HIGH COURT OF JUSTICIARY

[2021] HCJ 2
HCA/2020-06/XM

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

PETITION AND COMPLAINT

by

HER MAJESTY'S ADVOCATE

Petitioner

against

CRAIG MURRAY

Respondent

Petitioner: A Prentice, QC, Sol Adv, AD; Crown Agent
Respondent: J Scott, QC, Sol Adv, Harvey; Halliday Campbell WS, Solicitors, Edinburgh

25 March 2021

Introduction

[1] These contempt proceedings concern articles published by the respondent in the wake of the arrest, and subsequent prosecution, on an indictment containing charges of alleged sexual offences against a number of women, said to have been committed by Alexander Elliot Anderson Salmond whilst he was in office as First Minister of Scotland.

Mr Salmond was arrested on 23 January 2019 and appeared on petition at Edinburgh Sheriff Court the following day. Following several preliminary hearings a trial commenced on 9 March 2020 at Edinburgh High Court, concluding on 23 March, with an acquittal on all charges. The case attracted considerable media interest and publicity.

[2] In Scotland, complainers in sexual offences give evidence in "closed court" conditions, whereby the public are excluded from the court during the giving of their evidence. This exclusion does not apply to *bona fide* journalists who remain in court to report on the proceedings as an important aspect of the public nature of criminal proceedings. In Scots Law there is no statutory provision guaranteeing anonymity to complainers in sexual offence cases. Nevertheless it is accepted that the rationale for granting anonymity to such complainers applies equally in Scotland as in any other jurisdiction, namely that:

> "… public knowledge of the indignity which she has suffered in being raped may be extremely distressing and even positively harmful, and the risk of such public knowledge can operate as a severe deterrent to bring proceedings..." (Heilbron Committee (1975), para 153)

It is thus an accepted convention followed by the press not to print the identity of, or information likely to lead to the identification of a complainer in such cases. In the trial to which this case relates, mainstream media, in support of that convention, referred to the complainers by single initials – A, B, C and so on.

[3] Notwithstanding the convention already referred to, on occasion the court considers it necessary to make an order at common law that the names be withheld from the public, with an order under section 11 of the Contempt of Court Act 1981 prohibiting the publication of certain details. That is what happened on the second day of the trial to which this case relates: the court made an order in the following terms:

> "The court, on the motion of the advocate depute, there being no objection, made an order at common law and in terms of Section 11 of the Contempt of Court Act 1981, preventing the publication of the names and identity and any information likely to disclose the identity of the complainers in the case of *HMA* v *Alexander Elliot Anderson Salmond*."

[4] Towards the end of the trial, a motion was made to discharge two jurors, one for health reasons, and the other, juror number 5, for reasons which led the Crown to wish to consider taking proceedings against him for contempt of court. In view of the fact that such proceedings were in contemplation the court was asked to make an order under s 4(2) of the 1981 Act prohibiting publication of the matters discussed in court in relation to that juror. The court did so in the following terms:

> "The court on the motion of the advocate depute, there being no objection, made an order in terms of the Contempt of Court Act 1981, section 4(2) preventing the publication of the details of the issues raised in the legal submissions that took place between 14:20 hours and 14:25 hours on 10 March 2020. Said order to be in place pending the resolution of trial proceedings against the accused Alexander Elliot Anderson Salmond."

Background to these proceedings

[5] This petition was presented in April 2020, alleging that a number of articles published by the respondent on his website since 23 August 2019, and posted by him on Twitter, contained content in breach of both orders of court. It was also averred that a number of articles were further in contempt of court, in that they, and the improper moderation by the respondent of comments left on the site by readers, created a substantial risk of prejudice to the trial proceedings.

[6] The contents of 12 articles or posts published by the respondent (i) on his website dated 23 August 2019, 18 January, 10, 11, 12, 16, 18, 20, 30 March, and 3 April, all 2020; and (ii) on Twitter dated 29 March and 2 April, both 2020 were matters of admission and agreement, with the further agreement that the comments under each article were posted by

others in response to the articles. It is accepted that the Crown sent a letter to the respondent by email on 21 January 2020 stating that the article of 18 January gave "rise to a potential contempt of court", in its potential to create a risk of prejudice to the trial proceedings. The respondent replied on 5 March stating that he did not consider the article to be in contempt of court. A further letter concerning the article of 19 March was sent by email on 19 March to the same email address. The respondent denies receiving this.

[7] It is accepted that the respondent is responsible for the publication of the relevant articles and posts and for the publication and continued existence of third party comments in response to the articles, but not for re-tweets or twitter responses, since a person who tweets has little or no control over the responses generated thereto. The petition averred the manner in which specific content could be said to constitute contempt of court. The respondent disputed that the articles could be so categorised. It was apparent from the answers that apart from issues over the correct inferences to be drawn from the articles, there were numerous disputes of a factual nature. Resolution of these would have required the leading of evidence. The court fixed a hearing on the petition and answers.

The hearing

[8] An extensive joint minute agreeing relevant facts had been entered into. The Crown did not propose to lead any evidence, being content to rely upon the agreed facts. Affidavits from the respondent had been lodged. Senior counsel for the respondent intimated that these were being relied upon; but it was recognised that these contained material – for example reference to third party affidavits – which was accepted as being irrelevant or inadmissible. Senior counsel submitted that the court could identify and ignore such material.

[9] In advance of the hearing a number of affidavits from third parties had been lodged on behalf of the respondent asserting either that they had not been able to identify particular individuals from his articles, or that other news sources had also published the same information. Recognising that these matters could have no relevance to the question for the court, which required to be assessed on an objective assessment of the material, senior counsel for the respondent advised that he was not relying on these, or on a poll commissioned for a similar purpose.

[10] Amongst matters agreed in the joint minute were:

(a) That the respondent made extensive and repeated efforts with the Scottish Courts and Tribunal Service to register to cover the trial as a journalist in new media, but accreditation was not granted. In consequence, he was not given the Media Guide of guidance on contempt the Scottish Courts routinely offered to reporters.

(b) The respondent was not present in court to hear the prosecution case. He attended court as a member of the public when the gallery was opened on 18 and 19 March 2020. On the morning of 20 March 2020, he was prohibited from entering the court following a motion made by the Crown.

(c) That on 21 November 2019 the court released details of the charges on the indictment against Alex Salmond. Information as to the nature of the charges, that there were 14 of them and 10 complainers was widely, prominently and extensively reported in the press and on broadcast media at around that time. Beyond this there was no agreement as to which aspects of evidence given during the trial were reported on in mainstream media or the extent of material which was in the public domain at or after the trial. In four instances there was reference to third party publications concerning individual complainers. These were in relatively limited terms, relating to matters not concerning reporting of the trial.

(d) Certain facts were agreed in respect of individual complainers, for example, their occupation, their names, the letter by which they were referred to in the media, and the charge(s) in which they were complainers were agreed. Other limited information about activities of certain complainers, attendances at events, and the like, were agreed.

(e) Certain detail was agreed relating to the content of some third party publications in respect of certain complainers, but this was of an extremely limited nature.

Submissions

[11] Written submissions were provided by both parties. What follows therefore is a summary of the main points only, although we have considered the totality of the submissions.

