Neutral Citation Number: [2021] EWCA Crim 1165

Case No: 202101701 B5

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM THE CROWN COURT AT SWANSEA**
**HHJ Catherine Richards**
**T20200229**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2021

**Before :**

**LORD JUSTICE WARBY**
**MRS JUSTICE CHEEMA-GRUBB**
and
**MR JUSTICE MURRAY**

- - - - - - - - - - - - - - - - - - - - -

**Regina**
**- v -**
**James Oulton**

**In the matter of an application by the Pembrokeshire Herald for leave to appeal under s 159 Criminal Justice Act 1988**

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Matthew Paul** (instructed by **Civitas Law**) for the **Appellant/Applicant**
**Christopher Clee QC** (instructed by **Devonald Griffiths John**) made written submissions for the defendant

Hearing date: Tuesday 20 July 2021

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

*Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10am on Tuesday 27 July 2021*

**LORD JUSTICE WARBY:**

1. James Oulton was a well-liked and popular primary teacher at Mary Immaculate Catholic school in Haverfordwest, Wales. He had been in the job for 10 years when in 2019, at the age of 34, he was charged with 30 counts of sexual assault of a child under 13. The allegations involved 11 girls whom he had taught between 2012 and 2018, when they were in Year 4, and aged 8 or 9. He denied all the allegations. The case was tried before HHJ Catherine Richards and a jury in the Crown Court at Swansea between 12 April and 4 May 2021. The prosecution case depended on video-recorded interviews with the 11 girls.

2. In his police interview, Mr Oulton identified a number of individuals who he said would provide support for his case. Those individuals provided witness statements to the police which appeared to confirm what Mr Oulton had said. They were not called by the prosecution at trial. So Mr Oulton called them as his witnesses. On 4 May 2021, the jury acquitted Mr Oulton on all counts.

3. The Pembrokeshire Herald reported on the trial. The Herald is a weekly, local, paid for newspaper circulating in Pembrokeshire, South Ceredigion, and West Carmarthenshire. It has an estimated weekly readership of 17,500 people in print, and around 250,000 active monthly users on its website. The Herald was not able to report the names or any identifying material about the complainants. The automatic anonymity provisions of the Sexual Offences (Amendment) Act 1992 prohibit that. The paper was able to name Mr Oulton, there being no such provisions in respect of those accused of sexual crimes. But the Herald was unable to identify the witnesses he called in his support.

4. That is because, during the trial, before those witnesses gave evidence for Mr Oulton, he applied for and the Judge made a reporting restriction order (RRO) prohibiting the publication of anything likely to lead to the identification of any of the individuals as a witness in the case. The application had been opposed by the Herald and the BBC. After Mr Oulton's acquittal, the Herald applied for an order revoking the RRO, or allowing reporting of the evidence given by the defence witnesses, without naming them or publishing their image. This the Judge declined to do.

5. The Herald now applies for leave to appeal against the making of the RRO, and against the Judge's order dismissing the application to revoke or vary.

**The statutory powers**

6. The powers invoked by Mr Oulton and then by the Herald are contained in s 46 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA). A convenient summary of most of the relevant provisions is to be found in the judgment of Lord Judge CJ in *ITN Ltd v R* [2013] EWCA Crim 773 [16-23]:

> "16. Every court in England and Wales conducting criminal proceedings may make a reporting restriction order applicable to any adult who is a witness in the proceedings (other than a defendant). …
>
> 17. Section 46(6) defines a reporting direction as:

> "A direction that no matter relating to the witness shall during the witness's life time be included in any publication if it is likely to lead members of the public to identify him as being a witness in the proceedings."

18. Publication of the name and address of the witness, any educational establishment attended by the witness, the identity of any place of work, and "…(e) any still or moving picture of the witness" may be prevented.

19. The order may only be made in support of a witness eligible for statutory protection. The "eligibility" requires the court to be satisfied:

> "(3)(a) that the quality of evidence given by the witness, [or
>
> (b) the level of co-operation given by the witness to any party to the proceedings in connection with that party's preparation of its case,]
>
> is likely to be diminished by reason of fear or distress on the part of the witness in connection with being identified by members of the public as a witness in the proceedings".

