APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 14
HCA/2021/14/XM

Lord Justice General
Lady Paton
Lord Woolman
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

the Petition to the *nobile officium*

by

CRAIG MURRAY

Petitioner

against

HER MAJESTY'S ADVOCATE

Respondent

Petitioner: Dean of Faculty (Dunlop QC), Young; Halliday Campbell WS
Respondent: A Prentice QC (sol adv) AD, A Gray (sol adv); the Crown Agent

25 March 2022

Introduction

[1] This opinion follows the earlier determination by the court ([2022] HCJAC 5) that the petitioner was entitled to present a petition to the *nobile officium* to challenge a finding that he had breached a court order and was thus in contempt of court. The order prohibited

publication of any information likely to disclose the identity of the complainers in the trial of the former First Minister, Alex Salmond, on sexual offences charges. The petition seeks to quash the finding of contempt and the consequent sentence of 8 months imprisonment, which has now been served. The petitioner was granted parole after serving about four months in custody.

[2] The finding by the court, that the petitioner had breached the order, related to a number of articles which he had published on his website, notably those on 11, 18, 19 March and 3 April 2020, together with a tweet of 2 April. These articles were found to have contained information likely to disclose the identity of four of the complainers in the trial, which had commenced on 9 March and concluded on 20 March 2020.

[3] The petition raises a number of grounds of appeal. First, the court erroneously applied a test of strict liability. Secondly, the court erred in making findings which were contrary to the content of the petitioner's affidavits upon which he had not been cross-examined. Thirdly, the court wrongly considered that it was sufficient that the publication was likely to allow the complainers to be identified by a "particular section of the public" rather than the public as a whole. Fourthly, in contravention of Article 10 of the European Convention, the law of contempt was both vague and unforeseeable and could not be said to be prescribed by law. Fifthly, the court erred in holding that the article of 18 March risked revealing the identities of more complainers than was averred in the original petition and complaint.

[4] The petition challenges the sentence as excessive having regard to the petitioner's personal circumstances. The sentence is said to be disproportionate, when imposed upon a journalist, in the absence of exceptional circumstances.

The Court Order

[5] On 24 January 2019, the former First Minister, Alex Salmond, was made the subject of a petition charging him with a number of sexual offences, including attempted rape. The trial commenced on 9 March 2020. On the second day, the trial judge, the Lord Justice Clerk (Lady Dorrian) issued 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 …".

The Articles

The Alex Salmond Fit-Up

[6] On his website the petitioner describes himself as an "Historian, Former Ambassador, Human Rights Activist". On 23 August 2019, he published an article on the website entitled *The Alex Salmond Fit-up*. It begins with what is said to be a report from an unnamed investigative journalist and friend of the petitioner. The report claimed that Mr Salmond was being "fitted-up by officials in the Government". It referred to a judicial review in which Mr Salmond had successfully challenged the Scottish Government's procedures when investigating complaints against him. There were specific criticisms of the involvement of a special advisor, namely AB, in the civil service group which had been tasked with instructing the defence to the review. The actings of the permanent secretary to the present First Minister, Nicola Sturgeon, came under fire. The report ended with a comment that "this entire process against Salmond, already judged unlawful in the highest court in the land, stinks to high heaven".

[7] The petitioner continued by agreeing with that remark; adding that "no aspect of it stinks more than the role in steering the affair throughout, of [AB]". AB's role in the

Government is identified. The article turns its attention to the police, who had "put 22 officers full time into trying to dig up historic dirt on Salmond". Police Scotland had conducted the "biggest and most maliciously motivated fishing expedition in Scottish Police history". Next come criticisms of the procurator fiscal, who had spent an inordinate amount of time trying to "cobble together the pile of mince they have as 'evidence' into some sort of case". This is followed by an express reference to those who would later appear as complainers at the trial, *viz.*:

> "Meantime the parties behind the Salmond case can hide indefinitely from investigation on the pretext that it would prejudice a so-called independent process".

Yes Minister Fan Fiction

[8] A further article followed on 18 January 2020, under the heading *Yes Minister Fan Fiction*. This consists of a script of a fictional conversation between a Minister and her permanent secretary, along the lines of the popular, if now vintage, television series, *Yes Minister*. The script is prefaced by a warning to readers not to attempt to link it with "any actual court case" because this might cause them to "wander into contempt of court".

[9] The script begins with the permanent secretary suggesting that the Minister could destroy her predecessor's reputation by accusing him of sexual offences. In the absence of evidence, creative thinking was needed to find "more women to make allegations … Minister, activate the women you know …". The conversation covers the possibility of asking the person involved in putting "the dossier" together. This person is given a fictitious name, but it is similar to that of a particular institution, which is also the case with that of AB. The satire is a thinly disguised one of Ms Sturgeon talking about how to tarnish the reputation of Mr Salmond. The Minister's concern, that using a particular person would

necessarily implicate the Minister herself, is dealt with by a specific reference to "Accuser anonymity" whereby:

> "PERM SEC The identities of the accusers can be kept hidden by the court under penalty of severe jail sentences for anyone who reveals them …
>
> MINISTER … the accusers can just be my closest political cronies and the public will never be aware of that! That's brilliant, Perm Sec!"

[10] There is a separate suggestion that the wife of a politician may be willing to fabricate allegations of sexual abuse in order to further her, and her husband's, career. Her former position is mentioned, but a leak to the press would describe her as a "civil servant" to add credibility to the allegations. The politician is referred to by a nickname which makes him readily identifiable in the context of a particular comestible. His family were said to want a safe seat in a particular area. The wife is said to be a former special adviser. The Minister explains that she "can think of three or four women very close to us indeed who can make allegations … and nobody will ever know who they were". The script continues with a disparaging and, as it turned out, erroneous prediction on the manner in which the jury would reach their verdicts. In response to a request for the petitioner to substantiate his allegations, he explains that he cannot do that without being in contempt of court. In an associated tweet, a particular politician is named as intending to obtain a seat in the area mentioned in the script.

