THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 19

Court of Appeal Record No. 2018/148

Birmingham P.
Whelan J.
Murray J.

BETWEEN

INDEPENDENT NEWSPAPERS (IRELAND) LIMITED

SUNDAY NEWSPAPERS LIMITED

IRISH EXAMINER LIMITED

LANDMARK DIGITAL LIMITED TRADING AS BREAKINGNEWS.IE AND

THE NATIONALIST AND LEINSTER TIMES LIMITED TRADING AS THE KILDARE NATIONALIST

APPLICANTS/APPELLANTS

- AND –

I.A.

RESPONDENT/RESPONDENT

JUDGMENT of Mr. Justice Murray delivered on the 22nd day of January 2020

I ISSUES AND BACKGROUND

1. In these proceedings the appellants seek an order of certiorari quashing a decision of Her Honour Judge Ring (as she then was) made in the Dublin Circuit Criminal Court on 31st July 2015. On that date, the Court refused to accede to an application by the appellants to lift reporting restrictions in respect of a sentencing hearing which took place on 31st October 2014. In their Statement of Grounds, as modified in the notice of motion issued following their application for leave to seek Judicial Review, the appellants also seek a declaration that there is no basis in law for an order restricting reporting of that hearing *'insofar as same related to the Respondent whether by way of restricting publication of the name or identity of the Respondent or otherwise relating to the Respondent'*. The High Court (McDermott J.) refused both reliefs ([2018] IEHC 120). He held that the reporting restrictions had originally been lawfully imposed. He further held that there was no legal basis for extending the reporting restrictions beyond the 31st October 2014.

2. McDermott J. refused, however, to grant relief by way of Judicial Review to the appellants on the bases that (a) the appellants had failed to comply with the time limits provided for in Order 84 Rule 21 RSC, (b) the Circuit Court Judge was entitled in the exercise of her discretion to refuse to set aside the order and exercised that discretion properly, and (c)

it was appropriate in the exercise of the discretion of the Court attending the grant or refusal of remedies by way of Judicial Review, to refuse that relief. The appellants have not appealed the finding of the High Court Judge that there was a lawful basis for an order imposing reporting restrictions up to 31st October 2014. The respondent has not cross appealed against the finding that there was no lawful basis for the orders after that date. This Court is accordingly solely concerned with the correctness of the High Court Judge's conclusions in respect of these three issues (a), (b) and (c).

3. On 21st October 2011, the respondent appeared before the Dublin Children's Court charged with a number of offences. He was charged with two co-accused. The events giving rise to the prosecution of all three accused concerned the same injured party. All accused and the injured party were part of the same social circle. The appellant was seventeen when charged, and his co-accused were of similar age. The offences were alleged to have been committed between 23rd February 2010 and 25th March 2010, when the respondent was sixteen. The injured party was fourteen years and ten months old at the time of the offences.

4. The case first came before the Dublin Circuit Court on 11th December 2012. Throughout 2013 there were various adjournments. A date for trial was fixed on 24th February 2014. By then, the respondent was twenty. On that date pleas were entered by him to one charge of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990 and two charges of attempted defilement of a child contrary to section 3 of the Criminal Law (Sexual Offences) Act 2006. The latter two charges were rape offences within the meaning of the Criminal Law (Rape) Amendment) Act 1990. The two co-accused also pleaded guilty to certain offences. Reporting restrictions in the case had been applied from the time the matter first came before the Children's Court and were thereafter continued by different judges in different courts throughout the currency of the case. They were continued by the Circuit Court on 24th February. On that date the case was adjourned for a sentencing hearing on 21st July 2014.

5. On 21st July 2014, the facts were opened to the Court including the various charges against each of the accused. Evidence, including victim impact evidence, was given in relation to the injured party. At the conclusion of that evidence, the Court sought probation reports in relation to the accused and asked the probation service to meet with the accused in relation to certain matters raised at the sentencing hearing. The matter was adjourned to 31 October 2014.

6. On 21st July, the trial Judge continued the order imposing reporting restrictions. The order made on that date was as follows:

> *"The Court having heard the evidence tendered and the submissions on behalf of the respective parties and on the further applications of counsel for the defence for an order continuing the reporting restrictions, the Court doth Order that the said matter be adjourned to Dublin Circuit Criminal Court sitting in Court 5 CCJ at 11:00 on the 31/10/2014 before Her Honour Judge Mary Ellen Ring for sentence and that reporting restrictions do continue."*

7. On 31st October 2014, the sentencing hearing proceeded. In respect of the respondent, the Court imposed a sentence of two years imprisonment, suspended for three years from that date. The trial judge did not revisit the order made on 21st July 2014 restricting reporting of the case. Neither the Director of Public Prosecutions, nor the representatives of the respondent or other accused mentioned the reporting restrictions to the Court. Nor was any representation made on behalf of the Press. It is common case that, in consequence, the order restricting reporting made on 21st July remained in force after that hearing.

8. Notwithstanding that the reporting restrictions imposed by the order of 21st July 2014 thus remained in force, on 31st October 2014 and 1st November 2014 various articles appeared in publications owned by the appellants concerning the respondent's conviction and sentence. He was identified by name, as were the co-accused. Some of the information contained in these publications recorded the respondent as having committed more serious offences than those to which he had pleaded guilty. This prompted correspondence from the solicitors for the respondent complaining of the breach of the order imposing the reporting restrictions.

II THE CORRESPONDENCE

9. The first letter from the respondent's solicitors issued on 1st November to Independent News and Media plc. (the parent company of the appellants, each of which owns one of the outlets which published the respondent's name and is alleged to have defamed him). It recorded the fact of the reporting restrictions, asserted that the publishers were in contempt of Court by virtue of the publications, and called for the removal of all references to the respondent from the appellants' web sites. An application to Court was threatened. This prompted telephone and e-mail contact from the solicitors now representing the first named appellant and the removal of the articles from the relevant web sites. In an e-mail of 3rd November, the first named appellant's solicitors asked the solicitors for the respondent to provide them with more specific information concerning the reporting restrictions in question.

10. On 3rd November, the respondent's solicitors (who had also represented the two co-accused in the criminal proceedings) responded to the e-mail from the first named appellant's solicitors, referring to the fact of reporting restrictions being made on 21st July, and to the fact that no application was made on 31st October to lift those restrictions. Having reiterated the demand that the articles be removed, the respondent's solicitors noted factual inconsistencies in the publication and threatened an action in damages. They did not elaborate upon the terms of or basis for, the reporting restrictions.

11. This was followed by various letters before action addressed by the respondent's solicitors to the appellants. Letters to this end were sent to *The Sunday World* (owned by the second named appellant) and Landmark Digital Limited (the fourth named appellant) on the 17th November, and on the 18th November to *The Irish Examiner* (owned by the third named appellant), *The Herald* (owned by the first named appellant) and *The Kildare Nationalist* (owned by the fifth named appellant). Those letters complained of breaches of the court order and breaches of the respondent's right to privacy, and asserted that the

publications had been defamatory of the respondent. The letters to all but the fourth named appellant referred to the reporting restrictions in similar, but not identical, terms. For example, the letter to The Herald included the following statement:

> *"By order of the 21st July 2014, Judge Mary-Ellen Ring ordered that no details of the parties to this case be published. This is a consequence of the provisions of the Children's Act 2001, particularly section 252, which protects the anonymity of minors involved in criminal proceedings. No application was ever brought to amend or rescind this order. Consequently, there can be no doubt but that reporting restrictions continue to apply."*

12. The legal basis for the orders as recorded here was incorrect. Section 252 of the Children's Act provides that in proceedings for an offence against a child or in which a child is a witness, no report can be broadcast or published with identifies the child. By the time of sentencing there was no child a party to, or witness in, the proceedings. The point was made in replying letters from the solicitors for the various appellants that insofar as the Children Act had ever provided protection to the respondent against identification, that protection ceased upon his reaching his majority.

