorney General v News Group Newspapers Ltd* [1987] QB 1, 15D–E, per Lord Donaldson MR; *In re MGN Ltd* [2011] 1 Cr App R 31, para 15, per Lord Judge CJ.

32. It is important to focus on what prejudice it is said would be occasioned by the reports sought to be postponed...

...

(b) Is an order necessary?

35. At this stage, if any order is thought to be required, the key question is whether a less restrictive order might avoid the risk of prejudice that has been identified. For example, in *In re British Broadcasting Corpn* [2016] 2 Cr App R 13, targeted orders under section 45(4) of the Senior Courts Act 1981 were made, essentially: (a) directing various publishers (including social media platforms) to remove prejudicial comments (described as an "avalanche of public outrage": para 12), and (b) prohibiting further third-party commentary on reports of the retrial. On that basis, the Court of Appeal was satisfied that a blanket section 4(2) order postponing reporting of the retrial could not be justified as necessary or proportionate.... Other restrictions that may be sufficient to avoid the identified prejudice, rather than a blanket postponement order, are orders limited to postponing the identification of certain persons involved...These are just examples, but they show that consideration must be given to whether an order stopping short of a total postponement of reporting of the proceedings can be fashioned.

(c) The ultimate balance

36. There is reference in some of the authorities to the final stage being one at which the court exercises a discretion to make an order, or not. That is not strictly accurate. The court is required to make a value judgment about the competing rights and

> interests: *Ex p The Telegraph Group plc* [2001] 1 WLR 1983, para 21, per Longmore LJ. A reporting restriction is, to use the language of article 10.2 of the Convention, an interference with the right of freedom of expression. It must both be prescribed by law and "necessary in a democratic society". This last stipulation requires any order to be proportionate, with a balance being struck between the competing interests of free speech and the risk of prejudice to a trial. The balance is similar to that performed by the court when two competing Convention rights come into conflict. It requires "an intense focus on the comparative importance of the specific rights being claimed in the individual case": *In re S* [2005] 1 AC 593, para 17, per Lord Steyn. In the language of the headnote from *Ex p The Telegraph Group plc* (and approved in *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* [2005] 1 AC 190, para 69), at the third stage, the question is:
>
> > 'whether the degree of risk contemplated should be regarded as tolerable in the sense of being the lesser of two evils; and that at that stage value judgments might have to be made as to the priority between the competing public interests represented by article 6 and article 10 … ' "

[28] In my opinion the specification in a section 4(2) interim order should indicate why it is that reporting of the proceedings would give rise to a substantial and unacceptable risk to the administration of justice, and why no lesser measure would eliminate the risk. The purpose of the court having to specify why it is considering making an order is two-fold. First, to focus the court's mind on the application of the correct test. Second, to inform interested parties (and, later, other aggrieved parties) why the order is said to be necessary. If the only specification given is "on cause shown"; or "risk of prejudice to the administration of justice"; or "possibility of future trial proceedings"; or "to protect the privacy of the pursuer"; or "to protect a vulnerable person" in my view that will not satisfy the statutory requirement. None of those statements is indicative of the court being mindful of the relevant considerations. None of them explains why it is that the requirements of the subsection are said to be satisfied.

The present case

[29] The root cause of the difficulties in the present case is that on 7 August 2019 the first respondent made an order rather than an interim order. In my opinion, if he formed the preliminary view that the circumstances appeared to justify the making of an order he ought to have made an interim order. Even before the change brought about by SSI 2020/20, in my view it ought seldom to have been appropriate that the safeguards provided by the interim order procedure should be by-passed. There is no indication that the present case was one of the rare cases where there might be good reasons for proceeding directly to the making of an order. Had the first respondent made an interim order he would have had to specify why he was considering making an order, *viz* why it was that he considered postponement of publication was necessary to prevent a substantial risk to the prejudice of the administration of justice, and why no lesser step would be sufficient to protect the child's interests.