[11] On 19 January 2020, the article was re-posted as a tweet. The petitioner implored everyone with an interest in justice to read the article "very, very carefully indeed … between the lines".

Your Man Excluded

[12] On 11 March 2020, the day after the court had made the contempt order, the

petitioner published an article headed: *The Alex Salmond Trial: Your man excluded from the gallery*. The petitioner was not a journalist accredited by the court. In accordance with normal practice in cases involving evidence of a sexual offence, he had, along with all other members of the public, been excluded from the courtroom during the testimony of the complainers. Accredited journalists were allowed to remain. The court had adopted a number of measures to ensure that the large number of accredited journalists could view the proceedings, despite constraints of space.

[13] This article commences with some misleading comments on the law of evidence before describing the role of the journalist. It states that the petitioner knew the identities of the "accusers" and other things, which the jury would not know because they did not "fit into the judge's, or the lawyers', view of what is needful to be presented at trial". The article digresses with remarks on the law of contempt. It comments on one of the complainer's, Ms H's, testimony, as reported by others, "without fear of contempt of court". Ms H, who was the complainer in the most serious of the charges (attempted rape), was described as being:

> "a person who could stay in a bedroom inside Bute House … who was employed then in a central, vital political capacity, who remains today very much an intimate part of the small trusted inner circle of SNP leadership, a person approved as an SNP candidate by central vetting, who attempted … to get the nomination for [a named] Holyrood constituency which overlapped with [a named] Westminster … seat."

Your Man finally in

[14] On 18 March 2020, a further article was published by the petitioner; this time entitled: *Your man finally in the public gallery. The Alex Salmond trial day 7*. Day seven was the point at which the complainers' testimony had ceased, the Crown had closed their case and the petitioner was able to enter the courtroom and listen to Mr Salmond's evidence. In

reporting on the latter, including its allegation that the accusations had been politically motivated, a number of descriptions of the complainers was given. Ms A was said to be "extremely close to Nicola Sturgeon". The petitioner reported that he was constrained in setting out Mr Salmond's description of Ms A because "it would identify Ms A". Ms A had had input into a meeting on a specific date between Mr Salmond and Ms Sturgeon, when two complaints against Mr Salmond had been discussed. Ms B was rated highly as a civil servant by Mr Salmond. She prepared his answers to First Minister's questions. Ms B's line manager's description of her, as given in her evidence, was narrated and a specific aspect of her job was provided.

[15] Ms D was described as smart and a person who got things done. She too was rated highly and had accompanied Mr Salmond overseas, including to two named countries. Ms F's job title was given. There was a specific occasion when she had returned with Mr Salmond from Glasgow to Bute House on a particular date. Ms F had accompanied Mr Salmond on tours. There was a reference to them travelling together on a particular date. A twitter post by Ms F about the trip was quoted. There were diary entries in which Ms F described herself being at a particular location in advance of an interview with Good Morning Scotland.

I have a plan

[16] On 3 April, the petitioner published another article : *I have a plan so that we can remain anonymous but have maximum effect*. The lengthy title was said to be a quotation from a text which Ms H had sent to a "co-conspirator". The plan was that the complainers, who "were all very powerful women" would remain anonymous. This would "thus protect them against any backlash". The article is critical of what the petitioner describes as "Scotland's

laughably biased corporate media" and in particular of an article by Dani Garavelli which had painted a sympathetic picture of the complainers following Mr Salmond's acquittal on all charges.

[17] In the second half of the article, there is reference to a named person being the line manager of both Ms B and Ms D. Ms A was said to have had a personal history with a named journalist and was right at the centre of the Scottish Government. Ms D's hair was described.

The Cases as Presented

[18] In presenting their case, the Crown relied on the terms of a joint minute which agreed the provenance of the petitioner's articles. No witnesses were called. The Crown relied on the court being prepared to draw an inference from the published material that the petitioner had "intentionally and repeatedly breached the court order" (Crown written submissions at para 40). The petitioner's stated intention had been "to name those that he claims are involved in a criminal conspiracy" (*ibid* at para 57).

[19] In response, the petitioner lodged a number of affidavits. His own principal affidavit begins with a description of himself as "a retired diplomat, now a historian and journalist"; the latter said to be in "new media". It describes his career. The petitioner refers to articles which he published in 2018 and early 2019 before recounting, at some length, a meeting with Mr Salmond. At this it was claimed that Ms Sturgeon was "behind the process designed to generate false accusations; with a named person, [AB], as the orchestrator" (affidavit at para 12). This meeting appears to have prompted much of the material in the August 2019 *Alex Salmond Fit Up* article. The petitioner had been unaware that one of his prime targets in the article, namely AB, was to become a complainer.

[20] The petitioner explains that, by November 2019, he had learned of the identities of the complainers. He continues (para 40):

> "If the public knew the identities of those being put up to make allegations, and just how close to Nicola Sturgeon they were, they would immediately understand what was happening. But the convention protecting the identities of those making allegations of sexual assault, made such allegations the perfect vehicle for a positive campaign to frame on false charges, while the perpetrators of this conspiracy to pervert the course of justice had the protection of these courts against exposure".

It was, in the petitioner's mind, in the public interest that the public should know who the complainers were "in order to judge the actions of those in power over them" (para 41). The burden, of having this knowledge and not being allowed to reveal it, was a heavy one. Although he supported the principle of anonymity, "this was an absolutely unique case" (para 42).