13. On 3rd December, the solicitors for the first named appellant pointed out that the query in their mail of 3rd November in respect of the reporting restrictions had not been replied to. A copy of the order imposing the reporting restrictions was sought. The following day, the solicitors for the third named appellant wrote to the respondent's solicitors disputing that the publication was defamatory, and observing:

> *"…. We are not aware of any Court Order or indeed legislation that prohibited our client from identifying your client in the publication in question. We note that neither Judge Mary-Ellen Ring nor the prosecution have complained of any alleged Contempt of Court. For these reasons, we dispute that there was any breach of a Court Order."*

14. Similar letters were sent on the same day on behalf of the fourth and fifth named appellants. On 22nd December, the respondent's solicitors sent a copy of the Court order of 21st July to the solicitors for the second named appellant, reiterating that no application had been made to have the reporting restrictions lifted. On 2nd February the respondent's solicitors expressed dissatisfaction with an offer made by the solicitors for the third, fourth and fifth named appellants in response to the threat of legal proceedings. Brief and similar correspondence was exchanged between these parties on 11th February and 13th February.

15. On 4th March 2015, proceedings were instituted against the first named appellant. A Statement of Claim was delivered on 9th March. The latter pleaded the publication of the respondent's name in breach of reporting restrictions as an aggravating factor. Similar proceedings were issued on the same day against the third, fourth and fifth named appellants. A Statement of Claim was also delivered in these proceedings on 9th March.

16. On 7th May, the respondent's legal advisors attended before Judge Ring for the purposes of obtaining release of the transcripts of the sentencing hearing. The affidavit sworn by the respondent's solicitor to ground that application averred that the application was made because of the appellants' request that he provide evidence of the existence of the reporting restrictions.

17. The application made by the respondent to the Court on 7th May was granted. According to a letter sent on 8th May by the respondent's solicitors to the solicitors for the second named appellant, the Court confirmed on 7th May that the reporting restrictions did apply in the case, and that the order of 21st July *'subsided but continued as no application was made by the State on the 31st October any publication amounted to a breach of the said reporting restrictions'*. The letter indicated that proceedings were in the course of preparation. That letter provoked correspondence from the solicitors for the second named appellant on 11th May objecting to the fact that they were not put on notice of the application made on 7th May. The respondent's solicitors replied on 13th May observing that the reporter who was in attendance at the sentencing hearing was present in court on 7th May, noting that a solicitor representing the first named appellant had also been present on that date and asserting that insofar as the issue of lifting the reporting instructions was concerned *'this has already been dealt with'*.

18. On 22nd June, a Plenary Summons issued against the second named appellant, a Statement of Claim in that action being delivered on 30th June. Those proceedings were similar to the claims issued against the first, third, fourth and fifth named appellants on 9th March. They pleaded publication in breach of the court orders as an aggravating factor. In each of the plenary actions, the respondent is identified by name. No application has been made to have those proceedings anonymised, nor to have any form of reporting restriction imposed in respect of them.

III THE HEARING OF JULY 31ST AND THESE PROCEEDINGS

19. On 17th July, the appellants appeared before Judge Ring, and advised that they intended to apply to have the reporting restrictions lifted. The transcript of the hearing of 31 July records counsel for the appellants as noting his understanding that in the course of the 17th July hearing it was said that the injured party had indicated that she had no objection to being identified. It also appears from the transcript of the hearing of July 31 that on July 17 counsel for the appellants advised the Court that his clients had understood that the order imposing reporting restrictions had been made pursuant to the provisions of the Children Act. The Court is recorded as having corrected this, the trial Judge confirming that the reporting restrictions had in fact been imposed on foot of the provisions of the Criminal Law (Rape) Act 1981 as amended. The appellants' application was adjourned in the first instance to 27th July and came on for hearing on 31st July 2015.

20. At that hearing counsel for the appellants described his application as being *'in relation to a reporting restriction order made … initially on the 21st July 2014 and then … extended.'* He relied on the procedure described by the High Court in *Independent Newspapers (Ireland) Limited and others v. Anderson* [2006] 3 IR 341. In response to the Court's

observations that that decision envisaged an application that was *'reasonable and timely'*, counsel responded that the delay did not make a difference to any party, and that no party was in a position to say that there was any prejudice arising from the delay. He contended that delay could not reasonably be a factor of any weight in an argument as to the jurisdiction of the Court. He contended that section 252 of the Children Act was inapplicable because the respondent was no longer a minor at the time he entered his plea, relying upon *Donoghue v. DPP* [2014] 2 IR 762. The provisions of the Criminal Law (Rape) Act did not – he contended – protect the convicted person, they only protected the complainant and he emphasised that the articles published by his clients did not identify the complainant. He said that section 8 of that Act did not provide jurisdiction for the Court to make any order and that there was no jurisdiction to continue the order following the conviction of the respondent, referring to *Irish Times v. Ireland* [1998] 1 IR 359. He urged that that decision enabled the Court as part of its jurisdiction and without legislative basis, to impose restrictions in the interests of securing a fair trial but that rights to privacy and to good name could not be taken into account as against the provisions of Article 34 of the Constitution. However, and at the same time, he made it clear that he was not complaining that an order had been made, but that he was merely drawing the attention of the Court to the fact that the provisions of section 8 were *'self-regulating'* and that in his submission, strictly, the proper approach of the Court was for the Court to direct the attention of the media to the fact that the Act applied.

21. Counsel for the respondent pointed to the delay on the part of the appellants in bringing their application, emphasising that if the media was unhappy with reporting restrictions the appropriate course of action was for its representatives to apply to the Court in a timely manner so that the matter could be dealt with at an early opportunity. He argued that it was artificial and unfair for the matter to be dealt with a year later. He said that the reason for the application was the civil case, and that the media having reported on the matter it was moot. He contended that there was an inherent jurisdiction recognised in *Irish Times v. Ireland* to impose reporting restrictions outside of any specific or express statutory provision. He emphasised the difficulties both for the accused and for the Court if the Court had no power to continue reporting restrictions when an accused ceased to be a child. In written submissions delivered in connection with the application, the respondent contended that section 93 of the Children's Act 2001 should be construed so that once proceedings were commenced against a person while a child, the protections provided for by that section should continue until the proceedings are concluded. The contention was advanced that it would be unsatisfactory were a person turning eighteen in the course of a criminal proceeding to lose the anonymity they enjoyed at the commencement of that process, as this could result in undue pressure on the Court or the accused in dealing with the case.