Crown

[12] The advocate depute submitted that the respondent was guilty of contempt of court comprising of three separate and independent strands:-

(a) That the following material published by the respondent whether read in isolation or in conjunction with each other, contains information likely to disclose the identity of the complainers in the case of *HMA* v *Alexander Elliot Anderson Salmond*, contrary to the section 11 order imposed by the Court on 10 March 2020:

i. Articles which appeared on his website on 23 August 2019, 18 January, 10 March, 11 March, 12 March, 16 March, 18 March, 19 March and 3 April 2020;

ii. Posts on the social media platform "Twitter" on 29 March and 2 April 2020;

(b) That there was a substantial risk of prejudice to the proceedings in *HMA* v *Alexander Elliot Anderson Salmond* created by the respondent's publications of 23 August 2019 and

18 January 2020 and the improper moderation of the comments made by readers of said articles.

(c) That material published by the respondent on 30 March 2020 contained information which contravened the terms of the section 4(2) order imposed by the Court on 23 March 2020.

[13] He drew attention to the pleas in law for the respondent as helping to focus the issues. These were:

1. that the petitioner having delayed in bringing the petition in so far as it relates to alleged contraventions of section 1 and 2 of the Contempt of Court Act 1981, the prayer of the petition should be refused;

2. that the averments in the petition being irrelevant *et separatim* unfounded in fact, the prayer of the petition should be refused;

3. that a finding of contempt being incompatible with the respondent's rights under Article 10 of the European Convention of Human Rights ("ECHR"), the petition should be refused.

[14] The advocate depute referred to the written submissions for the Crown, indicating that he had nothing he wished to say in supplement of these. The court addressed certain questions arising from the submissions. One of these related to the issue of delay, and the use which could be made of articles dated 23 August 2019 and 18 January 2020, both before the trial, and before the section 11 order had been made. The advocate depute submitted that the articles were both still available on the website, so there had been no delay. The respondent had been put on notice that the article of 23 August might constitute contempt, in a letter emailed to him on 21 Jan 2020. The Crown could have brought proceedings then, but after careful consideration decided not to do that. The advocate depute submitted that

the court may be disinclined to consider strand 1(b) because of delay, and since the proceedings continued and were not asserted to be unfair.

[15] In any event, he submitted, these earlier articles were relevant in respect of other aspects of the case, since later articles should be read and interpreted in the context of the material which the respondent had already published. It was relevant to consider the whole period during which the material was accessible to the public: *HMA* v *Beggs (No 2)* 2002 SLT 139. The earlier articles were also relevant to how the respondent took his responsibilities regarding anonymity. If these articles aided identification of the complainers they amounted to contempt of court following the pronouncement of the order.

[16] A further matter upon which the court sought further assistance was in relation to the question of internet searches. In the petition, and more pertinently, in the submissions of the Crown reliance had been placed on assertions that inputting certain terms into an internet search engine would produce a certain result, relevant to individual complainers. It was asserted in the Crown submissions, with no timeframe supplied, that internet searches "would" produce the result referred to. This was not a matter of agreement, in fact it was generally disputed to be the case, the matter being seen very clearly in relation to complainer C where the Crown averred that a particular search would lead to the complainer, whereas the respondent averred it would lead to someone else entirely. The court wished to be addressed on how this material could be taken into account when it was disputed, bearing in mind that the algorithmic nature of the search engines may throw up different results at different times, and may even be influenced by the searches in question. The advocate depute submitted that the court had to proceed on the facts, which were those which had been agreed in the Joint Minute. Accordingly, the assertions relating to internet or twitter searches had to be left out of account. Apart from the Joint Minute, parties were

also agreed that the test whether material was likely to prejudice proceedings, or whether it was likely to lead to the identification of a complainer, was in each case an objective one.

[17] Thereafter the advocate depute relied on his written submissions, which can be summarised as follows:

1. The purpose behind section 11 should be interpreted broadly. It did not apply only to independent members of the public; it would be sufficient for a breach to occur if the published material made it likely for the complainer to be identified by a work colleague, a neighbour or the like. Where the court exercises a power to allow a name or other matter to be withheld from the public, section 11 provides that 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".

The specific order made included a wide prohibition in the interests of the complainers, namely one "preventing the publication of the names and identity and any information likely to disclose the identity of the complainers in the case of *HMA* v *Alexander Elliot Anderson Salmond*". The order identifies the scope of the prohibition, which applied to the "names and identity and **any** information likely to disclose the identity" of the complainers. The publication of any information likely to disclose the identities would constitute a breach of the order.

2. The material contained in the articles referred to in paragraph (a) of the alleged contempt, together or in isolation, was likely to disclose the identity of complainers in the trial and thus constituted contempt of court. The nature of the trial and the overall context were important. The information about the complainers already in the public domain by its very nature narrowed the pool of people from which the complainers might be drawn. The dates and loci of the charges were well publicised in advance of the trial. It was incumbent

upon journalists to have regard to the inherent and acute risk that additional material might be likely to lead to identification. The written submissions set out the way in which it was said the contents might lead to identification of individual complainers. In so far as relevant, and capable of publication without further risk to anonymity, these will be apparent in the court's analysis of the arguments, below. The risk had to be assessed against the backdrop of the material already in the public domain.

3.1 The respondent maintains that he is a member of the National Union of Journalists. As such he should have been aware of the Independent Press Standards Organisation Editors Code of Conduct("the IPSO Code"), clause 11 of which states: "The press must not identify or publish material likely to lead to the identification of a victim of sexual assault unless there is adequate justification and they are legally free to do so." Under reference to the Contempt of Court Act the IPSO Code (para 3) highlights the legal duty to take reasonable care in the publishing of information and specifically emphasises the caution to be exercised when publishing online in relation to sexual offences, especially those social media or other platforms that may be open to reader comments.

3.2 Particular reference is made (para 7) to the care to be taken to avoid the risk of "jigsaw identification" and the appropriate approach to be taken by responsible journalists to avoid such a risk. Jigsaw identification can occur through the combination of separate pieces of information or details about *inter alia* the victims, nature and timing of the offences and locations. The respondent's articles enabled this kind of jigsaw identification, in isolation or taken together. Seemingly innocuous facts published can still pose the risk of jigsaw identification when viewed within the existing matrix of information: the information provided by the respondent risked completing a picture leading to identification of the complainers. It was thus incumbent upon the respondent to take care to avoid such risk.

3.3 Further, the alleged failure of the respondent to moderate comments on his website in response to the articles increased that risk. It was agreed in the joint minute that the respondent was responsible for these comments: see also *In re BBC and others* [2016] 2 Cr App R 13. The IPSO Code emphasises the caution to be exercised when publishing online in relation to sexual offences, especially those social media or other platforms that may be open to reader comments. A failure to provide a warning may indicate a lack of reasonable care. Insofar as the comments under the relevant articles identified individuals or contributed to a jigsaw identification, the respondent was responsible for them.

3.4 There was a need to take account of third party publications also. There was extensive information already in the public domain about the subject matter of the trial before the order was made, calling for particular care to be taken on the part the respondent to avoid breach of the prohibition. In fact, the respondent provided additional information to that which was already in the public domain. As such the respondent's publication increased the risk of potential identification. There is a responsibility upon journalists to ascertain what information is already in the public domain, and to take account of their own previous publications in such cases before additional reporting so as to avoid their subsequent publication causing a "jigsaw identification". The respondent published material not already in the public domain.

4.1 If the conduct is to be viewed as disobedience to the order of the court, intent was not required, and the contempt could be complete even on the basis of carelessness (*Muirhead* v *Douglas* 1979 SLT (Notes) 17), where the test was said to involve:

> "such a degree of carelessness or disregard of obligation leading to interference with or material disruption in the course of the administration of justice as to be equiparated with wilful or deliberate disobedience or interference".