[21] Having become aware of the identities of the complainers, and knowing that "there was no general law or court order in place preventing" (para 44) publication, the petitioner explains that it would not be "responsible journalism" to reveal those identities. He was on the horns of a dilemma once the potential damage to the independence movement, which he thought would result from disclosure of the conspiracy, was taken into account. The most cynical part of the plot was the use of witness anonymity to disguise what was behind the allegations (para 46).

[22] After publication of the indictment, the press coverage had been hostile to Mr Salmond. Writing *Yes Minister Fan Fiction* had been (para 54):

> "a challenge to work out how to tell them without being in contempt of court … I therefore very carefully used a number of strategies not to be in contempt of court; ...".

The petitioner emphasised that he had not published names and that the nickname of the politician was not related to a particular comestible. The name of a particular financial

institution was unconnected to AB's real name. The petitioner had, at the forefront of his mind (para 70), the need not to reveal the identity of the politician's wife in his *Your Man Excluded* article.

[23] After the court order, the petitioner became more careful. He explains that:

> "It was necessary, for the public to have an understanding of the basics of the case, to explain that several of the accusers held senior positions in the SNP structures, but I was very careful to ensure that I gave no details of actual positions, or who worked in Edinburgh, who worked in London etc …" (para 71).

[24] After gaining access to the courtroom, the petitioner continued his policy of taking great care. He checked his prudence by carrying out Google searches. He deleted a reference to AB being at a particular meeting, although others had not. The fact that both he and Mr Salmond had been prosecuted, and Ms Garavelli had not, was "sinister" (para 78). The media reporting of the testimony at trial had been biased; omitting much of the defence evidence. The "mainstream" media had been overwhelmingly hostile to Mr Salmond. It was mainly because of the petitioner's blogs that the public had become aware of that evidence. He was fulfilling a "democratic duty" (para 84). Although he accepted that he was "up to the line" (*ibid*), he had been very careful not to cross it.

[25] On 20 March, the petitioner was excluded from the courtroom; a matter about which he protests in his principal affidavit. He regarded it as ironic that he was the one upholding the dignity of the court and explaining the correctness of the verdicts, while Ms Garavelli was attacking the court; hence his article *I have a plan*. The Crown Office was, he believed, "deeply corrupt" (para 114).

[26] The petitioner did not give oral testimony. His counsel did say that he was prepared to answer any questions which the prosecutor wished to ask. The Advocate depute declined to ask any questions.

The Decision of the Court of First Instance

Merits

[27] The court of first instance (sitting as a bench of three) rehearsed the practice in Scotland whereby courtrooms are generally closed to the public, but not to journalists, when complainers in sexual offence cases are giving evidence (*H* v *Sweeney* 1983 SLT 48 at 61). The convention is that the press do not publish the identities of complainers. This is covered by the Editors' Code of Practice (at para 11). The justification for the convention was set out as early as 1975 by the Heilbron Committee (at para 153) as being, first, to prevent public knowledge of the indignity to which a complainer had allegedly been subjected and, secondly, to reduce the risk that such knowledge would operate as a deterrent to the bringing of proceedings. In human rights terms the justification could be found in *Brown* v *United Kingdom* (2002) 35 EHRR CD197 in which the European Court recognised (at CD200), in the context of the legislation in England, that the prohibition on identifying complainers "encourages victims to report incidents of rape to the authorities, and to give evidence at trial without fear of undue publicity". In determining proportionality the court required to pay special regard to the fact that giving evidence in sexual offence trials is often conceived as an ordeal (*SN* v *Sweden* (2004) 39 EHRR 13 at para 47).

[28] The petitioner's contention was not that the order should not have been made, but that the material did not have the effect of identifying the complainers. The definition of what was meant by "likely to identify" was that there was a real risk, danger or chance of that identification taking place (*O'Riordon* v *Director of Public Prosecutions* [2005] EWHC 1240 (Admin) at para 29). In rejecting the petitioner's argument about a breach of Article 10, the court determined (Opinion, para [53]) that an intention to breach the order was not required.

If the order had been breached, a lack of intention to breach it was relevant only to penalty. If the order were Convention compliant, it could not be a disproportionate restriction of the petitioner's Article 10 rights to be found in contempt in the event of a breach.

[29] On the scope of the protection, where it was known that the complainers were likely to have some connection with Mr Salmond, and the dates and *loci* of the offences had been widely reported, there was an inherent and acute risk that the publication of any further personal, but otherwise innocuous, facts relating to job title, role, career moves or public appearances, would lead to identification. The question was whether the material was such that, looked at objectively, it was likely to lead to identification. If the material would be likely to enable a particular section of the public to identify the complainer, that would be sufficient to constitute a contempt.

[30] The court reiterated that the petitioner's intent was "beside the point" (para [59]). He had been fully aware that material, which was likely to lead to identification, should not be published. He was responsible for any contravention of the order (see *Muirhead* v *Douglas* 1979 SLT (notes) 17 at 18). It was publication in the face of the order which constituted the contempt (*Skeen* v *Farmer* 1980 SLT (Sh Ct) 133).

[31] On the relevance of the pre-order articles, which the petitioner had continued to display on his website after the order had been pronounced, the petitioner had been entitled to expect (para [62]) that the basis for the allegations of contempt should be set out clearly and specifically in the averments (*Byrne* v *Ross* 1992 SC 498 at 506). The pre-order articles could not, *per se*, be found to constitute a contempt but they did remain relevant because the post-order articles, when read in conjunction with them, could be regarded as likely to lead to identification.

[32] The court considered (at para [66]) the petitioner's affidavits to be full of irrelevant material, hearsay, gossip and potentially defamatory statements. They explored collateral issues and presented material from only one point of view. The petitioner was not merely identifying information but acting as arbiter, presenting it as proof of his conclusions, inferences and point of view. The principal affidavit was polemical. The petitioner's assertion, that he had never intended to publish the names of the complainers, may be "open to question" (para [67]) in light of the terms of his own affidavits.