22. In her ruling (delivered ex tempore on July 31st 2015) Judge Ring having outlined the background to the application, explained that on 21 July 2014 counsel for the DPP had confirmed that the matter was in camera, noted that at the end of that hearing those reporting restrictions were continued, commented that nobody had returned to court in the immediate aftermath of the publications on 31st October and 1st November and

observed that nothing further occurred until earlier that year. She emphasised that the order she had made *'applied to all three of the accused [i]t was in relation to the proceedings on the bill'*. That part of the transcript which records the reasons for her decision makes it clear that the primary reason for her conclusion that she would not lift the reporting restrictions, related to the impact of the order sought on the co-accused. She referred to their position, as follows:

> *"I haven't heard from them on the application being made on behalf of the newspapers because* ***clearly if I revisit the order, it is not only the effect on [the respondent] but it is an effect … it will affect his co-accused and they haven't been in any way invited to be present They are not here. I don't know whether they are even aware of this application.*** *So, it puts this Court in a difficult position because* ***clearly if I revisit the order in relation to [the respondent], well, then, that may give rise to unfairness in relation to the two other accused.****"* (Emphasis added.)

23. Noting (it seems from the transcript of the hearing before her, incorrectly) that the co-accused had not complained in any way about the publications, the Judge continued :

> *"for me to revisit the order in any way has an ongoing effect in relation to those two accused or defendants now, having pleaded guilty, and they may wish to be heard."*

24. Judge Ring concluded:

> *"An order today would have an effect not just on [the respondent] but his co-accused. So I'm not making any further order and another Court can decide I was wrong, that I was wrong in July, that I'm wrong today on the 31st July 2015 but I made an order. No-one came back. Publication occurred That can't be undone. There are other parties that would be affected by me revisiting my order. They haven't been invited to come to the Court and say whether they have any objection to it, so in light of all of that, the order that I made in July of 2014 stands and the parties can litigate the matter somewhere else."*

25. She continued:

> *"I will not make an order that has an effect on people who are not before the Court and I want to make that clear."*

26. At the conclusion of the ruling, counsel for the appellants *stated 'I should make clear that I'm not asking the Court to do anything about the other defendants, the other accused people, only about [the Respondent]*. The following exchange then took place:

> *"JUDGE: I know but the effect of it is that I would make an order in relation to him ….. and they're not here to say what effect or other that has on their clients or whether they should have anything done about the order of the 21st July as it affected their clients ..*

[COUNSEL]: … I just do want to make it clear I'm not asking for an order to be lifted in respect of those two gentlemen."

27. Leave to seek Judicial Review of the decision of Judge Ring was sought and obtained on 27th October. The essential ground advanced was that the Court erred in law and acted *ultra vires* in considering that the provisions of the Criminal Law (Rape) Act 1981 provided for the imposition of reporting restrictions when that legislation provided no basis for such restrictions where an accused had pleaded guilty. It was pleaded that the Judge erred in failing to have regard to the provisions of Article 34.1 of the Constitution, and the case law considering reporting restrictions. The appellants further asserted that the reasons given by the Judge for her decision were inadequate, failed to have regard to the applicable principles, and resulted in her having regard to extraneous and immaterial factors. The order of the Court granting leave makes clear that that leave was in respect of the reliefs sought in the Statement of Grounds *'relating to the Respondent only'*.

28. It is to be noted that in the Statement of Grounds, it was pleaded that the appellants had *'all proceeded on the understanding that, having regard to the provisions of the Criminal Law (Rape) Act 1981 as amended, they were free to publish the name of the Respondent in the context of publications reporting on his sentencing hearing of 31 October 2014'*. The Statement of Grounds was verified by affidavits sworn by each of the appellants' solicitors. They were not cross examined at the hearing of the Judicial Review.

IV THE EXTENT OF THE REPORTING RESTRICTION

29. At the hearing of this appeal, counsel on behalf of the appellants expressed the view that the order imposing reporting restrictions was unclear. He claimed some uncertainty as to what exactly *'reporting restrictions'* meant. In fairness to the appellants (who of course were strangers to the circumstances in which the order was made), it is important to observe that some (but not all) of the correspondence from the respondent's solicitors proceeded on the basis that the effect of the restriction was merely to preclude identification of the accused. This position is reflected in the respondent's written submissions in this Court, in which it is stated *'[t]he only restriction in the instant case related to the identification of parties'*.

30. That said, it was open to the appellants to raise any lack of clarity around the effect of the order when they appeared before Judge Ring. In fact, the transcript of the hearing of 31st July 2015 shows that the Circuit Court Judge viewed the order as having a broad effect. In particular, Judge Ring took some care to explain to the parties precisely how and why the orders had come to be made. She said that at the commencement of the hearing on 21st July 2014, the Court inquired of counsel for the DPP whether the matter was *in camera*. Counsel for the DPP confirmed that the matter *'at that stage'* was in camera. The Judge explained that this was because the indictment included charges of defilement which on the face of it would have been subject to an *in camera* restriction. She outlined that at the conclusion of the hearing on 21st July 2014 counsel for the respondent asked for *'reporting conditions to continue'*. The Judge replied that they would *'for the moment'*. The reporting restrictions thus 'continued' were those confirmed at the outset of the hearing. The restrictions referred to at the outset of the hearing were not merely

restrictions on the identification of the accused, but instead were restrictions which followed from the hearing being *'in camera'*. The Judge left no room for doubt about this in the course of the hearing on 31st July 2015 when she reiterated:

> *"So, the application was not on behalf of the accused initially, it was on foot of a query I raised and confirmed by Ms. Lacey for the DPP* ***that it was an in camera matter'****."* (Emphasis added)

31. In fact, when counsel on behalf of the appellants suggested to Judge Ring that the order was *'at least an order preventing or at least a statutory provision preventing identification of the victim… perhaps not quite in camera*, the Judge responded :

> *"Well, until the facts were heard, 'til the ages were ascertained and the circumstances, as is common, the order is made so that the full facts are known to a judge who then decides when the matter arises whether to continue the order."*

32. The Judge later explained exactly why such a broad order was made by her on 21st July:

> *"… when a case comes for sentence all the judge has is an indictment and the pleas that have been entered. That indicates the nature of the offence and there are then certain considerations given to, for instance, the question of* ***whether it should be in camera or not****. And until the facts are opened fully, the other aspect of a case is the concern that the Court would have in relation to the victim or the injured party as to* ***whether anything in the course of the facts is going to lead to the identification of the injured party and therefore even where names are not the same, the Court has to be certain that there isn't anything in publishing facts of a particular case that could, directly or indirectly, lead to the identification.*** *So, it is good and common practice that when a sentence is commenced, the sentencing judge will err on the side of caution, apply the relevant strictures in terms of publication and then in the fullness of time, having heard the facts, having heard the relationship in any with the injured party or whether* ***the facts will in any way lead to an identification of the injured party****, its only then that the issue of whether the order should continue or not is usually addressed and it wasn't addressed in this case."* (Emphasis added)

33. It follows from the foregoing that what was 'continued' on 21st July 2014 was not merely an order restricting identification, but an order precluding any publication of the facts. Indeed, the Judge made it clear at the conclusion of the hearing (when a reporter present in Court enquired as to whether he could report on the matter *'in the abstract'* without naming the parties), that her order was that there would be *'no reporting'*. The Judge said that this extended to precluding *'the reporting of today's application'*. All of this is only consistent with the reporting restriction operating to prevent reporting on the proceedings as a whole, and none of it is consistent with there merely being a restriction on identification of the parties. The in camera origin of the order thus made was noted by McDermott J. (para. 28 of his judgment). The judgement of the High Court proceeds on the basis that what was prohibited was publication not merely of the identity of the

accused, but of *'the facts of the case'* (para. 30), *'the proceedings'* (para. 47) and *'the material facts of the case'* (para. 48).