4.2 It was submitted that the test might be even lower, since, whilst the strict liability test does not automatically apply to the breach of the section 11 order, such a contempt is similar to other media contempts, which at common law had been strict liability offences (*Arlidge on Contempt,* para 16.53, reference to the Scottish chapter written by Lord Eassie).

4.3 In any event, it was submitted that in fact the material, especially taken together with the respondent's affidavit, justified the inference that the respondent had acted deliberately by publishing material in the knowledge that it would be likely to lead to identification.

5. The material relied upon in respect of paragraph (b) of the alleged contempt created a substantial risk of prejudice to the proceedings, judged objectively and against the expectation that jurors will follow the judge's directions. The alleged failure of the respondent to moderate comments on his website in response to the articles was prayed in aid under this heading of the alleged contempt. The test was not a high one and should be assessed at the time of publication, with no regard for the eventual outcome of the case (*HMA* v *Caledonian Newspapers Ltd* 1995 SLT 926; *Attorney General* v *English* [1983] 1 AC 116). There was a substantial risk that jurors exposed to the articles, which asserted that witnesses were lying and that their claims were fabricated as part of a conspiracy, might be prejudiced against the witnesses prior to hearing their evidence.

6. The material relied upon in respect of paragraph (c) of the alleged contempt, judged objectively, contravened the section 4(2) order.

7. As to the respondent's Article 10 argument, the Advocate Depute submitted that the section 11 order was made conform to the Contempt of Court Act 1981 and thus prescribed by law. In making the order the court would have balanced the importance of press reporting of proceedings against the importance of maintaining the anonymity of the complainers. The orders were necessary in a democratic society for the legitimate purpose

of facilitating the investigation and prosecution of sexual offences and allow complainers to come forward without fear of loss of anonymity. The section 11 order constituted a justifiable protection of these interests.

Respondent

[18] The Crown could not rely on articles published before the date of the court order as constituting a breach of the section 11 order. In the petition, including the petition as amended, articles published prior to 10 March 2020 were not relied upon, whether in isolation or in conjunction with other articles, to constitute a breach of the section 11 order, which was asserted only in respect of articles published on or after 10 March 2020. Had the Crown wished to rely on these articles as contempt they should have done so in the petition.

[19] In any event, reliance on these articles for the section 11 claim is affected by the same arguments in relation to delay as apply to the second strand of alleged contempt. The Crown were aware of these articles shortly after publication but took no enforcement action. No reason is given for the delay. Proceedings of this kind should be brought as soon as practicable after the event has come to the petitioner's attention: *Robb* v *Caledonian Newspapers Ltd* 1995 SLT 631. Where there is a long delay the court should decline to exercise its jurisdiction. In this case the delay endured for the whole period of the trial in question. Had there been thought to be a risk of prejudice to those proceedings the matter should have been brought to the attention of the High Court as soon as possible. In any event, it was submitted that there had in fact been no substantial risk of prejudice, for reasons developed in the written submissions.

[20] The test for breach of section 11 is not whether certain individuals would be likely to be able to identify the complainer from the publication, but whether the public at large

would be. The reference in the section to "the purpose for which it was so withheld" means the withholding of the name or other matter from the public. The section is designed to ensure that the public do not find out through the media a matter that has been withheld from them. The fact that there may be some people, such as work colleagues, who might to able to identify a complainer is not sufficient for a breach of a section 11 order. The information must be such as to lead to the public in general being able to identify the complainer.

[21] The submissions for the Crown assert that the information provided by the respondent "often extended beyond what was reported by others", but do not state what information in the respondent's articles which fall into this category.

[22] The test for asking whether there has been a breach of section 11 involves putting oneself in the position of someone who does not know who the complainers are, and to ask whether there is material in the article(s) which enables them to be identified.

[23] Arguments were advanced in respect of the individual complainers to support a submission that the articles were not likely to lead to their identification, and did not constitute a breach of the court order. In so far as relevant, and capable of publication without further risk to anonymity, these will be apparent in the court's analysis of the arguments, below.

[24] The Crown accepts that the article relied upon to assert a breach of the section 4(2) order did not directly refer to the issues raised by the advocate depute. Rather it is asserted that the respondent breached the order by providing an explanation for the discharge of juror 5 which was "bizarre and unfounded". If it was the latter it could not, by definition, amount to a breach of the order.

[25] The respondent asserts that he was at pains throughout the proceedings to ensure that the complainers could not be identified from anything he wrote. Should the court find that any of his articles had that result, any breach was unintentional. Any finding of contempt, or punishment therefor, would be incompatible with his Article 10 rights.

[26] The Contempt of Court Act 1981 is capable of operating in a manner compatible with Article 10 ECHR, but that does not mean that any finding of contempt made under the Act is automatically compatible with Article 10: the Court is still required to conduct a balancing exercise on the facts of the case before it (*A* v *BBC* [2014] SC (UKSC) 151 paras 51-53, and 69 *et seq*). The court must balance any public interest in publication and the credentials, profile and conduct of the respondent. The submission contains a list of factors which are said to militate against a finding for contempt. It is submitted that any breach of the order was unintentional, and that for a finding of, and punishment for, contempt to follow would constitute a breach of the respondent's article 10 rights.

Analysis and decision

[27] We propose to deal with the issues in reverse order.

Part 1(c)

[28] The third strand of the case presented in the petition relates to an article published by the respondent on 30 March 2020. It was accepted that the article having been published after the trial had concluded, the possibility of prejudice to those proceedings did not arise, because they were not "active" within the meaning of the Act. The advocate depute submitted, however, that the article contained commentary which contravened the terms of the section 4(2) order imposed by the Court on 23 March 2020 with respect of proceedings against the juror in question.

[29] The order in question related to the submissions made by the advocate depute during a motion to discharge juror number 5. It is not uncommon, at any stage of a trial, for circumstances to arise, for example illness, which make it necessary to discharge a juror from further attendance and to proceed with the remaining number. Statutory provision exists allowing for up to three jurors being excused in this way before the trial must be halted and recommenced if appropriate. By coincidence on 23 March another juror was also discharged for medical reasons. That this was the reason for discharge was stated in open court, and before discussion of the separate issue relating to the other juror. The discharge of this other juror was not made the subject of the section 4(2) order, which was only sought after the discharge for medical reasons had been effected.

[30] The situation was different in respect of juror number 5. Material was placed before the court which indicated that the juror in question might have acted in breach of his oath, and thus in contempt of court, and the advocate depute advised that consideration was to be given to taking proceedings against that juror. Section 4(2) of the 1981 Act provides that in any 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. In these circumstances the court agreed to make a section 4(2) order, preventing the publication of the issues raised, with the condition that the order was to remain in place pending the resolution of any proceedings that may be taken in respect of that specific juror.

[31] The advocate depute accepted that the article in question did not refer directly to the "issues raised by the advocate depute" as detailed in the order of 23 March, but published

an alternative and "bizarre" and "unfounded" alternative explanation for the circumstances of the juror's excusal. In other words, the Crown seeks to argue not that the report contravened the order of the court in any direct way, but that it did so by inference, implication, and under a "purposive construction" both of the order and the statute. The basis for the submission for the Crown was that since the material published by the respondent constituted a "gross misrepresentation" of what was actually said in court, it should be construed as breaching the order. We cannot accept that submission. The order was very clear as to what was prohibited, as is essential for any order of the court breach of which may have penal consequences. It must be construed exactly according to its terms and no further. The article in question bore no relation at all to the discussion which had taken place. It did not assert to be a representation of what had been said in court but bore to be the musings and speculation of the respondent. Whatever criticisms may be directed at them, that they constitute a breach of the section 4(2) order is not one of them.