[30] The first respondent did not make an interim order, and he provided no written explanation of his thinking when he issued the order. That is surprising. In my opinion the decision cried out for explanation. It is even more surprising that the first respondent appears to have been reluctant to provide reasons in response to the first petitioner's entirely reasonable request.

[31] A short reason was eventually communicated orally to the first petitioner via the sheriff clerk. It would have been far better for the first respondent to have committed his thinking to writing in a note at that stage.

[32] The reason given did not explain why it was that reporting of the proceedings would give rise to a substantial and unacceptable risk to the administration of justice, and why it was that no measure short of postponement of reporting could eliminate that risk. In my

opinion, there was inadequate specification of why the first respondent made the order. Moreover, what was said strongly suggested that he had not applied his mind correctly to the test which had to be satisfied if an order was to be made.

[33] If the first respondent's concern was that the child should not be identified in media reports, it seems highly likely that there were less restrictive measures which he could have taken to achieve that outcome. For example, he could have made an order under section 46 of the Children and Young Persons (Scotland) Act 1937 prohibiting publication of any details which identified the child (the child is a person under the age of 17 "in respect of whom the proceedings are taken"); or he could have exercised the court's inherent common law power to withhold the child's name from the public in the proceedings and, ancillary to that, he could have given appropriate directions using the power conferred by section 11 of the Contempt of Court Act 1981.

[34] Unsurprisingly, the inadequate explanation which was given led to Ms McInnes' questions. That provided the first respondent with a further opportunity to clarify his reasons. In my opinion it is unfortunate that he did not take that opportunity.

[35] If there was a good basis for the order having been made it ought to have been straightforward for the first respondent to have issued a brief note explaining his reasoning. On the other hand, if on reflection he doubted whether there were good grounds for the order, the right thing to have done would have been to issue a note explaining what his thinking had been, but acknowledging doubt as to the correctness of his decision. Sometimes mistakes are made. Judges are not infallible. If a judge believes that he has got something wrong the best course is to acknowledge it in order to facilitate the matter being put right where that is possible.

Is judicial review competent in the circumstances?

[36] While I consider that the first respondent has fallen into error in the respects discussed, in my opinion it does not follow that judicial review ought to be available to the petitioners. It is well established that resort to the supervisory jurisdiction, or indeed to any common law remedy, is generally incompetent where an alternative statutory remedy has not been exhausted. Exceptionally, resort to a common law remedy may be permissible if the statutory remedy would not be an effective remedy, or if there is another cogent reason why following that route would be clearly unsatisfactory. The leading authorities in Scotland are *Dante* v *Assessor for Ayr* 1922 SC 109; *British Railways Board* v *Glasgow Corporation* 1976 SC 224; *Tarmac Econowaste Ltd* v *Assessor for Lothian Region* 1991 SLT 77; *Watt* v *Strathclyde Regional Council* 1992 SLT 324; *Shanks & McEwan (Contractors) Ltd* v *Mifflin Construction* 1993 SLT 1124; *MH (Bangladesh)* v *Secretary of State for the Home Department* [2014] CSOH 143; and *MIAB* v *Secretary of State for the Home Department*, *supra*. In *MIAB* the Court observed:

> "[73] Although RCS 58.3 provides only that judicial review is not available if the application could be made by an 'appeal or review' under any statute, the general rule regarding the competency of seeking review, or at least of granting the remedy sought, is rather wider. It is that the court 'may decline to exercise its supervisory jurisdiction . . . if it appears that the petitioner has not exhausted a statutory remedy' (*Shanks and McEwan (Contractors) Ltd v Mifflin Construction Ltd*, Lord Cullen, p 1129), provided that there are no exceptional circumstances, such as the alternative being an ineffective one (*Shanks and McEwan*, following *Tarmac Econowaste Ltd v Assessor for Lothian Region*, Lord Clyde, reviewing the authorities, pp 78, 79). The court requires to be vigilant in ensuring that effective remedies are available to redress wrongs, but it should also be wary of 'trespassing on the jurisdiction of a tribunal which is competent to determine the matter at issue (*Tarmac Econowaste*, p 79; see also *H v Secretary of State for the Home Department*, Lord Jones, para 32; *Sangha v Secretary of State for the Home Department*, Lord Marnoch, p 547). In the human rights cases, an obvious alternative statutory remedy is to make an application under sec 113 of the 2002 Act and to await the results of that, and of any certification, before asking the court to exercise its supervisory jurisdiction. The fact that any appeal may require to be taken 'out of country' does not, of itself, render it ineffective (*H*, Lord Jones, para 37)."