V THE JUDGMENT OF THE HIGH COURT

34. The trial Judge first addressed the issue of whether there was a legal basis for the continuation of the order after 31st October 2014. He concluded that there was not. Although that determination was not the subject of any cross appeal, and indeed was accepted by counsel for the respondent at the hearing of this appeal, the reasoning which led the Court to that conclusion is important to the exercise of the Court's discretion. It was based on a number of factors.

35. First, McDermott J. examined the effect of section 93(1) of the Children Act 2001, as substituted by section 139 of the Criminal Justice Act 2006. That addresses the identification of children (defined as persons under the age of eighteen years) concerned in legal proceedings, and provides :

> *"In relation to proceedings before any court concerning a child –*
>
> *(a) No report which reveals the name, address or school of any child concerned in the proceedings or includes any particulars likely to lead to the identification of any such child shall be published or included in a broadcast or any other form of communication, and*
>
> *(b) No still or moving picture of or including any such child or which is likely to lead to his or her identification shall be so published or included."*

36. McDermott J. was clear that this self-executing provision – contravention of which is an offence - protected the respondent from identification for as long as he remained a child. However, the respondent argued that the purpose and intention of section 93 required that once a person was a child when charged, the protection of the section was intended to apply to those proceedings until their conclusion. The Court rejected this argument. Based on the decision of the Supreme Court in *Donoghue v. Director of Public Prosecutions* [2014] 2 IR 762, the terms of section 93 itself, and the mandate in Article 34.1 of the Constitution that justice be administered in public save in such special and limited cases as may be prescribed in law (para. 44 of the High Court judgment) the Court concluded that the provision ceased to operate when a person ceased to be eighteen (para. 43) :

> *"While it is clear that the protection conferred by s.93 continues for life in respect of a child who is prosecuted, convicted and sentenced under the age of eighteen, there is no specific provision extending those benefits when a child passes the threshold age limit of eighteen years in the course of the criminal proceedings."*

37. The Court observed that this reflected *'the well-established norm in relation to the treatment of offenders who were underage at the time of the commission of the offence but in respect of whom sentencing takes place ... when they are eighteen years or older'* (para. 34).

38. Second, the Court considered the provisions of section 8(1) of the Criminal Law (Rape) Act 1981, as amended. Insofar as relevant, that provides as follows in respect of *'rape offences'* which (consequent upon section 6 of the Criminal Law (Sexual Offences) Act 2006) includes the offence of defilement or attempted defilement:

> *"After a person is charged with a rape offence no matter likely to lead members of the public to identify him as the person against whom the charge is made shall be published in a written publication available to the public or be broadcast except –*
>
> *....*
>
> *(c) after he has been convicted of the offence.*

39. Clearly, this provision does not in itself provide a basis for a reporting restriction after conviction. However, McDermott J. emphasised that while the protection for the accused did not continue after conviction*, 'circumstances may arise in which it is appropriate to continue a restriction if to reveal the identity of the accused would also result in the identification of a complainant'* (para. 9, citing *LK v. Independent Star* [2011] 2 ILRM 272).

40. Section 7 of the Criminal Law (Rape) Act 1981 as amended provides :

> *"(1) Subject to subsection (8) (a), after a person is charged with a [sexual assault offence] no matter likely to lead members of the public to identify a [person] as the complainant in relation to that charge shall be published in a written publication available to the public or be broadcast except as authorised by a direction given in pursuance of this section."*

41. McDermott J. reasoned that it followed (para. 48) :

> *"… the learned trial judge was entitled notwithstanding the respondent's pleas of guilty to preserve the identity of the accused until such time as she was satisfied as to … whether the publication of* ***his identity or the material facts of the case*** *might reveal or tend to reveal the identity of the complainant."* (Emphasis added.)

42. The Court thus concluded that the orders made on 24th February and on 21st July continuing the restraint on publication were lawful, and in due exercise of the power of the trial Judge to ensure compliance with sections 7 and 8 of the 1981 Act. As I have noted, there is no appeal against that finding.

43. In the course of his consideration of these two statutory provisions, the High Court Judge addressed a third issue, namely whether – outside the applicable statute law – the Court had an inherent jurisdiction to restrain publication of the proceedings or some of the information revealed in the course of them. Noting that in *Irish Times v. Ireland* [1998] 1 IR 359, the Supreme Court had held that the rights conferred by Article 34.1 could be limited not only by acts of the Oireachtas but also by the Courts, McDermott J.

determined that the power of the Courts in that regard was highly constrained. He concluded (para. 45) :

> *"The applicants had a right to report or communicate what occurred in court and the only restrictions on publicity permitted is that which tends to deny an accused a fair trial."*

44. The end point of the High Court Judge's analysis of the applicable statutory provisions and authorities was that while the orders of 24th February and of 21st July 2014 were properly made by the Circuit Court Judge, the order placing a continuing restriction on publication ought not to have been continued after 31st October (para. 62). From conviction until the latter point, the restriction was properly maintained while the Judge ensured that identification of the respondent would not identify the complainant. However, because there was no evidence to suggest that the preservation of the identity of the respondent post-conviction was necessary to ensure the preservation of the complainant's identity under section 7 of the Act, McDermott J. concluded (para. 50 and 51):

> *"… the continuation of the order beyond the 31st October 2014 was not warranted by the necessity to ensure a fair trial or to protect the respondent's rights as a child or a person accused of a rape offence. There is no evidence to suggest that the preservation of his identity post-conviction was necessary to ensure the preservation of the complainant's identity under section 7 of the Act.*
>
> *… the order made on 21st July 2014 though made within jurisdiction ought not to have been continued beyond the 31st October."*

45. However, and as already noted, the Court refused the appellant any relief. First, the Court was of the view that the appellants had not brought proceedings within the time period specified in the Rules of the Superior Courts. McDermott J. explained (para. 54):

> *"… the framing of this application for judicial review seeks to attach previous orders by challenging the refusal to lift them in July 2015 thereby collaterally attacking the previous orders but seeking to do so well outside the period provided for under O.84 r21(1). The declaration sought is in my view clearly outside the time limited under the rules. I am satisfied for that reason that the declaration should not be granted."*

46. Second, the High Court found that even if there was no legal basis for the continuation of the reporting restrictions after October 2014, the Circuit Court Judge was entitled to exercise a discretion in refusing the application (para. 65). McDermott J. identified two reasons for the trial Judge's decision (para. 61) :

> *"The learned trial judge refused to lift the order because of the delay by the applicants in applying to have it lifted and because the other two accused were not put on notice of the application which if successful would have affected them."*

47. He repeated the basis for the Circuit Court's decision at para. 63, noting :

> *"The learned judge also noted that the two other accused who had not initiated civil proceedings were not the subject of the application and had no notice of it."*

48. McDermott J. continued (para. 65) :

> *"I am satisfied that the learned trial judge was entitled to consider the lapse of time in the circumstances when considering an application to lift the order some nine months later. I am also satisfied that it was open to the learned trial Judge to consider the delay as unreasonable and not the subject of any acceptable explanation. I am therefore satisfied that the learned trial judge was entitled to exercise a discretion in refusing the application notwithstanding this court's findings in relation to the continuation of the order beyond 31 October 2014. I am not satisfied that the learned trial judge was compelled in the circumstances to make a finding in favour of the applicants on the 31st May 2015 [sic.] following a breach of the court's order and a belated application to set it aside."*

49. Third, however, and aside from this, the High Court Judge decided that if he was wrong in this conclusion, he would in the exercise of his own discretion refuse relief. The judgment proceeds to identify a series of different grounds for that conclusion (paras. 66-68). These fell into three broad, albeit related, categories. The first arose from the conduct of the appellants. Thus, the Court emphasised that the appellants had published when they were enjoined not to publish, that they had failed to take early action to either clarify the nature of the order made or to lift it, and that they chose not to initiate a judicial review in respect of the operation of the order of 31st October.