Part 1(b)

[32] Sections 1 and 2 of the Contempt of Court Act 1981 impose a rule of strict liability to any "publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced" (section 2(2)). The rule applies to a publication only if the proceedings in question are active at the time of the publication.

[33] That the risk that was created by the publication when it was actually published has not ultimately affected the outcome of the proceedings is "neither here nor there." (*Attorney General* v *English* [1983] 1 AC 116, p141). In that case the accused had been acquitted by direction of the judge on other grounds prior to consideration of the issue of contempt. As long as the proceedings were live at the time of publication, the risk presented to the

administration of justice must be assessed at that time, and without regard to the outcome of the proceedings, even if these have been concluded by the time that the issue of contempt is examined.

[34] However, the fact that this is so does not mean that in any case, proceedings may satisfactorily be concluded, and without any explanation for the delay, contempt proceedings may successfully be brought long thereafter. In *Attorney General* v *English*, for example, the terms of the article were drawn to the attention of the trial judge on the third day of the trial. He referred the matter to the Attorney General for consideration of proceedings, but perhaps of more significance, the fact that it was drawn to the judge's attention would have enabled him to craft specific and careful directions to the jury as a safeguard against any potential effect of the article, had the case progressed that far. In *Robb* v *Caledonian Newspapers* the trial of the petitioner, a Church of Scotland minister, was due to take place on 4 July 1994 on charges of lewd and libidinous conduct. The accused had been arrested on these charges on 16 August 1993 and appeared on petition the following day. A newspaper article containing significant details of the alleged facts of the case, including details about the ages of the complainers was published on 20 August 1993. The publication was drawn to the attention of the Crown who took no action. It was not drawn at the time to the attention of the court. Subsequently, in March 1994 the accused brought a petition alleging contempt of court. The court concluded that it was not appropriate to take any action in the matter having regard to the delay in bringing proceedings and the fact that repetition was unlikely.

[35] In the present case the articles which are said to have created a substantial risk of prejudice to the trial proceedings were published by the respondent on 23 August 2019 and 18 January 2020. The trial took place between 9 and 20 March 2020. Preliminary hearings

were held on 21 November 2019, 22 January 2020 and 18 February 2020. The Crown was aware of the publication of 18 January prior to the second of these hearings, having written a letter to the respondent warning him that it might constitute contempt of court. However, no action was taken, then or prior to the conclusion of the proceedings, and it was not drawn to the attention of the court during the currency of the proceedings. The petition and complaint alleging contempt was presented to the court on 16 April 2020.

[36] In answer to the submissions for the respondent that the proceedings were fatally undermined by the delay in proceedings it was submitted that (i) there was in fact no delay in this case, as the articles in question remain available on the respondent's website; (ii) that the Crown were justified in waiting until the conclusion of the criminal proceedings, which caused no prejudice to the respondent: in *Robb* it had been recognised that there may be cases in which a delay in bringing the case to court can be justified; (iii) although it was desirable for alleged contempts to be dealt with expeditiously there was no fixed time limit for bringing such proceedings (*Robb);* (iv) that where there was a threat of further publication the court could take this into account (*Robb)* and the case was one where there was a risk that the respondent may publish similar articles in the future.

[37] We reject these submissions. In *Robb* the court, whilst recognising that there was no fixed time limit for the bringing of proceedings of this kind, nevertheless pointed out that the whole emphasis in this branch of the law has been upon the summary nature of the proceedings, to enable the alleged contempt to be dealt with in the interests of the administration of justice in as speedy and effectual a manner as possible.

[38] The court did say that there may be cases in which a delay can be justified, but it is worth quoting the whole passage in which that remark was made, namely that:

> "There may be cases where a delay in bringing the matter to the court's attention can be justified, as where the facts were not known to the interested party until a much later date. But when the complaint is of a publication which is said to have been contrary to the strict liability rule, the publication should be drawn to the court's attention as soon as possible so that it may be dealt with immediately."

No justification for was offered for delaying matters until a month after the conclusion of the criminal proceedings. As noted above the issue was not drawn to the court's attention as soon as possible, and this seems to have been a deliberate decision of the Crown who were aware of the second article at least within days of its appearance. The advocate depute submitted that "The Crown could have brought proceedings, but after careful consideration decided not to do that." The court was not favoured with the reasons for that decision, or with any justification for the decision not to bring proceedings as soon as possible. As the court in *Robb* observed, a decision to bring proceedings, or draw the matter to the court's attention as soon as possible

> "…. is necessary to prevent any further interference with the course of justice in the particular proceedings which are said to have been affected by it."

[39] Where the concern is that the material in question might be prejudicial to the course of justice, with a risk seriously of impeding it, we have difficulty in understanding what benefit might lie in delaying either proceedings, or the bringing of the matter to the attention of the court, until after those proceedings have been concluded and disposed of.

[40] As to the submission that the risk of repetition was a relevant factor, again the whole context in which that issue was considered in *Robb* requires to be identified:

> "A delay in bringing proceedings for an order to prohibit further publication is less objectionable if it emerges that there is a risk of publication being repeated while the proceedings in question are still active. But proceedings which seek punishment for alleged past contempt should be brought by the interested party as soon as practicable after the event has come to his attention."

[41] Part 1 (b) of the present case relates to alleged past contempts in circumstances where the proceedings are not active. In *HM Advocate* v *Caledonian Newspapers Ltd* 1995 SLT 926 the court commented that:

> "It is of no concern to the court under this section [section 2] that the publication may cause impediment or prejudice in some other respect, such as to the reputation of any person mentioned in the publication which may give rise to a claim against the publisher in damages. The sole purpose of the strict liability rule is to ensure that the course of justice in the particular legal proceedings is not put at risk."

[42] Whether any further article by the respondent in connection with the criminal proceedings might fall foul of other aspects of the law, such as defamation or the like, would be beside the point – they could not in our view constitute a contempt of court in respect of the criminal proceedings which are now concluded, nor did the advocate depute suggest they could. It seems to us highly likely that examined at the proper time the articles would have constituted a contempt, but we do not require to examine that question. Part 1(b) of the petition will therefore be refused.

Part 1(a)

The section 11 order

[43] The Sexual Offences (Amendment) Act 1992 provides blanket, lifelong anonymity for complainers in England and Wales, whether the publication takes place in England or in Scotland. Although section 4(1) of the Sexual Offences (Amendment) Act 1976, appears on the face of it to extend a similar protection, in England and Wales only, to complainers in rape cases in Scotland, further examination of the statute (section 7) shows this not to be the case. Observations to the contrary in *Application by Spectator Magazine* are accordingly wrong. The protection in England and Wales does not hinge on the making of a section 11 order, it arises automatically by operation of the legislation.

[44] There is no statutory protection for complainers in this jurisdiction, in relation to publication of information within Scotland. In this jurisdiction, complainers in cases of rape and other sexual offences give evidence under "closed court" conditions, whereby the public is excluded from the court during the giving of their evidence (see sections 92(3) and 271HB of the Criminal Procedure (Scotland) Act 1995). This exclusion does not apply to *bona fide* journalists whose presence is permitted as an important aspect of open justice. There is, however, a long-standing convention (see *H* v *Sweeney* 1983 SLT 48, at p 61) that the press do not publish the identity of complainers in sexual cases. This convention is fortified by the Editor's Code of Practice published by the Independent Press Standards Organisation, and applicable to all members of that organisation, which includes all mainstream media, including numerous online publications and websites. Paragraph 11 of the Code provides:

> "Victims of sexual assault
>
> The press must not identify or publish material likely to lead to the identification of a victim of sexual assault unless there is adequate justification and they are legally free to do so. Journalists are entitled to make enquiries but must take care and exercise discretion to avoid the unjustified disclosure of the identity of a victim of sexual assault."