[33] By the time of *Yes Minister fan fiction*, the petitioner considered that the public interest required revelation of the identities. The court continued:

> "[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."

The court drew the inference that the petitioner's reference to the conclusion of the trial meant that he was focusing on potential prejudice to the proceedings. The identity of the complainers did not feature in his thinking. His reference to the lack of anonymity for defence witnesses suggested a failure to understand the rationale and purpose of anonymity.

[34] The court determined that the articles of 11, 18, 19 March and 3 April, with the tweet of 2 April, constituted contempt in identifying four of the complainers. The article of 23 August 2019 (*The Alex Salmond Fit-Up*), on its own, was not likely to lead to identification,

although it might be different when it was read along with the others. That of 18 January (*Yes Minister Fan Fiction*) was likely to lead to the identification by "members of the public" of two of the complainers. The petitioner's intention (para [73]):

> "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 start showed that the petitioner was aware of the risk of contempt, if the script was read as relating to Mr Salmond's trial, but it was reasonable to infer that this was exactly what the petitioner had intended in terms of his tweet to his followers to read it "Between the lines".

[35] Linking the nickname of the politician to one of the complainers required very little imagination. Even if the named job was not the one held by the person, it did imply close contact with the minister in the workplace. The petitioner had breached the order by continuing to publish this article on his website. The breach was blatant when read with the earlier article. The court found (para [75]) that the article was "designed to allow [the nicknamed person], and by association [a complainer] to be identified". Other published details confirmed this intention.

[36] The article of 11 March (*Your Man Excluded …*), alone or taken with other material, contained sufficient detail as to be likely to lead to identification. There was reference to political aspiration and particular employment; the likelihood increasing when read in conjunction with the earlier material. Similar considerations applied to that of 18 March (*Your man finally in … Day 7*), with its reference to a job description. When read along with the article of the following day (*Your man finally in … Day 8*), which provided further information on a complainer's role and the name of her line manager (see also the Tweet of 2 April), this too was likely to lead to identification. The reference to another complainer,

wrongly initialled, having a specific job was tantamount to naming her. The 19 March article contained further breaches relating to these complainers.

[37] The article of 3 April (*I have a plan …*) did not constitute a breach in relation to the complainer having a link with a journalist, but it did in relation to another complainer by referring to her role in public life.

Sanction

[38] On 11 May 2021 the petitioner was sentenced to 8 months imprisonment. In mitigation, reference had been made to certain cases in England and to a sentence of 6 months which had been imposed on Clive Thomson for publishing the names of the complainers. The court took note of the petitioner's age (62), his lack of previous convictions, and his previous useful contributions to society in the diplomatic service. He was married with a young family. He had a number of serious health issues. Imprisonment, it was submitted, would be disproportionate. A substantial fine, which would be in line with other media contempts, would be appropriate.

[39] In a note of reasons appended to the interlocutor, the court had regard to the factors listed in *Re Yaxley-Lennon* [2018] 1 WLR 5400. The case was at the more serious end of the scale. The potential consequences for the complainers had been significant. The risk of identification would have been abhorrent and worrying to them, especially given the enormous publicity which the trial had attracted.

[40] The scale of the breach had been considerable; involving a number of publications over a period of about a month. The petitioner had taken no corrective action, even when members of the public had posted responses stating that they were able to identify individual complainers. The petitioner maintained that he had a readership of 77,000 and

that his coverage of another case had "reached millions". The scale of dissemination had been substantial.

[41] The petitioner knew that the complainers had been given a specific protection. He understood the risk inherent in his actions. He:

> "deliberately decided to run that risk, knowing that jigsaw identification of complainers might result, and did so repeatedly. It appears from the posts and articles that he was relishing the task he set himself which was essentially to allow the identities of complainers to be discerned, which he thought was in the public interest, in a way which did not attract sanction. In that he failed."

A serious issue of principle arose; *viz.* the importance to the administration of justice of granting anonymity to complainers in sexual offences cases. Actions, such as those of the petitioner, in the face of a clear order of the court, required to be treated as a contempt of considerable gravity. Despite the personal circumstances of the petitioner, the court did not feel that it could dispose of the case other than by way of imprisonment.

Permission to Appeal

[42] The petitioner at first applied for permission to appeal to the Supreme Court of the United Kingdom. On 8 June 2021, the court refused that application. It distinguished the petitioner's description of himself as a "journalist in new media" from that of the mainstream press, which was regulated and subject to codes of practice. Cases involving contempts by the mainstream press were not comparable.

[43] The petitioner advanced three grounds of appeal, each of which was said to raise a compatibility issue. The first was that a breach of Article 6 had occurred because the court had gone beyond the terms of the original petition and complaint in relation to the article of 18 March (*Your man finally in …*). The court explained (Opinion, para [6]) that it did not find that this article constituted a breach of the order on its own. When taken along with the

other articles, the finding of contempt had been correct. The court was not, in looking at the background, limited to the petition's averments.

[44] The second ground was that the finding of contempt was not compatible with Article 10(2) as the test was insufficiently precise and foreseeable. The court rejected that contention, and the argument that it could not be a contempt if only work colleagues or part of the community could identify the complainers. The court had not said that the ability to identify was restricted to members of the complainers' immediate or personal circle, but had proceeded (para [8]), on the basis of the risk of identification by members of the public.

[45] The third ground was that the sentence was disproportionate. Only in exceptional circumstances, notably where other fundamental rights had been seriously impaired, would a prison sentence on a journalist be appropriate. The court explained (para [11]) that the rights of the complainers, not to be identified, had been "seriously and flagrantly impaired" by the petitioner's actions. The latter struck at the heart of the fair administration of justice. The circumstances were exceptional, involving an infringement of the complainers' Article 8 rights. It was the repeated publication of material likely to lead to their identification "in the face of a clear order of the court prohibiting that which drew the sanction".