50. The second aspect of the Court's discretion arose from the appellants' motivation in bringing the proceedings. The Court felt that the fact that the application was brought to support the appellants' defence of the defamation proceedings was relevant to the exercise of its discretion. The fact that the application was made in respect of only one of the accused, was emphasised. McDermott J. explained (at para. 67) :

> *"I am not satisfied that this Court should exercise its discretion in favour of the applicants for the purposes of assisting them in their strategy in defending the defamation proceedings. It is noteworthy that relief was no sought against the other two accused who did not issue proceedings against the applicants. Peculiarly, the effect of this application would, if successful, serve only to lift the restraining order in respect of the respondent alone and not in respect of coverage of the entire proceedings. This does not seem to me to suggest an application motivated solely by the applicants' interest in the public administration of justice and the exercise of their constitutional rights under Article 40.6.1 …"*

51. Third, the Court was also concerned with the impact on the respondent of the relief claimed. Earlier in its judgment, the High Court described the operation of the 'sunset' clause in section 258 of the Children Act 2001. That provision in certain circumstances

enables the expungement of a conviction for an offence committed before a person is eighteen years old. It operates three years after the conviction. For a person convicted and sentenced prior to his eighteenth birthday section 258 in tandem with section 93, facilitates the rehabilitation of the offender. However, a person sentenced after the age of eighteen loses the benefit of anonymity. McDermott J. reasoned as follows :

> *"The sentencing principles and post-conviction regime imposed by the court and provided for in s. 258 are intended to assist the respondent. He is able to the degree set out in s.258 to gain a substantial benefit and is shielded from the opprobrium of his conviction to the extent allowed under the section as time moves on …. This is a further factor which leads me to conclude that I should exercise my discretion in refusing the relief sought."*

VI THE TIME BAR

52. I do not believe that Order 84 Rule 21 RSC afforded a basis for refusing Judicial Review of the decision of the Circuit Court Judge. That rule imposes an obligation to make an application for leave to seek Judicial Review within three months from the 'date when grounds for the application first arose'. The period is capable of extension in accordance with Order 84 Rule 21(3) RSC. Order 84 Rule 21(2) identifies when time begins to run in certain circumstances for the purposes of Rule 21(1) :

> *"Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding."*

53. Here, the decision sought to be reviewed was that of Judge Ring of 31st July 2015. The proceedings were brought within three months of that date. In circumstances where (unlike its predecessor) the version of Order 84 Rule 21 in force since 2012 does not impose a separate, express obligation to bring the application *'promptly'*, the provision is complied with once relief is sought within three months of the date of the impugned order. Absent prejudice to a respondent or third party (Order 84 Rule 21(6)), a claim cannot normally be defeated for delay if brought within the relevant time (*Ryan v. Clare County Council* [2014] IESC 67 at [32]). The same considerations apply to the relief sought by way of declaration.

54. Of course in this case, the order of 31st July 2015 was parasitic upon the events of 31st October the previous year. A determination that the Circuit Court Judge was wrong in refusing to set aside the order of 21st July 2014 would in all likelihood (and depending on the grounds for that conclusion) be predicated on the finding that the order ought to have ceased to have effect on 31st October.

55. This notwithstanding, the order of 31st July 2015 and the events of 31st October 2014 were legally distinct. The decision of Clarke J. in *Independent Newspapers (Ireland) Limited v. Anderson* [2006] 3 IR 341 describes the procedure to be adopted where orders are made by a trial Court imposing reporting restrictions. As explained there, where a

Judge makes an initial order imposing restrictions without hearing representatives of the media (as will frequently be necessary in order to prevent publication) those representatives must be given the opportunity to be heard thereafter (see [2006] 3 IR at 350). As also explained by Clarke J. in *Anderson*, the media organisations in this situation are in a position analogous to a party against whom an ex parte order has been made ([2006] 3 IR at 350). The general rule is that *'any order made ex parte must be regarded as an order of a provisional nature only'* (*Adam v. Minister for Justice* [2001] 3 IR 53, 77, per Hardiman J.), and in consequence there is an entitlement to apply to set aside such order enjoyed by the person against whom it was thus made (*Adams v. DPP* [2001] 2 ILRM 401). The facility to apply to lift the continuing operation of the order of 21st July 2014 not merely reflects general principle, but having regard to the fact that the Judge who made the order will be in a far better position than a reviewing Court to determine whether on the facts such an order should be continued, it locates the initial jurisdiction in the appropriate forum.

56. That being so, where the procedure described in *Anderson* is operated, it is not correct to refuse Judicial Review of the second order made by the trial Court on the basis that it comprises a collateral attack on the original order prohibiting publication. A 'collateral attack' in this sense arises in multi-stage decision making processes within which later decisions inevitably depend on and assume the legality of an earlier determination. In that situation, a challenge to the later decision may directly or indirectly present an issue as to the legality of the earlier one. Such an indirect attack is not permissible where the earlier decision could and should have been challenged within a fixed period which has passed. The rationale underlying the relevant case law is that a party who has the benefit of an administrative decision which is not challenged within a legally mandated time frame should not be exposed to the risk of having the validity of that decision subsequently challenged in later proceedings which seek to quash the validity of a subsequent decision (*Sweetman v. An Bord Pleanala* [2018] 2 IR 250, 264). In deciding whether proceedings are barred by this principle, the essential question depends on whether *'it is clear that a particular question or issue is to be definitively determined at an earlier stage so that there is no possibility to have that issue or question re-opened at a later stage'* (id. at p. 265). If the legality of the first decision can be re-opened by a second decision, the challenge to the second decision is not properly viewed as a collateral attack on the first.

57. So understood, the issue of collateral attack does not arise here. The decision in *Anderson* requires that the decision imposing reporting restrictions not be final, because it is subject to the possibility that the media organisations will exercise their right to apply to set it aside. Here, had the appellants mounted a challenge by way of Judicial Review to the failure on 31st October 2014 to lift the order of 21st July, they would have been met with the response that before challenging the decision they ought to have first applied to the trial Court to set it aside. Having complied with that procedure, they cannot at the same time be held time barred for so doing. This application was thus properly brought as a challenge by way of Judicial Review to the refusal of the trial Judge to set aside the order, and that decision was made on 31st July.

58. It could, of course, undermine the time limit thus understood were the appellants free to delay in seeking to set aside, and to thereby undercut the obligation of promptitude that attaches to the Judicial Review remedy. However, insofar as such delay is relevant in relation to a challenge to an order of the kind in issue here, that delay is a matter properly addressed (a) by way of the power of the trial Court when an application to set aside the restriction is made, and thereafter (b) by reference to the general jurisdiction of the High Court to refuse Judicial Review on discretionary grounds. That objection does not fall within Order 84 Rule 21.