[45] In the *Application by the Spectator Magazine* [2021] HCJ 1 in the proceedings to which this petition relates, the court noted:

> "To strengthen the protection further, in some cases the court considers it necessary to make a formal order at common law withholding the identity of the complainer from the public, with a section 11 order prohibiting publication of the complainer's identity or material likely to lead to her identification as a complainer in the case. The purpose behind allowing the witness to give evidence in closed court conditions is to enable the witness to speak freely, to limit the embarrassment and awkwardness which may be felt, and to encourage complainers in other cases to feel able to come forward without concern that they may have to give evidence in a crowded court and before members of the public. It is, in short, largely the same as the justification for providing subsequent anonymity to complainers, whether that is achieved by legislation, convention, court order, the Editor's Code, or a combination of these."

[46] The justification is that complainers should be protected from the distress and indignity which might arise from public knowledge of their identity as complainers in a sexual offence, and to make it less difficult for other complainers to come forward (see the report of the Heilbron Committee (1975); and *Brown* v *United Kingdom* (2002) 35 EHRR CD197). These reasons were adverted to in a decision of the IPSO complaint committee 05764-15 A, *A Man* v *Daily Record,* at para 11:

> "The protection of the identities of people who make allegations of sexual assault is of great importance to society generally, and not just to those individuals at the centre of ongoing cases, as it is essential in ensuring that other victims are not dissuaded from reporting sexual offences to the police, for fear of unwanted publicity."

[47] In that case the complaint committee also noted, para 12:

> "12. The terms of the Sexual Offences (Amendment) Act 1992 did not apply in this case, and no order preventing identification of the complainant had been imposed. The newspaper had been legally free to name the complainant. However, the Code sets out a more stringent test than the law in that, regardless of the legal position, publications may not name victims of sexual assault unless there is 'adequate justification' to do so. This justification must be a compelling one in order to outweigh the general public interest in preserving victims' anonymity."

We note the terms of the convention and of the Editor's Code of Practice, not merely to illustrate the background against which the present petition is brought, but because of the submissions repeatedly made on behalf of the respondent that he accepted that he should be held to the same standards as mainstream journalists. Such journalists would be expected to follow the local convention, and to abide by the Editor's Code of Practice.

The relevance of Article 10

[48] As a generality, article 10 of the European Convention on Human Rights is of major significance in determining whether the court should, in any given case, impose on the press a restriction on matters which may properly be reported in relation to court proceedings,

and in particular, criminal proceedings. This was emphasised in four cases relied upon by the respondent. *PA Media Group, London Borough of Haringey* v *The mother, The father, A & B (by their Children's Guardian)* [2020] EWHC 1282 (Fam) and *A Local Authority* v *The mother and father of A & B* [2020] EWHC 1162 (Fam), were both child welfare cases concerning possibility of jigsaw identification of the child who was the subject of that decision, and possible reporting restrictions as a result. Neither case related to the issue of anonymity for complainers in sexual offences. *In re Press Association* [2013] 1 WLR 1979 was a case in which the court had made an order, purportedly under section 1(2) of the 1992 Act, prohibiting the publication of the identity of the defendant, on the basis that this could lead to identification of the complainant. On appeal the court held that such an order was not competent, and that the complainant was already protected under the Act, and a contravention of the complainant's right to anonymity involved the commission of a criminal offence:

> "It is a criminal offence to contravene section 1 of the Act, whether by naming or enabling a "jigsaw" identification to be made. The ambit of the offence is not limited to the press. In short, it encompasses publication of prohibited material by anyone by whatever means publication occurs, and extends to bloggers and twitterers or any other commentators."

[49] *In re S* [2005] 1 AC 593 concerned a child, S, whose mother had been indicted for the murder of his brother, and the issue arose whether there should be a prohibition on reporting the criminal (or other) proceedings in a way which might lead to identification of S. S was not a witness in the criminal proceedings, and it was held that the interference with his article 8 rights was indirect and not of the same order when compared with cases of juveniles directly involved in criminal trials. The House of Lords gave guidance on the correct approach to take when articles 8 and 10 were in conflict, and noted that given the number of statutory exceptions to open court reporting, the court should not create further

exceptions by a process of analogy save in the most compelling circumstances. Amongst those statutory exceptions of course, in the jurisdiction in which the case arose, is the anonymity given to complainers in allegations of sexual assault (see para 20). The weighty observations made about the importance of open justice, public hearings, and the ordinary rule that the press, as watchdog of the public may report everything that takes place, must be seen in a context in which that ordinary rule is already the subject of significant statutory restriction. The case therefore, whilst of significance in relation to other circumstances where the question of restrictions to press reporting arises, may tell us little about the issue with which the present case is concerned.

[50] As the court noted in the application by *Spectator Magazine*, para [13], whilst the principles derived from or referred to in these cases is not in dispute, they "are issues which bear only lightly on a decision to withhold the name of a complainer from the public and to prevent publication of material likely to lead to their identification". Although in Scotland any order of the court regarding anonymity of a complainer must proceed under section 11 of the 1981 Act, which requires regard to be had to article 10, and in particular whether there is a pressing social need for the order, outweighing the public interest in publishing the material withheld, these matters arise for consideration against a background of a voluntary restriction by the media in this respect in the form of the IPSO Editor's Code of Practice and the local convention adopted by Scottish journalists. It does so also against the background that legislation in other parts of the UK prohibits publication of material likely to lead to the identification of those making allegations of sexual assault as defined in the law of England and Wales, and indeed prohibits publication of such matters in England and Wales when the individual concerned is the complainer in a rape case in Scotland. The court will also be bearing in mind that in *Brown* v *United Kingdom* (2002) 35 EHRR CD197, conviction and fine

of a newspaper proprietor for a breach of section 1 of the 1992 Act was found not to be a disproportionate interference with the right to freedom of expression under Article 10 of the Convention, notwithstanding the blanket, lifelong nature of the restriction imposed by the Act, and the limited circumstances in which it can be lifted. The pressing social need for anonymity for victims of sexual offences was recognised in *Brown* v *UK*:

> "The Court recognises that the relevant provisions of the Act are designed to protect alleged rape victims from being openly identified. This in turn encourages victims to report incidents of rape to the authorities, and to give evidence at trial without fear of undue publicity. The Court recalls that the Commission has previously had regard to the special features of criminal proceedings concerning rape and to the fact that such proceedings are often conceived of as an ordeal by the victim (see *SN v Sweden*, No. 34209/96, para. 47). The Court considers that it must pay special regard to these factors when examining the proportionality of the restrictions at issue in the present case."

[51] As the advocate depute submitted anonymity may be viewed as necessary in a democratic society to facilitate the investigation and prosecution of sexual offences, to allow alleged victims of sexual assault to come forward without fear of the distress and indignity publication of their identity might entail, and to encourage their participation in the criminal justice system.

[52] It is not suggested on the present case either that the court should not have made the order; or that it should be recalled; or that the order itself was not compatible with article 10 ECHR. The submission is simply that the material published did not have the effect asserted by the Crown.