[46] On 29 July 2021 the UK Supreme Court refused permission to appeal because "the application does not raise an arguable point of law of general public importance."

Submissions

Petitioner

[47] The submissions on behalf of the petitioner were prefaced by a contention that the petitioner held and continues to hold the genuine belief that there had been a conspiracy and the public had a right to know of it. . He conceived that he was fulfilling a journalistic

role. In its opinion on the refusal to grant permission to appeal to the UK Supreme Court, the court had, without justification, distinguished between the petitioner and the mainstream press. This ran contrary to European Court jurisprudence (*Magyar Helsinki*: *Bizottság* v *Hungary* (2020) 71 EHRR 2 at para 167). There had been no evidence that the petitioner had sought deliberately to identify the complainers for any vindictive purpose. His purpose had been, as a "public watchdog", to report on concerns about serious misconduct at high levels of public and political office.

[48] Five grounds of appeal were advanced. The first was that the court had erred in applying a strict liability test for a breach of a section 11 order. It had erred in holding that "intent to breach the order" was not a pre-requisite. Strict liability only applied where there was a substantial risk of prejudice to the course of justice (1981 Act, s 2(2)). *Skeen* v *Farmer* and *Robb* v *Caledonian Newspapers* 1995 SLT 631 were in that area in which proof of intent was not needed. There was a presumption that there required to be a mental element in statutory offences (*Pwr* v *Director of Public Prosecutions* [2022] 1 WLR 789). It was accepted that publication had been intentional and that there was no need to prove an intention to break the law. It was not enough just to show that a publication contained the last piece in a jigsaw. The court had to find that the petitioner's actions had been in wilful disobedience of the order (*McMillan* v *Carmichael* 1994 SLT 510). Intention to defy the court was necessary. (*Robertson and Gough v HM Advocate* 2008 JC 146 at para 29; *AB and CD* v *AT* 2015 SC 545 at para [29]; *McKinnon,* 2nd Division, 26 January 2022, unreported Statement of Reasons). It was possible for there to be a breach of a court order but not a contempt (*Sapphire 16* v *Marks and Spencer* 2022 SLT 84).

[49] The second error was that the court had made findings which were contrary to passages in the petitioner's affidavits upon which he had not been cross-examined. They

explained how he had used strategies to avoid being in contempt of court. He was mindful of the need not to identify the complainers. Although the court had expressed the view that his statements about what he had intended were "open to question", it had not made a finding of wilful disobedience. If there had been doubts about the petitioner's honesty, these ought to have been put to him in cross and considered in the submissions (*Browne* v *Dunn* (1893) 6 R[1] 67 at 70; *Lee* v *HM Advocate* 1968 SLT 155; *Robertson and Gough* at para 94; *McKenzie* v *McKenzie* 1943 SC 108 at 109). There had been insufficient evidence to infer an intention to identify the complainers (*R (Balajigari*) v *Home Secretary* [2019] 1 WLR 4647 at para 55). It was not fair to call a person a liar without doing so in cross-examination.

[50] The third error had been that the court had considered it to be sufficient that there was a likelihood of identification by a "particular section of the public". The test ought to relate to the public as a whole and not merely to a group of work colleagues. The remoteness of the risk, and the extent to which other parts of the jigsaw were already in the public domain, had to be taken into account (*A local Authority* v *Mother* [2020] 2 FLR 652 at para 18; *Rotherham MBC* v *M* [2016] 4 WLR 177). There had been no finding that any member of the public could have identified the complainers. The court's decision was inconsistent with its subsequent Opinion in refusing permission to appeal to the UK Supreme Court.

[51] Ground four maintained that the law on contempt was incompatible with Article 10 of the European Convention. A finding of contempt had to be one which was prescribed by law and necessary in a democratic society. It had not been prescribed by law as it was vague and unforeseeable. What was "a particular section of the public"? Journalists would not be

[1] This is a reference to English law reports, namely "Reportable Reports", not to Rettie.

able to anticipate the consequences of their reporting. They would not know the other parts of a jigsaw. The test to be applied went beyond the Editors' Code, (para 11), and would have a chilling effect on the reporting of criminal proceedings.

[52] Ground five complained that there was a breach of Article 6 and general unfairness because the Crown had not said that the article of 18 March 2020 might have led to the identification of B, F/J or H, even although there was a reference to it identifying A. There was a need to confine the finding to the averments in the original petition and complaint (*Byrne* v *Ross* 1992 SC 498 at 506).

[53] On sentence, imprisonment had been excessive having regard to the factors in *Re Yaxley-Lennan* (para 80), including the effect of the breach on the trial, the scale of the breach, the gravity of the offence being tried, the level of culpability and the reasons for the person acting in breach. The contempt could be aggravated by subsequent defiance or lack of remorse. The scale of sentences in similar cases was a factor, although each case had to be considered on its own facts. The contemnor's personal circumstances should be taken into account as should whether a special deterrent was needed.

[54] The petitioner was otherwise of good character. He had a history of public service. His affidavits stated that no breach had been intended. He had personal health issues. In terms of the Criminal Justice Social Work Report, he was unlikely to re-offend. He had been willing to pay a fine. Comparative cases including that of Mr Thomson, who had identified the complainers by name, and *Solicitor General v Mayfield* [2021] EWHC 1051 (QB), had involved lesser sentences (respectively 6 months and 12 weeks suspended). The sentence was disproportionate having regard to the fact that it was a journalist who was involved and there were no exceptional circumstances (*Cumpănă* v *Romania* (2005) 41 EHRR 14 at para 115). Journalists had an important role to play and the petitioner had been acting as a

"public watchdog". There should be no dilution of the protection offered by the European Court (*R (AB)* v *Secretary of State for Justice* [2021] 3 WLR 494 at para 54). Imprisonment should be the last resort.