20. In deciding whether any particular witness qualifies for eligibility the court must:

> "(4) … take into account, in particular
>
> (a) the nature and alleged circumstances of the offence to which the proceedings relate;
>
> (b) the age of the witness;
>
> (c) such of the following matters as appear to the court to be relevant namely
>
> (i) the social and cultural background and ethnic origins of the witness
>
> (ii) the domestic and employment circumstances of the witness, and
>
> (iii) …
>
> (d) any behaviour towards the witness on the part of
>
> (i) the accused,
>
> (ii) members of the family or associates of the accused, or
>
> (iii) … "

In addition to these specific matters, the court must also "consider any views expressed by the witness".

21. Provided the witness is eligible for protection and that it is appropriate for a reporting direction to be made, before making the order, the court must consider:

> "(8) …
>
> (a) whether it would be in the interest of justice to do so, and
>
> (b) the public interest in avoiding the imposition of a substantial and unreasonable restriction on the reporting of the proceedings".
>
> 22. If the eligibility test is met, the court may also impose a reporting direction which is subject to "an excepting" direction, dispensing with restrictions which might otherwise be thought appropriate. Dealing with it broadly, the effect is that the court may limit the reporting direction, as it did here, to a photograph or film of the witness. In short the effect of any restriction should be limited to those which are reasonable bearing in mind the context of the public interest in the reporting of proceedings.
>
> 23. The reporting restriction may be revoked by the court of trial or an appellate court, that is [a] "court dealing with an appeal … arising out of the proceedings …". (s.46(12))."

7. The power to revoke is conferred by s 46(10). The court of trial or an appellate court also has power to make a lesser order, which varies a reporting direction that has previously been imposed by carving out some matters, and permitting these to be published. This is another form of "excepting direction". This power is conferred by s 46(9), which provides as follows:-

> "The court or an appellate court may by direction ("an excepting direction") dispense, to any extent specified in the excepting direction, with the restrictions imposed by a reporting direction if—
>
> (a) it is satisfied that it is necessary in the interests of justice to do so, or
>
> (b) it is satisfied—
>
> (i) that the effect of those restrictions is to impose a substantial and unreasonable restriction on the reporting of the proceedings, and
>
> (ii) that it is in the public interest to remove or relax that restriction;
>
> but no excepting direction shall be given under paragraph (b) by reason only of the fact that the proceedings have been determined in any way or have been abandoned."

**The April Order**

8. Mr Oulton's application was initially made orally at the end of the evidence on Thursday 15 April 2021, but the Judge required it to be made in writing on notice to the media. Over the weekend, Mr Oulton's Counsel, Mr Clee QC, prepared a two-page written application document, dated 18 April 2021, and his solicitor, David Williams, prepared a supporting witness statement. The witness statement explained that Mr

Williams had contacted the witnesses who were due to be called on behalf of Mr Oulton, because of concerns that reports and comments on the Herald's Facebook page would affect the willingness of the witnesses to attend. The Herald had left the comment section of its Facebook page open. Mr Williams' statement dealt separately with each intended witness, giving details of their circumstances and an account of their fears, anxieties and concerns.

9. The application was heard by the Judge on the morning of Monday 19 April 2021, the sixth day of the trial. Mr Clee informed the Judge that the comments on Facebook had stirred matters up within the locality, something which the Judge had herself understood to be the case. Otherwise, Mr Clee relied on his written submissions. Mr Williams's statement was taken as read, without requiring him to confirm it on oath. The BBC made written submissions. The Herald appeared by Matthew Paul of Counsel, who made oral submissions. He argued that a s 46 order would be exceptional, as it would in effect prohibit significant reporting of the defence case. It should be resorted to, only if all lesser measures had been "ticked off". The evidence relied on was insufficient to satisfy the criteria identified in s 46.

10. In an *extempore* ruling, the Judge said she had reminded herself of the Judicial College guidance on *Reporting Restrictions in the Criminal Courts* (the Guide) and the importance of open justice. She also had in mind the central importance of the defendant having a fair trial, in a sensitive case involving children and a member of staff at a primary school in a small locality. She referred to the evidence of Mr Williams, describing it as noting an increase in the witnesses' reluctance as a result of reporting by the Herald, and comments on its Facebook page. She said she was satisfied on the evidence that each of the witnesses had expressed concern about coming to court if his or her name was published. The concerns related to their position professionally and within the locality. One, she said, had been disciplined due to their open support for Mr Oulton.