[53] The remaining issue in relation to article 10 is the argument for the respondent that should the material published by him be found to constitute a breach of the section 11 order, then such breach was unintentional and in the unique circumstances of original trial "any finding of contempt or punishment for it would be incompatible with [the respondent's] article 10 rights". We reject such an argument. If the material in question is found by the

court to breach the order, any specific circumstances, including the assertion that a breach was unintentional, may found in respect of a decision as to any potential sanction, but not in our view otherwise. If the making of the order is convention compliant, it would not be a disproportionate restriction on the respondent's article 10 rights that he may be found in contempt of court for a breach thereof.

The scope of the protection

[54] The respondent argued that it would not be sufficient to establish a breach of the court order if the material in question would lead to identification of complainers by only a section of the public, such as work colleagues. It was submitted that it was necessary to show that the public in general were likely to be able to identify the complainers from the material published. On behalf of the respondent reference was made to *A Local Authority* v *The mother and father of A & B* [2020] EWHC 1162 (Fam), where Hayden J stated (para 18):

> "The potential for jigsaw identification, by which is meant diverse pieces of information in the public domain, which when placed together reveal the identity of an individual, can sometimes be too loosely asserted and the risk overstated. As was discussed in exchanges with counsel, jigsaws come with varying complexities. A 500-piece puzzle of *Schloss Neuschwanstein* is a very different proposition to a 12-piece puzzle of *Peppa Pig*. By this I mean that whilst some information in the public domain may be pieced together by those determined to do so, the risk may be relatively remote. The remoteness of the risk would require to be factored in to the balancing exercise when considering the importance of the Article 10 rights. Indeed, as I have averted to above the Article 10 rights may be of such force as ultimately to outweigh the risk of identification of the children. In this case the background of the proceedings is important. Such is the level of information in the public domain including A's full name and images in national newspapers and various social media platforms that I am satisfied that were I to name the Local Authority, the family and therefore both children would be identified with ease."

[55] The advocate depute submitted in this respect that the nature of the case and overall context was important. There was information in the public domain about the complainers which by its very nature narrowed the possibilities as to whom the complainers were. It

would be a matter of common sense that they were likely to have had some connection with the former First Minister. The dates and loci of the offences were widely reported before the trial commenced. There was an inherent and acute risk of identification from publication of any further personal but otherwise innocuous facts relating to the job title, role, career moves or physical appearance of any complainer.

[56] We note that the approach advanced by the advocate depute is the one adopted by the IPSO conduct committee in relation to alleged breaches of paragraph 11 of the Editor's Code of Practice. In *A Woman* v *Airdrie & Coatbridge Advertiser,* complaint 01029-19, the committee noted:

> "…this fundamental principle in cases involving sexual assault, a publication must not publish material likely to lead to the identification of the victim. The article had disclosed information heard in court regarding the circumstances in which the offences had occurred. This included the location in which the offences had taken place and the defendant and the complainant's association with that location. The Committee considered that the combination of these particular details, alongside the period of time in which the offences had occurred, and the ages of the victims, represented information which would be known to the complainant's community, particularly those who knew the defendant and the complainant, and was likely to lead to her identification as a victim in the case."

In *Rotherham Metropolitan Borough Council* v *M and others* [2016] 4 W.L.R. 177 one of the reasons for deciding not to name particular individuals who had committed sexual offences against a child was that if they were named, the child "would be quickly identified in the local community in which she lives."

[57] We accept the submissions made by the advocate depute. As he submitted, and as was noted in *A Local Authority* v *The mother and father of A & B,* the background context is important. That context suggests that the complainers in question would have been drawn from a relatively small group of people. To adopt the analogy used by Hayden J, the jigsaw here is much closer to *Peppa Pig* than to *Schloss Neuschwanstein*. The question which must be

asked is whether in its context the material was such as was likely, objectively speaking, to lead to identification of the complainers. If the material would be likely to enable a particular section of the public to do so that would be sufficient. We accept the submission of the advocate depute that the objective analysis should be applied to the following question "has the respondent published the names or identity or any information likely to disclose the identity of the complainers?".

[58] In *Marie O'Riordan* v *The Director of Public Prosecutions* [2005] EWHC 1240 (Admin), para 29, Rose LJ, observed:

> "A useful definition of 'likely to lead to identification' is to be found in the judgment of the former President of the Family Division, Dame Elizabeth Butler Sloss, in the *Attorney General* v *Greater Manchester Newspapers Limited*, The Times, 7th December 2001, which is cited in paragraph 20 of the judgment, of Simon Brown LJ, in *The Cream Holdings Ltd* v *Banerjee* [2003] Ch 650. She said:
>
> 'The use of the word 'likely' in the order is not to be equated with statistical probability that it will lead to the identification of the boys or their whereabouts but to the real risk, the real danger, the real chance that it may lead to that dangerous situation.'"

We have proceeded on this basis.

Intention

[59] Amongst submissions made for the respondent was a submission that any breach of the order was unintentional, and as a result he should not be found in contempt. We reject the suggestion implicit in that submission that intent to breach the order is a requisite of a finding of contempt for having done so. The respondent's intent in publishing is beside the point. The question is whether the material is such that, judged objectively, it was likely to lead to identification of the individuals concerned as complainers in the case. The respondent is fully aware that such material must not be published, and claims to have had the prohibition, and the risk, in his mind at all times. If the material is reasonably capable of

bearing an interpretation that it is likely to lead to identification then the respondent is responsible for that. As suggested in *Skeen* v *Farmer* 1980 SLT (Sh Ct) 133, it is the publication itself, in the face of the court order which constitutes the contempt. That case dealt with a ground (b) type of contempt and was of course a decision prior to the introduction of the 1981 Act, which made it clear that a ground 1(b) contempt was subject to strict liability. It was observed in *Robb* v *Caledonian Newspapers* that the essential nature of the court's jurisdiction and the procedures appropriate to bring such matters to its attention were not affected by that Act. The control or safeguard for the respondent in an allegation of a ground 1(a) type contempt are (a) the limits of the order made under section 11 and (b) the objective test about whether the material is likely to disclose identification. If so it should be obvious to him at the time of publication. In *Muirhead* v *Douglas* the court noted that:

> "where there has been in fact a failure to obey or obtemper an order or requirement of a court such a failure demands satisfactory explanation and excuse, and in the absence of such may be held to constitute a contempt of court of varying degree of gravity."

It is not maintained in the present case that there is any such explanation or excuse, rather it is simply asserted that there has not been a breach of the order.

The relevance of articles published prior to the date of the order

[60] There is a preliminary issue which arises in respect of the two articles, dated 23 August 2019 and 18 January 2020. The Crown does not assert in the petition that the articles which predated the court order constitute a breach of the order by virtue of remaining on the internet. In the petition, these articles are relied upon only for the alleged contempt under head 1(b). The relevant paragraph states:

> "68. It is respectfully submitted that the articles dated between 23 August 2019 and 20 March 2020 contain material the publication of which the Petitioner believes and avers would have been liable to prejudice the case against Alexander Salmond."

The two earliest articles are selected for specific averment:

> "69. It is respectfully submitted that the publication of the 23 August and 18 January Articles was such as to create a particular impression in the minds of persons who were called to try Alexander Salmond … The text of the 23 August and 18 January Articles is of a highly prejudicial nature.
> 71. It is respectfully submitted that publication of 23 August and 18 January Articles tends to interfere with the course of justice in the said legal proceedings and created a substantial risk that the course of justice in said proceedings could have been seriously impeded or prejudiced."