Respondent

[55] The respondent maintained that the court at first instance had applied the correct test. It was not disputed that strict liability only applied in the circumstances set forth in section 2(2) of the 1981 Act. The purpose of punishing contempt was to uphold the rule of law (*Transocean Drilling UK* v *Greenpeace* 2020 SLT 825 at para 55). The purpose of a section 11 order was protection from distress and indignity and a facilitation of the investigation and prosecution of crime. The contemnor's intention was not relevant (*Muirhead* v *Douglas* 1979 SLT (Notes) 17).

[56] On ground two, the petitioner's assertion that he had not intended to breach the order was "open to question". It had been contradicted by the other evidence which had all been agreed by joint minute. The respondent's written submissions had maintained that the respondent had deliberately published the material to provide a likelihood of identification. On grounds three and four, the court had applied the correct test. That of a particular section of the public was not applied, although it was said that it might be sufficient. On ground five, the petition and complaint had given due notice of the articles which had amounted to a breach of the order. The court had been entitled to conclude that the article of 18 March, either in isolation or taken in conjunction with others, contained information likely to disclose the identity of the complainers.

Decision

Merits

[57] The trial of Alex Salmond was an extremely high profile event. Feelings were running high between his supporters and others who seemed to enjoy the prospect of his political demise. The revelation of the identities of the complainers would be likely to result in considerable abuse and harassment (particularly on social media) against them. There was a real danger that they would be physically harmed. It was obvious that they would be persons who had had significant contact with the former First Minister, probably in the workplace context. Quite apart from the risks of direct abuse to the particular complainers, it was important, in the interests not only of their dignity and privacy and those of other potential complainers in other settings but also of the general public in having sexual offences reported, investigated and tried, that their identities were kept from public gaze (*Brown* v *United Kingdom* (2002) 35 EHRR CD197 at para CD200).

[58] The long-standing practice in Scotland has been to exclude the public from the courtroom when a complainer in a sexual offences trial gives evidence. The media are not excluded, but that is on the understanding that they do not publish or broadcast information which is liable to identify a complainer. Over the years, the media has taken a very responsible attitude to this. It has followed the Editors' Code of Practice (para 11), which is published by the Independent Press Standards Organisation. The mainstream media, that is to say journalists who have been duly accredited as such by the court, appear to have no difficulty in abiding by what is a readily understandable and almost universally accepted practice.

[59] In cases in which the court has reason to believe that less scrupulous persons, whether purporting to be journalists or not, may nevertheless publish information which is

likely to lead to the identification of a complainer, it may pronounce an order under its general common law powers, prohibiting such publication and backing it up with an order under section 11 of the Contempt of Court Act 1981. That is what occurred here; the court pronouncing an order:

> "preventing publication of … any information likely to disclose the identity of the complainers …".

[60] Contempt of court is "constituted by conduct that denotes wilful defiance of, or disrespect towards, the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law itself" (*Robertson and Gough* v *HM Advocate* 2008 JC 146, LJC (Gill) at para [29]). There is no strict liability. Where there is a court order in place, which prohibits a particular action, and a person deliberately does something which breaches that order, that is sufficient to prove the crime, including any mental element. The deliberate conduct constitutes the wilful defiance of the court. It is not a defence to say that, albeit that his actions did deliberately breach the order, a person nonetheless thought that he was acting in such a way as to avoid a finding of contempt. It will not do to say that deliberate acts, which are in breach of a court order, were not intended to constitute criminal conduct when, as a matter of fact, they did by contravening that order. In that sense, although it might have been better phrased, the court of first instance was correct to say that an intention to breach the order was "beside the point".

[61] The mental element relates to the deliberate nature of the publication, not to whether the publisher, in his inmost thoughts, meant to breach the order. Strict liability is not in play where deliberate publication is, as here, admitted. The only remaining question is whether the material, viewed objectively, was likely to identify the complainers. It might have been better to use "liable" rather than "likely", since there is no element of probability involved.

If material which is deliberately published produces a real or substantial risk of identification, that is determinative of this issue.

[62] The petitioner submits that the court of first instance did not make a finding of wilful defiance. Although it is true that these words do not feature in the reasoning in the court, it is clear from the language which was used that that is indeed what the court was finding in concluding that a contempt had been made out. The court held (at para [70]) that the *Yes Minister Fan Fiction* article disclosed that the petitioner intended to convey the information, which he deemed it to be in the public interest to reveal (ie the identities of the complainers). That task, if completed, would amount to wilful defiance, in due course, of the court even if the petitioner thought that he might be able to achieve this without being in contempt. The petitioner's intention was for his readers to see this article as referring (as it clearly was) to Mr Salmond's trial. The petitioner's actions thereafter in the post-order articles were taken deliberately to fulfil the task which he had set himself. The petitioner's principal affidavit effectively admits the breach and the contempt. He states that in writing the *Yes Minister Fan Fiction* article it had been a challenge to work out how to tell the public of the identities without being in contempt. It was not a challenge, it was an impossibility, since doing so would be a breach of the plain terms of the order.

[63] The language of intention is conveyed in the court of first instance's sentencing reasoning. It refers to the petitioner's knowledge of the risk which he ran and his "deliberately" deciding to run the risk, repeatedly; "relishing the task he set himself which was essentially to allow the identities of complainers to be discerned". As the court said, when refusing permission to appeal to the UK Supreme Court, it was the repeated publication of material likely to lead to identification "in the face of a clear order of the court prohibiting that which drew the sanction".