11. The Judge went on to say that she was satisfied (1) that the quality of the witnesses' evidence, and the level of their cooperation in connection with the case, was likely to be diminished by reason of fear or distress of being identified by members of the public as a witness in the proceedings; (2) that, in this case, a reporting restriction was necessary to secure the cooperation of the witnesses, and to ensure that the quality of their evidence was the best it could be; (3) having taken account of all the factors set out in s 46(4), to the extent they were relevant to the case, that it was in the interests of justice to make the order, even taking into account the public interest and the need to avoid the imposition of a substantial and unreasonable restriction on the reporting of proceedings.

12. The Judge's Order was formally drawn up on the day in the following terms:

> "no matter relating to [*the witnesses, whose names were set out in the Order*] who are concerned in the proceedings, shall be included in any publication if it is likely to lead members of the public to identify them as being a witness in the proceedings."

13. The Order granted permission to any person directly affected to apply to vary or discharge within 24 hours of being notified of it. No such application was made. The

trial proceeded for a further 11 days, until its conclusion on 4 May 2021, when the jury returned its not guilty verdicts.

**The May Order**

14. Thirteen business days later, on 21 May 2021, HHJ Catherine Richards heard an application by the Herald for an order revoking the RRO pursuant to s 46(10) of the YJCEA, or an excepting direction under s 46(9), removing the restrictions in the Order entirely. In the alternative, the Herald asked for an excepting direction "permitting The Pembrokeshire Herald (and other news organisations) to report the content of defence witnesses' evidence, without either naming the witnesses or publishing photographs or video of them." The application had been made by way of a seven-page written argument from Mr Paul, dated 7 May 2021, and a witness statement from the editor, Thomas Sinclair, signed and dated 9 May 2021.

15. The written submissions asserted that, following Mr Oulton's acquittal, the Herald had faced criticism for making a full report of the prosecution case, but failing to report the defence case in detail. It went on to say that the Herald considered "the learned Judge was wrong in law to make the Order" as it not only prohibited the naming of witnesses but, because of the circumstances of the case, made the reporting of their evidence in Mr Oulton's defence practically impossible.

16. The submissions referred to passages from the Guide and to well-known authorities supporting the principle that an RRO is a measure of last resort, to be used only where every alternative remedy has been exhausted. A derogation from open justice can only be justified if it is shown by cogent evidence to be both necessary in pursuit of a legitimate aim and a proportionate incursion into free speech. It was argued that those criteria were not satisfied.

17. Here, the relevant aims were those specified in s 46(2)(b) YJCEA: improving the quality of the evidence given by the witness, or the level of co-operation given by the witness in connection with the preparation of Mr Oulton's case. The RRO was not shown to be necessary in pursuit of such aims. The evidence did not set out why the RRO would improve the quality of the witnesses' evidence, nor did it say that the witnesses would not attend court or "come up to proof" in the absence of an RRO. The witnesses had evidently co-operated with the defence to date. The evidence did not explain why less restrictive measures would not suffice, and the Judge did not address the issue. Further and alternatively, it was argued that the Judge's approach to proportionality was flawed. She had failed properly to examine and evaluate the witnesses' concerns, and to balance these against freedom of expression and the public interest. She had failed to bring an "intense focus" to bear on the specific rights engaged by the case, as required by *In re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593.

18. It was acknowledged that the Court was not permitted to make the variation sought solely because Mr Oulton had been acquitted, but it was submitted that his acquittal was a material consideration for the Court to take into account. It was argued that the RRO imposed an unreasonable restriction, which should be discharged in the public interest: it was important to publish the defence evidence so that people were properly informed about the facts of the case and the probable basis for Mr Oulton's acquittal.

19. The Judge gave Mr Oulton an opportunity to respond, and he did so via Mr Williams. By letter to the Court dated 20 May 2021 he reported that the witnesses' "views and concerns remain the same as outlined in my witness statement", and gave some details of additional matters some of them had raised. The Judge did not require the attendance of Mr Oulton's representatives at the hearing.