This is supported by averments stating the impression given by these articles and how they may be said to give rise to a risk of prejudice.

[61] Although some of the content of the article of 18 January is referred to as having similarities considered to relate to one of the complainers in the case (para 16), this is not suggested in the context of breaching anonymity, but of potential prejudice. Anonymity is referred to (para 17) but not in the context of the respondent having breached that but in a context of an assertion that he had implied that complainers were fabricating evidence and using their anonymity to enable them to do so, but the article is not referred to in any part of the petition which asserts a contempt of court under head 1(a). In respect of head 1(a) of the petition, it is asserted:

> "72. It is respectfully submitted that the 10 March, 11 March, 12 March, 16 March, 18 March, 19 March and 3 April Articles and the 29 March and 2 April Tweets, whether read in isolation or in conjunction with each other, contain information likely to disclose the identity of the complainers in the case of *HMA* v *Alexander Salmond*, contrary to the section 11 order imposed by the Court on 10 March 2020."

Again this is supported by averments specifying in what way the order of 10 March is said to have been breached, and in which publications. Only those itemised in para 72 are referred to. In his submissions, however, the advocate depute advanced an argument that the pre-order articles constituted contempt by remaining on the site and that individually or together with other articles they were capable of leading to identification of the complainers.

[62] The question arises whether this is a submission we can or should entertain, when the Crown has not made that assertion in the petition. The petition is the basis upon which the Crown makes its assertions that the respondent has been guilty of contempt of court, and by which it provides notice to him of the way in which that contempt has been effected. The court, and more pertinently the respondent, is entitled to expect that the basis for the allegations of contempt will be set out clearly and specifically in the petition, in the same way that would be expected in allegations of breach of interdict. This point was alluded to in *Byrne* v *Ross* 1992 SC 498, which was a breach of interdict case, where the temporary judge had concluded that the respondent had breached the interdict in three separate respects, only two of which formed part of the pleadings in the process; the third incident had not been averred as a breach. On appeal, Lord Hope, delivering the opinion of the court, said (p506)

> "A breach of interdict constitutes a contempt of court which may lead to punishment, and it is necessary in the interests of fairness that the alleged contempt should be clearly and distinctly averred and that the proceedings for contempt be confined to the averments."

[63] In the circumstances we do not consider it open to us to consider the terms of these articles on their own in relation to head 1(a) of the allegations. That does not mean that we cannot consider whether the articles are a breach of the court order, but would prevent such a breach featuring in any finding of contempt. Moreover, these articles remain relevant to head 1(a) insofar as they may result in subsequent articles, being read in conjunction with those earlier articles, being likely to lead to identification of the complainers.

Whether material had been published elsewhere

[64] There is a dispute between the parties regarding whether certain material published by the respondent had been published elsewhere. The court is not in a position to resolve

that dispute. However, that issue is not material to the issue which the court has to address. It is irrelevant to whether what the respondent published constituted a contempt of court. The court requires to focus on the task of considering the material published by the respondent and asking whether it is material which is likely to lead to identification of the complainers in *HMA* v *Salmond* in that capacity.

The respondent's affidavits

[65] Two signed affidavits have been lodged on behalf of the respondent. In these he states that he is "a retired diplomat, now a historian and journalist". He describes himself as a "journalist in new media", focusing on his own website, but stating that he has also had articles published in the mainstream printed press. In the affidavits he states that the stated purpose of his blog, to use insider knowledge of government to interpret contemporary events, is not a reference to acquiring material from within government but to use his diplomatic experience and understanding of governmental affairs to comment on, and interpret, contemporary events.

[66] The affidavits are full of material which is irrelevant, hearsay, states gossip as fact, and in some instances even potentially defamatory. It explores in detail the collateral issues which were excluded at trial and presents all the material from one point of view interpreted through the one prism. As with many of the articles with which these proceedings are concerned, the respondent does not merely identify information, put the material before the public and ask questions arising from it. He acts as arbiter, presenting the matter on the basis that his belief, opinions and interpretation of the information, assuming that is the right word to use, is "the full truth". The material is presented as proof of his conclusions, inferences and his point of view. Where a piece of evidence may be capable of different interpretations, the interpretation supporting his belief is generally selected. In that sense

the affidavit is polemical, as is most of the material published by him. As he stated clearly in the article of 23 August 2019 "I make no claim to be impartial".

[67] The respondent states that he knew the identity of the complainers by November 2019 but asserts that he has never at any time had the intention of publishing the names of complainers in the Salmond trial. When one considers the content of his affidavits, that assertion may be open to question.

[68] A notable feature of the affidavits is the repeated focus by the respondent on the absence of a court order prior to 10 March 2019 as meaning that had he wished to identify the complainers he could have done so prior to that date, "knowing there was no general law or court order in place preventing me simply from publishing". This however "would not have been responsible journalism". That it would have been a clear contravention of the IPSO Editor's Code of Practice and of the local convention are not matters which appear to have engaged him, although it is clear from para 40 of his main affidavit that he was aware of the convention.

[69] By the time he wrote the "Yes Minister" fan fiction article, he was aware of the identities of the complainers, and it clear from paras 40-43 that he had formed the personal view that these identities were something which "there is the strongest possible public interest in knowing". At paragraph 40 he asserts that if the names of the complainers were known to the public "they would immediately understand what was happening". While stating that he supports the principle of giving anonymity to those alleging sexual assault, based on his opinions about the material presented in his affidavit, he questions the public interest in granting anonymity in the present case, although this assertion formed no part of the submissions made on his behalf.

[70] He wrote the "Yes, Minister" article after a health scare because "there were things I would not wish to die without having told". There was thus clearly an intention to convey to the public information and opinion about the criminal proceedings and the background thereto. It is clear that he understood the risk inherent in the action he was taking, since he states that it was "a challenge" to work out how to convey the information "without being in contempt of court" (paragraph 54 of the affidavit). He used certain strategies seeking to avoid being in contempt, the main one of which was "to leave information that people would not understand the ramifications of but would after the trial or once further evidence emerged". It is a reasonable inference that by using coded language he anticipated that if not at the time of the article, at least by the conclusion of the trial, the material would be understood beyond its *ex facie* terms. In a tweet of 19 January, in direct reference to this article, he wrote:

> "I implore everybody who supports Independence – and indeed everybody with an interest in justice - to read this article very, very carefully indeed. Between the lines."

A comment was made by him in the 12 March article is to similar effect: "I am dependent on you reading this whole article with intelligence, and thinking "I wonder why he just told me that bit? Where was that relevant?""

[71] It is also a reasonable inference from the reference to the conclusion of the trial that the concept of contempt concerning him was that which applies to prejudicing proceedings. The question of the identity of the complainers, and the journalistic obligation under both the convention and the Editor's Code of Practice to protect these clearly did not feature in his thinking. In fact he records that at the time he wrote the fan fiction article there was "no order in force against publication of names" but "I nevertheless decided not to do that". The repeated reliance on the absence of a court order for anonymity shows that he fails to

recognise or appreciate the significance and importance of both these elements of protection. The fact that he refers to defence witnesses giving evidence "without the benefit of anonymity", and elsewhere refers to "the screen of court enforced anonymity" in respect of complainers, suggests a failure to understand the rationale and purpose behind anonymity for complainers in sexual offence cases.