VII THE DISCRETION OF THE CIRCUIT COURT JUDGE

(1) Delay

59. As a matter of general principle, a party seeking to set aside an ex parte order is expected to move promptly. A failure to move with expedition entitles the Court to refuse to lift its original order. In many cases, the exercise of the discretion necessarily invested in a court in deciding whether to adopt this course of action is straightforward and involves a balancing of the interests of the two parties in the case having regard to the effect of the delay and the explanation tendered for it.

60. The order in issue in this case, however, has very a particular legal status, and very significant constitutional consequences. It has the effect of imposing an ongoing reporting restriction on proceedings which, in accordance with the mandate of Article 34.1 of the Constitution, must be heard in public. That provision exists not for the sole benefit of the media which enjoys its protection, but also for that of the public which has a right to both receive information regarding such proceedings and to the benefit of the check on judicial power it entails (see *Gilchrist v. Sunday Newspapers Ltd.* [2017] IESC 18 [2017] 2 IR 284 para. [3]). The balancing exercise arising where there has been a delay in seeking to set aside such an order is dominated by that constitutional imperative, not by the interests of the parties to the proceedings.

61. Article 34.1 requires any restriction on the public administration of justice to be in accordance with law. Where such a restriction assumes the form of a court order either implementing the terms of a statutory provision, or protecting a constitutional or other compelling entitlement of the kind envisaged by the decision in *Gilchrist v. Sunday Newspapers* [2017] 2 IR 284, the restrictions must be limited to those which secure a clear and significant objective, and must go no further than necessary to achieve that objective (see *Independent Newspapers v. Anderson* [2006] 3 IR at 353). More recently this has been phrased in terms of the need for circumstances in which the necessity for deviation from the administration of justice in public to be *'truly compelling'* (*Gilchrist v. Sunday Newspapers* [2017] 2 IR 284 at [40]). *Gilchrist*, it should be noted, rejects the proposition that it is only in order to secure a fair trial that the Court has the power to impose restrictions on the administration of justice in public.

62. Between 21st July and 31st October 2014, the reporting restriction in issue in this case was justified by reference to the interests of the complainant. It appears common case as between the parties that the continuation of the restriction is not required to protect her interests after that date (although having regard to the passage of time, this is an issue in

relation to which I entertain some concern and to which I will return). It follows that if the reporting restrictions are to remain in force after 31st October 2014, it is necessary that there be another constitutionally appropriate justification for the constraint. If the justification for maintenance of the order after that date is the delay of the appellants in seeking to have the order lifted, then the principle that the delay of the appellants precludes the grant of relief, must itself satisfy the tests outlined above. It must advance a constitutionally protected interest or an otherwise compelling exigency as described in *Gilchrist*, and must operate in accordance with the principle of proportionality.

63. Of course, it is well established that delay, acquiescence and laches may debar a party from invoking constitutional entitlements they might otherwise enjoy. However, where - as here - the consequence of such a barrier to relief is the maintenance of an otherwise unlawful impediment to the constitutional entitlements of the public as a whole, the circumstances legitimately generating such a barrier would have to be exceptional. While the interests of good administration may require that delay in *inter partes* litigation be visited in some circumstances with a consequence for the delaying party even without proof of prejudice, it is not appropriate in general that the right of the public in the administration of justice in public be diminished by the lassitude or indifference of the media in moving to lift restrictions of the kind in issue here. It may be that delay would properly preclude such relief in circumstances where it is established that lifting the restriction after an effluxion of time would result in a clear and significant prejudice to a third party's interests. However, no such prejudice has been established here. The respondent may well be prejudiced if the reporting restrictions are lifted. However, based on the evidence in this case, any such prejudice is a result of the lifting of the restriction *per se*, not as a result of the lifting of the restriction some time after it ought to have been removed. There is therefore no causal connection between any such prejudice, and the passage of time. That being so, the delay of the appellants did not afford a basis for refusing the application to set aside the restriction.

64. All of that being said, it should be observed that while it is undoubtedly the case that Judge Ring referred in the course of the hearing on 31st July to the delay of the appellants in seeking the relief claimed, it is not clear to me that she necessarily based her refusal of the orders squarely on that consideration. The primary concern underlying her order was the interests of third parties that were not before the Court. Had she substantially based her decision on the passage of time, I do not believe that on the facts of this case this would have been a reasonable determination having regard to the factors I have outlined above.

65. Finally, and aside from all of the foregoing, I am far from convinced that the passage of time in this case was in any event sufficiently egregious to warrant the conclusion that relief be refused. I will return to this aspect of the case in the next section of this judgment.

(2) Rights to Fair Procedures of Other Parties :

66. Underlying the Circuit Court Judge's decision of 31st July 2015 is the conclusion that it would be wrong as a matter of procedure to make an order setting aside the reporting

restrictions without the other accused being aware that such an order was being sought and without their being given an opportunity to make representations in respect of the lifting of any aspect of that order. It is important to emphasise that the Judge re-iterated this view after the appellants' counsel had made it clear that he was only seeking to lift the reporting restriction *'in relation to'* the respondent. Judge Ring said *'the effect of it is that I would make an order in relation to him ….. and they're not here to say what effect or other that has on their clients or whether they should have anything done about the order of the 21st July as it affected their clients ..'*

67. As the trial Judge who had both continued the order on 21st July 2014 and conducted the sentencing hearing on 31st October, Judge Ring was uniquely placed to determine whether the grant of the relief claimed by the appellants could have an impact on the other accused such as to trigger their entitlement to be heard. In this respect, it is important to repeat that the order which it was sought to set aside was not simply an order preventing the identification of any of the accused, but an order preventing the reporting of any of the facts.

68. In fact, no argument was advanced to this Court to the effect that the other accused would not have a right to be heard in advance of the lifting of the reporting restrictions simpliciter. That was obviously correct: indeed in *Anderson* itself, the Court was clear that an application to set aside an interim reporting restriction must be made *'with all relevant parties having been given the opportunity to be heard on notice'* ([2006] 3 IR at 350-351). In my view, it is very difficult to see how this obligation could ever be complied with by giving notice to only one accused, where the reporting restrictions it is sought to set aside relate to a single hearing involving three accused, overlapping events, and the same injured party. This is all the more so where, as here, the accused and the injured party were part of the same social group with the inevitable risk, as contended for by the respondent in his submissions, that the identification of one party will enable the identification of others.

69. In their written legal submissions in this Court the appellants addressed this issue as follows:

> *"If and insofar as the relief was refused out of a concern that the granting of same would affect a third party right, there is and was no basis for that relief. The Appellants have at all times made it clear that they were not seeking any relief other than* ***as against the Respondent*** *as and this was made clear as of the date of the grant of leave."* (Emphasis added)

70. The position of the appellants as articulated in oral submissions was that the rights of the co-accused did not arise because the relief claimed was *'confined to reporting restrictions insofar as they applied to'* the respondent. However, even the revised declaratory relief set forth in the Notice of Motion assumes that it is possible to lift the reporting restrictions *'relating to the Respondent'* without impacting on the other parties to the case. It was a matter for the appellants to establish that this was so.