[64] The second ground of appeal is misconceived. The Advocate depute elected to rely on the published material, whose provenance had been agreed by joint minute, to demonstrate that the petitioner had deliberately posted that material with a view to allowing the complainers, or at least some of them, to be identified. This was presumably done by the petitioner with a view to fuelling his theory that the case against Mr Salmond was a conspiracy amongst those close to his successor. That material was sufficient to enable the court to draw the inference that the petitioner had deliberately, that is to say wilfully, acted in a manner which was in breach of the court order and therefore in contempt of court. It was a matter for the petitioner to decide, in the context of the summary procedure on a petition and complaint, how to persuade the court otherwise. He elected to do this by lodging affidavits which set out, amongst many other things, an explanation for his conduct. Although it was said that the petitioner would have been prepared to answer any questions, he did not elect to testify in open court. That was a decision for him to take; no doubt upon legal advice. That would include his counsel's view on the potential effectiveness of any cross. The respondent did not consider it necessary to put any questions to him. In that situation, it was a matter for the court to compare and contrast the information before it and to reach any findings in fact which were necessary for its determination.

[65] The respondent's case was presented in open court, with the material, which was to be relied upon, agreed by joint minute. There was no unfairness. The petitioner was given, and took, the opportunity to respond to it. It would have been apparent to the petitioner that, on its face, the agreed material called for an explanation. His credibility was under challenge by the Crown (cf *R (Balajigari)* v *Secretary of State for the Home Department* [2019] 1 WLR 4647). If he was unable to provide a satisfactory explanation, the court might draw

inferences adverse to his interests. As it transpired, the court was not at all impressed by the content of the petitioner's affidavits; describing them correctly as containing irrelevant material, hearsay, gossip and potentially defamatory statements. Rather than identifying information, the affidavits contain a one-sided view, expressing the petitioner's beliefs, opinions and selective interpretation. The court considered the petitioner's affidavits to be polemic; an aggressive attack on another's view. In that situation, there was no requirement for the Advocate depute to insist on questioning the petitioner and thus providing him with an additional vehicle for expressing himself. On the contrary, the Advocate depute was well advised not to do so and to confine his submissions to the written material.

[66] This situation is in marked contrast to one in which a party is testifying and his opponent does not put the case which he (the opponent) intends to present thereafter. In that situation, it may well be unfair to present that later case without affording the party an opportunity to comment on it in advance. There is an obligation, especially, but not exclusively, in civil cases, to lay the foundation by cross-examination for substantive contradictory evidence to be tendered *subsequently* (*McKenzie* v *McKenzie* 1943 SC 108, LJC (Cooper) at 109; emphasis added; *Lee* v *HM Advocate* 1968 SLT 155, LJG (Clyde), delivering the opinion of the court, at 157). The failure to cross may be fatal, although recall of the party is the obvious alternative (*ibid*). That is not the position here. The Crown had already set out their stall in detail. The petitioner had advance notice of the case which he had to meet.

[67] The order of the court, whose validity is not challenged, was a prohibition of the "publication of … any information likely to disclose the identity of the complainers". The purposes of such an order has already been explored, but one is the protection of the complainers' dignity and privacy. In order to achieve that result, the order must at least

prevent identification of a complainer within the community in which she either lives or works. The court of first instance was correct to hold that it would be sufficient, for a breach to occur, if the publication created a real risk of identification to a "section of the public". It is not necessary for it to identify the complainer to the public as a whole.

[68] In this case there were pieces of the jigsaw in place which would enable the public as a whole to see that the complainers would be likely to be part of Mr Salmond's governmental or political team. The revelation of further details regarding their jobs and places where they worked with Mr Salmond would enable, at least, those in the governmental and political communities to identify who they were. Although that would be enough to constitute a breach, the court of first instance held that the ability to identify the complainers went beyond those communities, as the petitioner had intended, and extended to the general public. That, according to the court, was plain from the terms of the article of 18 January (*Yes Minister Fan Fiction*) and continued with the post-order publications. As was made clear in its opinion concerning the application for permission to appeal to the UK Supreme Court, the court's finding of contempt was not based on the ability of a section of the public to identify the complainers. It was much broader than that. It is clear from comments on the petitioner's articles that members of the public were able to identify some of the complainers.

[69] As described above, contempt of court is a well-defined concept. That is, in the context of this case, of peripheral relevance. The court had pronounced a clear and specific order prohibiting publication of material likely to lead to the identification of the complainers. There is nothing difficult to understand in this. Even without the order, journalists in Scotland have, for many years, been trusted not to reveal the identity of

complainers. That trust, so far as responsible journalists are concerned, has been well placed (see *X* v *Sweeney* 1982 JC 70, Lord Avonside at 93).

[70] Article 10(2) specifically authorises freedom of expression to be curtailed in order to protect the rights of others. The order itself is not challenged as being a breach of the petitioner's Article 10 right of freedom of expression. Standing the European Court's *dicta* in *Brown* v *United Kingdom* (2002) 35 EHRR CD 197 (at CD200) and *SN* v *Sweden* (2004) 39 EHRR 13 (at para 47), any such challenge would have been bound to fail. If the order is valid, and is necessary to protect the complainers' Article 8 right to respect for their private lives, it cannot reasonably be said that a breach of the order, and the relative finding of contempt, is a contravention of Article 10.

[71] The process of petition and complaint is intended to be a summary one, requiring a swift determination of the court. It is not one in which extensive written pleadings are desirable, since the process is not an adversarial one between the Crown and the alleged contemnor but a method by which the Crown can bring to the court's attention instances of possible contempt. It is nevertheless important that the contemnor is given fair notice of the allegations against him in the same way in which a breach of interdict is considered (clear and distinct averments: *Byrne* v *Ross* 1992 SC 498, LP (Hope), delivering the opinion of the court, at 506).