Applying the objective test to the articles in question

Article 23/8/19

[72] In the advocate depute's submissions, the content of this article is referred to as being in breach of the order but the way in which it may be said to do so is not addressed. Whilst we can fully understand the basis upon which it was asserted that this article fell within the scope of ground 1(b) of the allegations, we fail to see how, on its own, its continued presence on the respondent's website can be said to constitute a breach of the court order. The content is all about the successful judicial review and the unlawful process which led up to it, and the involvement of named individuals in that process in official roles, and which are not stated or implied to be in the capacity of complainer. We do not consider that on its own it is likely to lead to members of the public identifying a complainer in the criminal proceedings. The position may be different where this article is read along with other articles written by the respondent.

The article of 18 January 2020 – Fan Fiction

[73] As with the prior article, there is much here which might reasonably have been asserted, at the appropriate time, to constitute contempt of court under head 1(b). However, in our view the article is expressed in such terms as might be likely to lead to members of the public identifying two complainers in the criminal case. A number of points require to

be made. One must bear in mind the respondent's avowed intention in writing this article in order to place before the public material which he could not otherwise place before it, and his assertion that it was a challenge to find a way to do so which would not constitute contempt of court, but which would at least be understood when more evidence was in the public domain or after trial. It is clear that his intention was to present material in a way which was effectively "encoded", aligning with his view that there was "the strongest possible public interest" in knowing the identity of the complainers. The warning at the beginning of the article shows that the respondent was aware that if the article were read or interpreted in the context of the case against *Alex Salmond* there was a risk that it might constitute contempt of court; but it is equally a reasonable inference that this is exactly how he intended that the article should be read. In a tweet drawing attention to this article (19 January 2020) he implored his followers "to read this article very, very carefully indeed. Between the lines."

[74] Moreover, the contents of the article show that he was aware that the identities of the complainers was something which would be protected by the courts "under penalty of severe jail sentences for anybody who reveals them." The overall content of the article must be read in this context. The article contains the suggestion that an individual with a named job might be put up to making false allegations against the minister's successor. The nickname given to that person is one which would require very little imagination to link with one of the complainers. On top of that the article asserts that the individual was closely involved in the civil proceedings and the internal inquiry with which it was concerned. The named job is not the one held by a complainer but it is one which implies close contact with the minister in the same way as the job of one of the complainers would in fact do. When one reads it in conjunction with the article of 23 August the position is made even more

clear, particularly in respect of an association with the civil proceedings. In our view these matters alone are sufficient to mean that the respondent breaches the order by continuing to publish the article on his website. It breaches the order when read alone; when read with the article of 23 August the breach is blatant.

[75] Given what we have already noted about the respondent's intent when writing this article the nickname used for a well-known politician as someone associated with another of the complainers may reasonably be interpreted as being designed to allow him, and by association her, to be identified. There are other references to the politician and a position he might be seeking, combined with the nickname, which would allow that identification to be made. Were there any doubt about the matter, there is reference to a job formerly held by the complainer in question which would provide another piece of the jigsaw. This too constitutes a breach of the order.

Article 10 March

[76] In our view the assertion by the respondent that he knows who one of the complainers is does not breach the order. There is nothing in the article by association with said complainer which might reasonably lead to her being identified.

Article 11 March

[77] In our view this material falls foul of the court order. Alone or taken together with other material it contains sufficient detail to be likely to lead to identification of a complainer. The reference to the complainer's political aspirations, which have a specific context, and the role in which she was previously employed, are sufficient to do so. In addition, when the material is read in conjunction with the article of 18 January the likelihood of identification is very strong. It is disingenuous to point out that there were

other constituencies which might meet the description given in the article. This is true , but the number is small indeed, and the detail must be looked at in its whole context. In respect of the same complainer as the breach referred to in paragraph 75 above, it is a breach of the order on its own and when taken together with the article of 18 January.

Article 12 March

[78] We do not think that either alone or together with the other material this is material which would be likely to lead to identification of any of the complainers. The main complaint is a reference to SNP figures at the heart of the current SNP administration. This is not such as would be likely to lead to identification of complainers.

Article 16 March

[79] We do not consider that this, in its generality, breaches the article, nor do we consider that it does so in the context of other articles.

Article 18 March

[80] This article, when taken with the articles of 23 August 2019 and 18 January 2020 is likely to lead to identification of the same complainer as referred to in paragraph 74 above. It is thus a breach of the court order.

[81] In respect of a different complainer, this article also breaches the order in the same way as the article of 11 March does, and for the same reasons (see paragraph 77 above). It does so alone, and when taken together with the articles of 11 March and 18 January.

[82] Finally, regarding a third complainer, whilst no doubt several individuals may from time to time have been involved in assisting with preparation for FMQs, it is reasonable to suppose that this would not be a large number. When this article is read along with the

article of 19 March, which provides further information about the complainer in question, including an aspect of her own job and the name of her line manager, and the tweet of 2 April which does likewise, the information is likely to lead to the identification of a complainer.

[83] The information about a further complainer relating to her hair and the name of her line manager is, on the information available to us, not likely to lead to identification of the complainer in question. It was a matter of agreement that the line manager in question manages over 30 individuals. Unlike the situation in respect of the previous complainer we do not think the information is sufficiently specific to identify the individual complainer.

[84] The article contains reference to another complainer, named by a letter of the alphabet by which another complainer was in fact referred, and specified the job held by her at the time in question. The specificity is such that to specify her as holding it when she did, and in the context which is given, is tantamount to naming her. This is a clear breach of the order.

Article 19 March

[85] This is a further breach of the order in relation to the complainer referred to at paragraph 82 above, in itself but also taken with the articles of 11 and 18 March and 18 January, and for largely the same reasons.

[86] We are not in a position to accept the Crown's assertion that details contained herein would enable a complainer to be identified from a twitter search. However, we are satisfied that the detail relating to a complainer, wrongly referred to by the letter F, contained in this article is likely to lead her identification. The fact that here and in the prior article the individual was referred to by the "wrong" letter of the alphabet has no effect on whether the material is likely to lead to the identification of a complainer.

[87] There is a further clear and obvious breach of the order in relation to the complainer referred to at paragraphs 74 and 80 above, when taken with the articles of 23 August and 18 January.

Article 3 April

[88] In respect of one of the complainers the Crown case ties this article in with the tweet of 29 March. Even taking the two together we do not consider that the material is likely to lead to identification of a complainer. The main basis upon which this was originally said to constitute a breach was that a google search was said to throw up her name. We have no basis upon which to accept that submission. It is a matter of agreement that the organisation referred to receives funding from different public–sector grants and that a number of officials, elected and in the civil service, will be involved in administering them. On the information provided to us we cannot conclude that this, or the tweet of 19 March, together or separately constitute a breach of the order. Nor do we consider that the reference to a specific journalist in association with a complainer is a breach of the order. It is reasonable to assume that such a journalist would have very many contacts within the world of government, and there is nothing in this material to make a link with a complainer such that may be identified.

[89] There is a further reference to the complainer referred to at paragraphs 74, 80, and 87 and her role in public life which in our view is a further breach of the order in respect of her, when read with the other articles referred to at para 87.

[90] Having regard to the context in which these articles appeared, including the terms of the article of 18 January 2020 and the tweet referring thereto, as well as the content of the respondent's affidavit, we are satisfied that these breaches of the court order, in respect of the articles of 11, 18, 19 March, 3 April and the tweet of 2 April, must be considered to

constitute contempt of court. The contempt relates to material capable of identifying four different complainers. We shall therefore make such a finding, and we shall put the case out by order for a further hearing in respect of the consequences of this decision.