71. In order to lift the reporting restriction *in relation* to the respondent, the appellants will presumably have to not merely identify the respondent, but also detail the offences to which he pleaded guilty and sentence imposed on him. The transcript of the sentencing hearing is not before this Court and no evidence has been tendered establishing that it is possible to 'lift' the reporting restriction in this way, without affecting the co-accused and in particular without also referring to aspects of the offences involving the other accused, thereby potentially impacting on them in such a way as to entitle them to be heard. Judge Ring's ruling discloses that at the very least she believed the circumstances were such that the co-accused had the right to make representations as to whether they would be affected were such relief granted. This Court has been provided with no basis on which it could conclude that she was in error in this regard. This is particularly the case given the breadth of the order made. Even if the order were viewed as having a narrower scope than the transcript of the hearing of 31st July 2015 suggests, and even if it were an order which merely precluded identification of the respondent, in circumstances where the undisputed evidence is that the respondent and other accused were members of the same group of friends, the appellants in order to establish that Judge Ring erred in her conclusion would still have to establish that identifying him would not impact on their interests. This they have not done.

72. If the lifting of the reporting restriction 'in relation to' the respondent presented the risk of the co-accused being identified, then on every version of the test applicable to the activation of rights of procedural fairness articulated in *Dellway Investments Ltd. v. NAMA* [2011] 4 IR 1, the entitlements of the co-accused to be heard were triggered: such a decision would clearly have an adverse effect on their rights and/or interests (see Murray CJ at 205, Denham J. at 227, Hardiman J. at 283, Fennelly J. at 321, Macken J. at 343, Finnegan J. at 359). That entitlement is as inherent an aspect of the administration of justice, as is the requirement that justice be dispensed in public. The co-accused may wish to advance legal arguments as to the construction or effect of the relevant statutory provisions that have not been addressed in this judgment. They may be able to point to an impact for them of publication that would be relevant to the proper balance insofar as it affects them. The issue, of course, is not whether those arguments if advanced would produce a different result: this does not affect their entitlement to advance them (see *Glover v. BLN* [1973] IR 388, 426). The point is that in neither this Court nor in the Circuit Court were they joined so as to enable them so to do. It follows that not only has it not been established that Judge Ring erred in refusing to make the orders sought by the appellants without the co-accused being notified of that fact, but that those persons had an interest in the outcome of these proceedings which required that they be served with them (Order 84 Rule 22(2)). The altered form of the relief claimed only avoids this necessity if the appellants can establish that the making of the modified orders sought by them would not have affected the interests of the other parties. As I have said, they have not discharged that onus.

73. This gives rise to a further issue. If reporting of this kind is to take place, there is an obvious concern that it might operate to identify the complainant. Without knowing what information is to be disclosed, the Court does not know what the implications of this

would be for the complainant. The only information disclosed to this Court as to the position of the complainant appears in the transcript of the hearing of 31st July 2015. There, the position was put as follows by counsel for the appellants :

> *"I understand from what was said by counsel for the DPP on the last occasion that we were here when it was adjourned to today that the victim had indicated that she had no objection to being identified."*

74. While noting that at the hearing of this appeal, counsel on behalf of the appellants advised the Court that the Director of Public Prosecutions had indicated that she did not wish to be joined as a party to these proceedings in the High Court, in the light of the passage of time and the provisions of the EU Victims Directive (Directive 2012/29/EU), the current position and views of the injured party cannot be considered to be immaterial to the issue of whether the orders should be lifted. Aside from everything else, I would not be prepared solely on the basis of the limited evidence before the Court dealing with her position, to countenance the lifting of the restriction on the entire of the sentencing hearing without the current position of the complainant in this regard being ascertained and confirmed.

75. Further, even if this Court were to make – or to in some sense sanction the making – of an order of the kind suggested by the appellants, it would present a further difficulty. If one assumes that when the appellants refer to the orders being lifted *'in relation'* to one accused but not the others, they mean that they would be free to report on the sentencing hearing without naming the other accused or (perhaps) giving details of the sentences imposed on them or (perhaps) to the offences to which they had pleaded guilty (and as I have observed I do not know if this would be possible), that beings into focus a striking difference of treatment as between the various accused. It would arguably present an invidious discrimination, with details of the proceedings insofar as they affected the respondent being permissibly publicised, but those of his co-accused remaining subject to a reporting restriction. Yet the essential case advanced by the appellants is that the Court should make an order with this effect, the only justification for the consequent differential treatment thus arising being that the respondent is the person who has sued the appellants for defamation and/or that he is the only one of the accused believed by the appellants to be sufficiently newsworthy to merit an application of this kind. This is an issue which clearly, and with some justification, concerned McDermott J. (see paras. 32 and 67 of his judgment).

76. For these reasons, the Court cannot conclude that the appellants have discharged the onus of establishing that Judge Ring erred in law in the conclusion she reached. Therefore it cannot grant orders of certiorari. For the same reason, it cannot grant the declaratory relief in even the modified form in which it is claimed. Even if the Court could grant the modified form of that relief (and it has not been established that this is possible) there would be a strong argument that it should not do so because the appropriate course of action in the light of the comments made by Judge Ring was not to seek Judicial Review of her decision at all, but to re-enter the matter before her on notice to the co-accused.

There can be no question but that the appellants at all times had the entitlement to re-enter the matter on notice to the parties potentially affected by the order to this end, a point forcefully and correctly made by the respondent in its written submissions in this Court. This was not disputed by the appellants. The references by the Circuit Court Judge to the entitlement of the parties to *'litigate the matter somewhere else'* did not, and could not, change this.

VIII THE DISCRETION OF THE HIGH COURT

77. A significant aspect of the High Court's decision was the conclusion that in the trial Judge's discretion he would refuse relief by way of Judicial Review. In this regard some preliminary comments are appropriate. The discretionary power of the Court to refuse relief by way of Judicial Review is an inherent aspect of the remedy. However, the fact that a remedy may be discretionary does not imply that the court is, in any real sense, at large in determining to grant the relief (*Shell E&P Ireland Limited v. McGrath* [2013] 1 IR 247, 271). It means no more than that the court can take into account a range of factors in determining whether to grant relief and in fashioning the terms of any such relief (*De Roiste v. Minister for Defence* [2001] 1 IR 190, 209 (Denham J.)). The interposition of a discretion does not mean that a Judge can either override in any way the law, nor interfere with the rights of any individual as such (*Smith v. Minister for Justice and Equality* [2013] IESC 4 at [6.1]). The discretion must be exercised either within the framework of recognised categories of case, or by reference to an identified principle. As with other exercises by a trial court of its discretion, while this Court will give due weight to the to the view of the trial Judge, the Court has full appellate jurisdiction in respect of any such orders (*Godsil v. Ireland* [2015] 4 IR 535, 557).

78. The discretionary factors by reference to which Judicial Review has been refused have tended to fall into three broad groups – grounds relating to the action or inaction of the claimant (such as a failure to exhaust an alternative remedy, delay, laches, waiver, acquiescence or misconduct in connection with the proceedings), grounds relating to the impact a remedy will have on others (such as where the grant of relief would represent an unwarranted interference with the settled rights or expectations of third parties) and grounds relating to the practical value of the remedy (such as mootness or futility), (see Auburn *Judicial Review Principles and Procedure* (2013) para. 32.03). While these categories are in no sense closed, where they are to be extended that development must be justified on a principled and reasoned basis (see De Blacam *Judicial Review* 3rd Ed. Para. 33.15). In considering the application of that discretion here, it is appropriate to have regard to the importance of the underlying issue (*Eastern Health Board v. Farrell* [2000] 1 ILRM 446, 449), to the fact that the order which is sought to set aside has ongoing effects (*O'Keefe v. Connellan* [2009] 3 IR 643, 654), and to the merits of the application and consequences for the applicant if an order of certiorari is not granted (*Stefan v. Minster for Justice* [2001] 4 IR 203, 217).