[72] The petition and complaint made averments about the article of 18 March (*Your man finally in*), which were incorporated in the pleadings *brevitatis causa*. The specific complaint was that Ms D had been identified by reference to a feature of her hair. There was a more general averment that three articles published by the petitioner at around this time, including that of 18 March, could lead to the identification of the complainers. As outlined above, this article described a number of complainers, namely Mss A, B, D and F (actually J).

It is odd that the respondent did not make specific reference in the petition and complaint to A, B and F, but the article as a whole was before the court. Submissions were made by the Crown relative to Mss B, D and J. By the time of the hearing the petitioner did have fair notice that the article was part of the equation.

[73] In the context of a summary process, in which the article was not found to be a contempt *per se* and, as the court explained in its opinion on permission to appeal, the court was not confined to the specific averment involving Ms D, it could look at the article as a whole and determine, as it did, that it did constitute a breach of the order when read along with the other articles.

[74] For these reasons, the appeal against the finding of contempt fails.

Sanction

[75] Protection of the right of free speech is an important aspect of a civilised and open society. It is primarily through the news media that the public are informed about matters which "may call for consideration and action" (*McCartan Turkington Breen* v *Times Newspapers* [2001] 2 AC 277, Lord Bingham at 290). Journalists act as conduits "for information and thereby have a vital role in contributing to public discussion and debate and acting in a 'watchdog' role through investigative journalism" (Reed and Murdoch: *Human Rights Law in Scotland* (4th ed) para 7.55). There is force too in the argument that certain campaign groups outside the mainstream media, such as non-governmental organisations, should be afforded similar protection where they too contribute to the public debate (*ibid* fn 4; *Magyar Helsinki*: *Bizottság* v *Hungary* (2020) 71 EHRR 2 at para 167)).

[76] The court must therefore:

> "exercise the utmost caution where … sanctions imposed … are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern" (*Cumpănă* v *Romania* (2005) 41 EHRR 14 at para 111).

Even when considering any competing Article 8 right, the media should not be "unduly" deterred from "fulfilling their role of alerting the public to apparent or suspected misuse of public power" (*ibid* at para 113). Imposing a prison sentence on a journalist will only be compatible with Article 10 in exceptional circumstances, "notably where other fundamental rights have been seriously impaired" (*ibid* at para 115).

[77] The petitioner attempts to portray himself as a journalist "in new media", thereby securing what may be thought to be the added protections afforded to the press where a contempt of court has occurred. This is unconvincing. A journalist is a person who writes for or edits a newspaper or periodical; whether in hard copy or on-line. The petitioner is not such a person, nor is he an NGO or campaign group. An individual does not become a journalist merely by publishing his or her thoughts on-line, whether by operating a website, running a blog or tweeting. If it were otherwise almost everyone would be a journalist. That is not the case.

[78] A journalist has responsibilities, notably in relation to the accuracy of the information reported (Editors' Code of Practice para I i) *viz:* "The press, while free to editorialise and campaign, must distinguish clearly between comment, conjecture and fact" (*ibid* I iv). The petitioner has no such responsibilities. He is not, so far as the court is aware, subject to the Editors' Code. He does not have an editor and seems to find it extremely difficult to distinguish between comment, conjecture and fact. In short, the court does not consider that the strictures, which, quite rightly, are imposed on the court when dealing with journalists, apply to the petitioner. Having regard to the responsible manner in which the news media behaves in relation to the identity of complainers, the court does not consider either that the

imposition of a prison sentence on the petitioner will have any effect on the ability of the press to report upon sexual offences cases.

[79] Even if the court were to regard the petitioner as a journalist, this was, in line with the *dictum* in *Cumpănă*, an exceptional case which did involve the fundamental rights of others, notably the Article 8 right to respect for the complainers' private lives.

[80] As the court of first instance determined, this was a contempt of very great gravity. The petitioner deliberately set out to publish information likely to lead to the identification of the complainers and did so. Displaying what some might describe as a substantial degree of arrogance, he elected to circumvent the law, which permits the court to prohibit the disclosure of the identity of complainers (or the publication of information likely to lead to identification) in sexual offences cases, and the existing universal press convention of not revealing these identities, simply because, in his mind, he knew best. It is one thing to maintain, and disseminate, a view that the allegations against Mr Salmond were a criminal conspiracy engineered by the First Minister and to face any consequences of so doing. It is quite another to subject other persons, whether identified or identifiable, to the risk of abuse and to having their dignity and privacy invaded in a manner which the courts strive to protect.

[81] Notwithstanding the petitioner's personal circumstances, but taking into account his apparent total lack of remorse, and perhaps insight, in relation to the consequences of his actions, the court is unable to conclude that a sentence other than one of imprisonment would have been appropriate. The lesser sentence imposed on Mr Thomson is distinguished by Mr Thomson's acceptance of his contempt, the limited circulation of his tweet and his remorse. Miss Mayfield ([2021] EWHC 1051 QB) also accepted that she had been in breach of the court's order and had removed her Facebook posts when advised that

she was in breach of the order. Before taking into account the mitigation, the trial judge considered that 6 months imprisonment on each of two counts was appropriate. The defendant was the mother and sole carer of three children, one of whom had additional needs. She too had health issues. The sentence was discounted accordingly and again for what was analogous to an early plea. The conditions for a suspended sentence, which is not available in Scotland, were then applied.

[82] The petitioner is an intelligent person whose actions were deliberate and calculated. They clearly showed contempt for the court's order and for the rule of law. They created serious risks for the complainers' mental and physical health. Even if this court were to sentence him anew, had an error in the first instance court's analysis been detected, it would have reached the same, or a very similar, result. The appeal against sentence is refused.