20. Having heard Mr Paul expand on his written submissions, the Judge delivered a full and detailed ruling, explaining her reasons for dismissing each limb of the Herald's application. She recounted the factual background to the original application. This included the great reluctance of the witnesses to attend court; the strenuous efforts made by the defence, which succeeded in overcoming that reluctance; and the fact that the defence application had been prompted by comments the Herald had allowed to be posted on its Facebook page. Those comments had not risked prejudicing the jury, which was drawn from an area that was not the target audience for the Herald. But the impact on the defence witnesses was a different matter. Feelings in their community had been running high. The publicity had affected their willingness to attend and co-operate.

21. The Judge did not accept that she had been wrong to make the order. Her review of the evidence at the time had led her to conclude that the order was necessary to ensure a fair trial, by ensuring the witnesses attended trial and gave their best evidence. Nor was she convinced that it was now right or proper to revoke the order or to make an excepting direction with the same effect. The witnesses had come to give evidence on the basis that they would be protected. The Judge did not accept the Herald's contention that reporting of the defence case had been impracticable under the restrictions. There had been no restriction on publication of defence challenges to the prosecution evidence, or Mr Oulton's own evidence, which had been detailed and covered all relevant aspects of his case. The BBC had reported his evidence. The Herald had reported relevant parts of the defence closing speech. The Judge considered that reporting of the detail of the witnesses' evidence would inevitably make them identifiable. She therefore declined to make the more limited excepting direction sought, permitting the publication of the witnesses' evidence, without names or pictures.

**Grounds of appeal**

22. By its notice of appeal dated 4 June 2021, the Herald repeats with only minor and immaterial variations the arguments which it unsuccessfully advanced to HHJ Catherine Richards on 21 May 2021. The remedy sought is (i) a declaration that the April Order was unlawful and/or (ii) a declaration that on 21 May 2021 the Judge ought to have accepted the Herald's fall-back argument, and made an excepting direction permitting reporting of the content of the defence witnesses' evidence, but without naming or publishing images of them.

23. In his admirably clear and concise oral argument, Mr Paul has elaborated on the written grounds of appeal. He reminds us that, as Lord Sumption observed in *Khuja v Times Newspapers Ltd* [2019] AC 161 [34(2)], ordinarily, the collateral impact of publicity for the trial process is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public. Counsel emphasises that the powers under s 46 are exceptional. They can only be exercised if the statutory threshold criteria are met and the Court is satisfied, having scrutinised the

competing rights, that the interference with freedom of expression is necessary and proportionate. An order will only be proportionate if no lesser measure could have sufficed. Counsel makes three main criticisms of the approach of HHJ Catherine Richards: (a) she was insufficiently rigorous in her approach to the evidence of Mr Williams and the question of whether this met the statutory thresholds; (b) she did not adopt the step-by-step approach required, to ensure the necessity of an RRO; (c) her reasons for the May Order involved the fundamental error of acting as an editor, usurping the function of Mr Sinclair of the Herald, in deciding what it was appropriate to report.

24. There is no appearance on behalf of the Crown or Mr Oulton, but Mr Clee QC has submitted succinct written representations in opposition to the application in the form of a respondent's notice. He argues that in making the April Order the Judge correctly identified the legal principles and was entitled in the circumstances to make the order she did. As to the hearing on 21 May 2021, she was entitled to refuse the application made.

**The powers of the Court of Appeal**

25. It is clear that this Court has jurisdiction to entertain an appeal against the imposition of an RRO pursuant to s 46 YJCEA and, where appropriate, to revoke the RRO. The power to do so is contained in s 159(1)(c) of the Criminal Justice Act 1988, which confers on "a person aggrieved" a right to appeal to this Court, if it gives leave, against "any order restricting the publication of any report of the whole or any part of the trial on indictment …": see *ITN Ltd v R* (above) [25-26]. The powers of the Court are specified in s 159(5). They are: "(a) to stay any proceedings in any other court until after the appeal is disposed of; (b) to confirm, reverse or vary the order complained of; and (c) to make such order as to costs as it thinks fit."

26. But the Criminal Procedure Rules require a person aggrieved by such an order to act promptly. They must serve their appeal notice within 10 business days after the making of the order: Crim PR 40.2(2)(b). The Herald's notice of appeal was thus some 30 days out of time, in so far as it relates to the RRO dated 19 April 2021. It was not filed until a month after the trial had finished.