[37] In my view the petitioners have an alternative statutory remedy. I am not persuaded that the right to seek variation or revocation is not an effective remedy. I think it noteworthy that although in *A* v *Secretary of State for the Home Department, supra,* the Lord Ordinary did not provide reasons for making a section 11 order, the Supreme Court considered that the ability to seek prompt revocation of the order was an effective remedy. I am not convinced that there are exceptional circumstances justifying resort to judicial review notwithstanding the existence of the statutory remedy. In the whole circumstances I think that this court should be very wary indeed of trespassing upon the statutory jurisdiction which has been conferred on the sheriff. In my opinion the sheriff can determine the real question at issue here.

[38] In my judgement the real issue which requires to be determined is whether the requirements for a section 4(2) order are met (cf. *R* v *Birmingham City Council ex parte Ferrero Ltd* [1993] 1 All E R 830, per Taylor LJ at p 538H; *R (Willford)* v *Financial Services Authority*, *supra*, per Moore- Bick LJ at para 36). An application for revocation would provide the petitioners with the opportunity to question whether the requirements of section 4(2) are satisfied, and to have the order revoked if they are not. The issue before the sheriff who considers the application would not be whether or not the first respondent's reasons - such as they were - were sound or adequate. The process would not be one of appeal from or review of the first respondent's decision. Rather, the court would require to hear and determine the application on its merits.

[39] I am not persuaded by the petitioners' argument that the absence of adequate reasons in the present case means that they cannot assess whether to apply for revocation. That argument appears to me to be overstated. The fact is that the only circumstance which

the first respondent has prayed in aid is the involvement of a vulnerable person. To my mind, that circumstance falls very far short of showing that the requirements of section 4(2) are satisfied. In my opinion, on the basis of the material which is available to them, the petitioners and their legal advisers are in an adequate position to assess the strength of the case for revocation and to proceed with an application should they wish to do so (cf *R (Willford)* v *Financial Services Authority, supra*, per Moore-Bick LJ at para 37).

[40] Nor am I swayed by the suggestion that the frequency of no reasons or inadequate reasons being provided for orders is an exceptional circumstance which justifies judicial review in the present case notwithstanding the existence of the alternative statutory remedy. First, the statutory regime has undergone recent and significant alteration since the order of 7 August 2019 was made. From 2 March 2020 civil courts imposing reporting restrictions must now proceed first by imposing an interim order, and they must specify why they are considering making an order. Accordingly, the rules now direct that that explanation is to be given in every case where it is proposed that an order should be made. It is no longer possible to avoid that specification requirement by omitting the interim order stage. Given that there has been such recent consideration of the statutory position I am wary of the contention that intervention by the court is necessary. Second, while the reasons which the first respondent gave were inadequate, they were not reasons provided in purported compliance with the specification requirement in the rules. Nor do I think that the second declarator which the petitioners seek involves an important point of principle which is likely to affect a large number of cases. While, as already discussed, I think that in a section 4(2) case the specification of why an order is being considered should indicate why it is that reporting of the proceedings would give rise to a substantial and unacceptable risk to the administration of justice, and why it is that no measure short of postponement of reporting

could eliminate that risk, precisely what is required by way of specification is likely to be fact dependent and to vary from case to case.

Disposal

[41] I shall refuse the petition. I reserve meantime all questions of expenses.