

PRIVILEGED AND CONFIDENTIAL LEGAL ADVICE – NOT FOR PUBLICATION

JOINT NOTE BY SENIOR AND JUNIOR COUNSEL

for the Respondents in the Petition of Alex Salmond, Petitioner, for Judicial Review

Re reporting restrictions

- 1 We have been asked for advice on the legal basis on which reporting restrictions might be made by the Lord Ordinary in the course of the judicial review proceedings that have been raised.
- 2 The Court may impose reporting restrictions, *inter alia*, using powers conferred by the Contempt of Court Act 1981 and/or in the exercise of its inherent powers to control its own procedures in the interests of justice.
- 3 The relevant principles are discussed fully in *A v BBC* 2014 SC (UKSC) 151 and (as mentioned briefly at the consultation on 11 September 2018) were applied by the Appeal Court in *A v Harrower* 2018 JC 93 in the context of extortion.

Contempt of Court Act 1981

- 4 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.
- 5 Section 11 of the 1981 Act provides that in any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld.
- 6 The power conferred by s 11 is parasitic: it is available only where an order has already been made in connection with proceedings before the court. However s11 is available whether the previous order was made in terms of the 1981 Act or at common law (*A v BBC* at paras 58 to 61).

Common law

- 7 The following propositions can be derived from *A v BBC*:

- 7.1 The court has an inherent jurisdiction to determine how the constitutional principle of open justice should be applied. It is for the courts to determine its ambit and its requirements, subject to any statutory provision (paras 27, 34);
- 7.2 That inherent jurisdiction embraces a power to permit the identity of parties or witnesses to be withheld from public disclosure where that is necessary in the interests of justice (para 38);
- 7.3 The court can take steps in current proceedings in order to ensure that the interests of justice will not be defeated in the future (para 38 by reference to the example of undercover police officers giving evidence from behind a screen and with their identities otherwise protected to ensure their effectiveness in future investigations);
- 7.4 It is impossible to enumerate or anticipate all possible contingencies (para 40);
- 7.5 Limitations on the principle of open justice “may not require to be as drastic as the complete exclusion of the public or the media from the proceedings” (para 35).
- 7.6 The court must carry out a balancing exercise, central to which “will be the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and, conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others” (para 41).

Convention rights

- 8 The principle of open justice is expressly protected by article 6(1) ECHR but is subject to qualifications that “broadly reflect the various grounds on which exceptions to the principle of open justice are made in our domestic law, either under common law or under statute (*A v BBC*, para 44).
- 9 Other articles of the Convention may be relevant to any decision by a court to impose a reporting restriction, including article 8. Where the rights of individuals under, inter alia, article 8 conflict with the right of the media under article 10, a balance must be struck and any restriction should be proportionate.

Application in this case

- 10 The petitioner seeks orders allowing the names of the complainers and the contents of the complaints made by them to be withheld from the public in the proceedings before the court.
- 11 He also seeks an order in terms of s11 of the 1981 Act prohibiting any press or media reporting of the petition and all proceedings relating to it which would – in its own right or with other information – identify the complainers or disclose the content of their complaints.
- 12 So far as the respondents are concerned, there is a particular concern that any reporting of the findings of the Permanent Secretary in relation to the complaints may generate publicity that would create a risk to any future criminal proceedings.

- 13 In our view it would be appropriate for the respondents to acquiesce in any application by the petitioner for orders that seek to protect the identity of the complainers. As we understand it, the complainers themselves have sought to protect their privacy and have been given assurances by the respondents that their anonymity would be preserved.
- 14 So far as the nature of the complaints is concerned, clients have not expressed the view that the publication of that information would be likely to prejudice any subsequent criminal trial. Clients may wish to remain neutral in relation to the reporting of the allegations themselves. It is of course the case that the most serious of the allegations has already been the subject of press coverage.
- 15 Clients do have concerns about publication of the findings of the investigation – which findings are narrated in brief in the petition itself as well as in the Permanent Secretary’s final report. Restrictions on the reporting of the findings could be sought on the grounds that such restrictions are in the interests of justice, particularly by reference to the existence of ongoing police enquiries.
- 16 It seems to us to be likely that there will be little difference between the parties as to what would be appropriate, as regards reporting restrictions. Nevertheless, that does not mean that such restrictions will inevitably be granted. We say that for two reasons. Firstly, the court itself has an interest in ensuring open justice, and will not automatically grant reporting restrictions even when both parties consent. Secondly, given the high profile nature of this case, it is perhaps inevitable that certain media organisations will seek to make representations as to any reporting restrictions – as indeed happened in *A v BBC* itself. We make these points not to deter clients from seeking or acquiescing in such restrictions, but rather to warn in advance that this may not be entirely straightforward or unopposed.
- 17 On timing, it would in our view make sense to discuss the timing of applications for reporting restrictions with those acting for the petitioner. They have not yet moved for the reporting restrictions presaged in the petition and it would be helpful to know if they intend to do so (and to indicate the extent to which the respondents would acquiesce in any application made).
- 18 Motions for the respondents could be enrolled at any time but it would be desirable for them to be heard before the deadline (yet to be fixed) for lodging answers.

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