27. The Herald acknowledges this point. The first response advanced in its notice of appeal is that "the merits of the learned Judge's decision of 19 April 2021 are equally engaged by her refusal to revoke the order on 21 May", so that this Court does not lack jurisdiction to deal with the proposed appeal. The point is that the notice of appeal was filed within 10 business days after 21 May. That is correct. But we cannot accept Mr Paul's further submission that the May Order is amenable to challenge under s 159 of the 1988 Act.

28. Decisions of this court make clear that s 159 does not confer a right of appeal against a decision to refuse an RRO, or a decision to discharge such an order, or a decision to make an excepting direction under s 45 YJCEA (which permits an order anonymising a child). Nor do the statutory powers of the appellate court to revoke or grant an excepting direction under s 45 of the YJCEA confer a freestanding right of appeal against such a direction. This does not mean that a person aggrieved by such orders has no remedy. Such decisions may be challenged by way of judicial review. And in principle, this Court can reconstitute itself as a Divisional Court to deal with a judicial

review application. See *Aziz (Ayman) v R* [2019] EWCA Crim 1568, [2020] EMLR 5 [51-57] and *KL v R* [2021] EWCA Crim 200, [2021] 2 WLR 1275 [43-61], [63] and the cases there cited.

29. These cases do not directly address the question of what powers this Court enjoys in respect of an order refusing to grant an excepting direction. But the wording of s 159 and the reasoning in the cases we have cited seem to us to compel the conclusion that the position is the same where, as here, the court of first instance has made an order refusing an application for an excepting direction under s 46 of the YCJEA. Such an order does not fall within the natural meaning of the words of s 159(1). It is not an "order restricting the publication of any report …". It is the original reporting direction that does that. When a court refuses to make an excepting direction it is not imposing a restriction; it is declining to vary a reporting direction that has already been made. As Mr Paul acknowledged, the wording of ss 45 and 46 is in all material respects the same.

30. It follows that, in order to mount its challenge to the decisions of the Judge, the Herald would need one or both of (a) an extension of time to apply for leave to appeal under s 159 against the imposition of restrictions by means of the April Order, (b) permission to seek judicial review of the refusal by way of the May Order to make an excepting direction.

**An extension of time for appealing against the April Order?**

31. In its notice of appeal, the Herald applied for such an extension of time, in case we took the view - as we do - that the lateness of its challenge to that Order is not saved or excused by its application to appeal against the May Order. Time limits may be extended, even after they have expired: Crim PR 36.3(a). The standard approach of this Court is to grant an extension if, but only if, the Court is satisfied that it would be in the interests of justice to do so. The onus lies on the applicant to explain why the extension should be granted: "A person who wants an extension of time within which to serve a notice must apply for that extension when serving the notice, and give the reasons for the application": Crim P R 36.4.

32. The Herald submitted in its notice of appeal that time should be extended for "this component of the Appeal" because (a) given that it is seeking declarations rather than the quashing of the RRO, extending time as requested does not compromise the interests of any party to the case, and (b) the balance between the protection of vulnerable witnesses and open justice is an important question that deserves clarification from the Court. At the hearing, Mr Paul told us that the Herald had considered whether to appeal after the April Order was made, but the news value was becoming stale. The acquittal was the driver behind the application on 21 May.

33. We see a number of problems with these arguments. To start with, the delay is long, inadequately explained, and in our view unwarranted. The time limit for appealing against an RRO is uniquely short. That, no doubt, reflects the importance to all concerned of resolving such issues swiftly, ideally during the trial. This Court is able to deal with such appeals on short notice. In *R v Beale* [2017] EWCA Crim 1012, [2017] EMLR 26, for instance, a media appeal under s 159 was heard and determined within 4 days in the middle of a five-week trial. In the present case, the Herald had ample time and opportunity to apply to this Court. It could have done so at a time when – as it seems to us – the news value of a court report was, so far from waning, at its highest.

The defence case did not begin until 27 April 2021. Yet the Herald deliberately chose not to appeal, but waited until a month after the end of the trial to bring this application. Such delay of itself carries with it an element of unfairness to the defence and the witnesses.

34. That unfairness would be compounded if the Court were to quash the order at this late stage, after the witnesses had come to give their evidence in the legitimate expectation of anonymity. Recognition of this point is implicit in the Herald's decision to limit the remedies it seeks in the way we have identified. But we do not think this is a solution. The remedy sought by the Herald is not one that we consider we have power to grant, or would be willing to grant if we did. The jurisdiction of this Court is entirely statutory. The powers available on the hearing of an appeal under s 159 are those specified in subsection (5), which we have quoted above. Mr Paul refers to the powers of the Civil Division of the Court of Appeal under Part 40 of the Civil Procedure Rules, and invites us to find that, although s 159 and the Crim PR are silent on the matter, the Criminal Division has an inherent jurisdiction to grant a declaration. But although this Division has an exceptional jurisdiction to exercise powers which are necessarily implicit in the statutory functions conferred by Parliament, it has no "inherent" jurisdiction properly so-called: see *Yasain v R* [2015] EWCA Crim 1277, [2016] QB 146 [31-38]. We do not think it is open to the Court to make a declaration on an appeal under s 159.

35. Nor would we consider a declaration to be an appropriate remedy in this case. The primary purpose of this appellate regime, as we see it, is to safeguard the free (and in particular the contemporaneous) reporting of legal proceedings held in public, except where reporting restrictions are shown to be necessary and proportionate. That is why the statute provides for the remedies it does. A declaration granted months after the event would not affect what could be reported by the Herald or anyone else about Mr Oulton's defence. Where available, a declaration is a discretionary remedy. It is not granted to resolve questions that are of academic interest only.

36. We do not see this case as calling for a declaration in order to clarify the legal position. The statutory provisions are detailed and prescriptive. There is no suggestion that the Judge failed to identify and apply them. In doing so, she expressly followed the guidance in the Judicial College Guide, which the Herald places at the centre of its argument. The principles that must be followed are well-established. The Herald does not contend that the Judge erred in law in her identification of the applicable principles. It is clear, in any event, that she was fully apprised of those principles, not least via the able argument of Mr Paul. The true burden of the Herald's argument is that the Judge failed properly to apply the principles to the facts of the case. The reasoning is essentially case-specific.

37. In reaching our conclusion that it would not be in the interests of justice to extend time, we have also given consideration to – without deciding upon – the apparent merits of the proposed appeal. The evidence of Mr Williams had some arguable shortcomings and, in the abstract, aspects of Mr Paul's critique have some attraction. It is important, however, to consider these matters in their proper factual and procedural context. Decisions about reporting restrictions are evaluative in nature, involving a balancing exercise akin to the exercise of a discretion; although the fact that Convention rights are engaged means that review of the decision under challenge must be intense, the appellate court will be slow to interfere: *JIH v News Group Newspapers Ltd* [2011]

EWCA Civ 42 [2011] 1 WLR 1645 [26] (Lord Neuberger MR); *Al Maktoum v Al Hussein* [2020] EWCA Civ 283, [2020] EMLR 15 [42] (Underhill LJ).

38. This was a decision made by the trial judge on the sixth day of a long, sensitive, and difficult trial which had clearly assumed a high profile in the relevant communities. The defence application was made urgently, as a consequence of the Herald's own decision to make its Facebook page available as a platform for reader comments, an inherently risky process. The Judge did not act precipitately, but was astute to ensure the application was made on the basis of evidence not mere assertion and that the media were able to make informed representations on notice. That evidence had to be assembled in haste, over a weekend. It was open to the Judge, in evaluating it, to take account of knowledge she had obtained in her judicial capacity. She had managed the pre-trial stages of the case, including the Pre-Trial Preparation Hearing and cross-examination of the complainants, which had been recorded under s 28 of the YJCEA. Her rulings make plain that she had gained a detailed and intimate knowledge and understanding not only of the evidence, but also of many of the personalities involved, the procedural and other dynamics of the case, and the social and cultural context in which it was being heard. We do not agree that she substituted her own judgment for that of the editor, in deciding what deserved to be published. She took a judicial decision about what reporting it was necessary in the interests of justice to prevent. On our reading of her rulings, the Judge was very much alive both in April and in May to the specific rights in play, and brought the necessary intense focus to bear upon them. She was much better placed than this Court, and – with respect - better placed than the Herald, to evaluate the evidence and to assess the appropriate weight to attach to the competing considerations.

39. For these reasons, the application for an extension of time for appealing against the April Order is refused.

**Judicial review of the May Order?**

40. The problem we have mentioned at [28-29] above was identified by the Court, and drawn to the Herald's attention, in the week before the hearing. The Herald responded by way of the submissions on the reach of s 159 that we have discussed and rejected above. It was submitted in the alternative that we should reconstitute ourselves as a Divisional Court, grant judicial review and make the declaration sought.

41. As we have indicated, this approach would be open to us procedurally. A declaration is a remedy available in judicial review. The time limits for judicial review are not so strict: a claim must be brought "promptly, and in any event within 3 months after the grounds for making the claim first arose": CPR 54.5(1). Viewed in the abstract, therefore, a judicial review challenge to the Order of 21 May 2021 might be tenable. But we would dismiss any judicial review application, for five reasons.

42. First, the reality of the matter is that the May application was in large measure an attempt to have a second bite at the same cherry. The Herald's primary ground for seeking revocation of the April Order was not that there had been a change of circumstances. It was arguing that the order should not have been made, or made in those terms, in the first place. Mr Paul has submitted that such an approach is authorised by s 46, which gives the Court an unfettered power to revoke an earlier order on the basis of further and better argument. We do not find that persuasive. A similar argument

has been rejected in relation to rule 3.1(7) of the Civil Procedure Rules, which states that "A power … to make an order includes a power to vary or revoke the order": see among other authorities *Tibbles v SIG plc* [2012] EWCA Civ 518, [2012] 1 WLR 2591 and *Thevarajah v Riordan* [2015] UKSC 78, [2016] 1 WLR 76. In our view, the application to revoke was on a proper analysis an attempted appeal, to the Court which made the original order, and the Judge had no jurisdiction to entertain it.

43. Secondly, and in any event, if we were to entertain a claim for judicial review of the Judge's refusal to accept in May that she was wrong in April we would in effect be granting the very extension of time for appealing that we have held is inappropriate.

44. Thirdly, we find it difficult to see how the Judge could lawfully have granted the Herald's application for a limited excepting direction. There had been a material change of circumstances between 19 April and 21 May, namely Mr Oulton's acquittal. This was highlighted by Mr Paul. But as Mr Paul acknowledged, the statute prohibits the Court from treating the outcome as a sufficient reason for making an excepting direction on the grounds relied on by the Herald: see s 46(9), quoted above. And it is hard to attribute much weight to the acquittal as a factor in favour of reporting details which neither the witnesses nor Mr Oulton himself were willing to see reported.

45. The only other material change of circumstance to which the Herald could point was some online criticism of its reporting. The evidence on this point was not strong. The editor said that in the hours and days following Mr Oulton's acquittal there was "what I would describe as harsh criticism of The Pembrokeshire Herald for 'one sided reporting'", which he believed to stem from its inability to report the defence case. But he was able to give only one concrete example of such criticism. This shows that the person concerned was aware that there was a "gagging order" in place, and that the Herald had told its readers of that fact, and of its consequent inability to report details of the evidence. The reader's criticism was that the order "was not to name any of the witnesses to protect them and their children" but "they could have said X said this or X said that yet again they chose not to…" This is a misconception. It is not in dispute that, on the most unusual facts of this case, the Herald could not have published reports of the kind outlined here, without infringing the April Order. But if there is a solution, it would lie in correcting the reader's misunderstanding, as we have done. We do not think the remedy can be the variation of the RRO.

46. Fourthly, for the reasons we have given, we would not regard this as a suitable case for a declaration whatever the procedural vehicle by which the challenge was brought. Fifth and finally, the points made at [36-37] above have resonance in the present context. We would therefore refuse permission for judicial review.

## Reporting of this judgment

47. Because the points we have made about timing, jurisdiction, and remedies may have some importance that goes beyond their significance for this individual case, we give leave for this judgment to be cited and reported. For that reason, we have omitted some details that would have tended to identify the witnesses referred to. Having done so we make it clear, for the avoidance of doubt, that the April Order does not operate so as to prohibit or limit reporting of this judgment.