79. Bearing these factors in mind, it is my view that some of the grounds relied upon by the High Court Judge as justifying the refusal of relief, do not properly arise in the context of the discretion to refuse Judicial Review. As I have already explained, given that an

application to set aside was the appropriate response to the continuation of the order after 31st October, the fact that the appellants did not directly seek Judicial Review of that decision cannot be a barrier to relief. In circumstances where the evidence before the High Court was to the effect that the appellants had believed at the time of publication that they were entitled to publish having regard to the operation of section 8 of the Criminal Law (Rape) Act 1981 as amended, it was not correct to refuse leave to seek Judicial Review because of that error. This is aside from the consideration of whether the publication of articles the dissemination of which ceased once the appellants were advised of the existence of the order, could ever properly prevent the obtaining of relief quashing a preclusion on publication which should not as a matter of law have been continued in the first place.

80. Nor do I believe it was correct to refuse relief by way of Judicial Review because the appellants wished to use the fact of any relief granted in connection with their defence of private law proceedings. The motive of an applicant in making a claim for judicial review – whether commercial or otherwise – should not usually be a relevant consideration in the exercise by the Court of its discretion to grant or withhold a remedy (De Smith *Judicial Review* Eighth Ed. 2018 Para. 18-060 citing *R (Mount Cook Land Limited) v. Westminster City Council* [2003] EWCA Civ. 1346 at [45]-[46]). The position will be otherwise where the intention of the appellant is abusive of the Court process (see *Sean Quinn Group Ltd v. An Bord Pleanala* [2001] 2 IR 505). There was no basis on which this could have been said to be the case here.

81. In this connection, the trial Judge cited a passage from the Fourth Edition of Hogan and Morgan *Administrative Law* para. 16-167 :

> *"Relief will not be granted if the purpose is not regarded as legitimate. This ground of refusal is more difficult to identify, but there have been cases where the courts have held that they will not facilitate a litigant who seeks relief for an unmeritorious or ulterior purpose."*

82. The authorities in the text cited in support of this proposition do not necessarily establish it: *State (Abenglen Properties Limited) v. Dublin Corporation* [1984] IR 381 is properly viewed as having been decided on two basis – that the prosecutors had available to them an alternative remedy by way of appeal, and that the relief sought was futile (see the judgments of Walsh J. at 397 and of Henchy J. - with whom Griffin and Hederman JJ. agreed – at p. 400-401 and 405). *State (Doyle) v. Carr* [1970] IR 87 was similarly decided on the basis that the relief sought would achieve no purpose. More fundamentally, the refusal of an order quashing an otherwise unlawful reporting restriction on the grounds of the appellant's motive, would not be consistent with the constitutional imperative: *"[t]he principles of open justice and the publicity of proceedings do not depend on whether they are pursued for high principle or for commercial considerations or worse'*, per O'Donnell J. *Gilchrist v. Sunday Newspapers Ltd.* [2017] 2 IR 284, 292.

83. I have touched earlier on the issues of the passage of time between the making of an application to Judge Ring, and of the impact on the respondent of the granting of such an order in the context of the proper approach to the setting aside of the order. The same considerations as outlined there, apply to the exercise of discretion in granting relief by way of Judicial Review. Delay should not defeat an application of this kind in the absence of a strong and countervailing prejudice caused by that delay. None has been identified here. That is particularly the case given the true extent of the delay. The High Court Judge was rightly critical of the failure of the appellants to go back to Court when they were advised by the respondent's solicitors that the publication of the respondent's name had been in breach of a Court order, as he was of the publication itself. However, it was not until 22nd December that the order itself was provided to some of the appellants, and even then there was a lack of clarity as to the legal basis for the order, and indeed its reach. The inactivity between then and the reactivation of the matter following the application made to Judge Ring on 7th May was certainly remarkable. It also does – as the High Court observed – raise issues as to the extent to which the appellants in making their application to Judge Ring were in fact concerned with the legality of the order made, as opposed to the protection of their own position in the private law proceedings. The period of delay of a number of months does not, however, amount to a proper basis for refusing the relief claimed here, if the underlying decision was made without jurisdiction.

84. In any event, for the reasons explained above, the respondent has not established a sufficient prejudice caused by the passage of time to justify the preclusion of Judicial Review in this case. The effects described by the High Court Judge are consequences of the law properly applied, not a consequence of any action or omission of the appellants in moving their application to set aside. The legal position has been authoritatively described as follows: *'[o]nce an accused has been convicted, his right to anonymity evaporates under the express terms of s.8(1) and a judge has no residual discretion to extend its duration unless publication might lead to the identification of the complainant'* (O'Malley *Sexual Offences* Second Ed. 2013 para. 17-20). The fact that this may undermine the rehabilitative purposes of other provisions in the Children's Act may be a reason to criticise the law. They do not afford a ground for suspending its application.

IX THE APPROPRIATE ORDERS

85. I have already explained why I do not believe this to be a case in which it is appropriate to grant either certiorari of the decision of 31st July 2015 of Judge Ring, as she then was, or the declaratory relief claimed in these proceedings. In summary, the decision of the Circuit Court not to lift the reporting restrictions was based on the fact that other parties involved in the proceedings to which the reporting restrictions attached, were not advised of the application to lift those restrictions and were thus not in a position to make any representations as to why the order should not be lifted. While the application to Judge Ring and thereafter to this Court was presented on the basis that the appellants only sought orders lifting that restriction in relation *to the respondent*, Judge Ring was clearly concerned that the co-accused should nonetheless be afforded the opportunity to address the effect any such order might have on them. The appellants have not identified any basis on which it could be concluded that Judge Ring erred in reaching this conclusion. In

particular, the appellants have not established that it would be possible to partially lift the order in the way suggested by them without potentially affecting the rights and interests of the co-accused, and without therefore engaging their rights to fair procedures.

86. It follows that an order of certiorari of Judge Ring's decision cannot issue. Nor can the Court grant the declaratory relief claimed (a) because granting such relief would in this case in effect decide the issue which Judge Ring in a legally valid decision has refused to decide, and (b) because the declaratory relief itself would affect those parties. Once Judge Ring decided as she did the appellants should have proceeded to advise the co-accused and then re-enter the matter before Judge Ring, as they were clearly entitled to do. Their failure to do this has not merely the consequence that the decision of the Circuit Court which they seek to quash was, in fact, lawfully made, but it means that this Court is asked to make an order potentially impacting on the interests of persons who are not before it in circumstances where there was available to the appellants another remedy of which they could and ought to have availed.

87. This conclusion has the consequence that an order imposing reporting restrictions which the High Court has held to have no lawful basis, remains in force. For reasons considered above, this is an unattractive outcome. However, I am of the view that this is a necessary consequence of the constitutional scheme: the right of the co-accused to fair procedures is as integral an aspect of the administration of justice as is the requirement that justice be administered in public. In this case the latter can only be fully achieved when the former has been respected.

88. It is accordingly a matter now for the appellants, should they wish to do so, to proceed before the Circuit Court to have those restrictions lifted in whatever form they feel appropriate, upon notice to all potentially affected parties, and in a context where that Court can be certain that whatever order is sought is made cognisant of and having regard to the rights of the complainant. In that regard the following should be noted :

    (i) The High Court has held that there is no lawful basis for the reporting restriction. That decision has not been appealed.

    (ii) This Court has determined that the fact of the passage of time in seeking the lifting of an order of this kind should not in itself preclude the making of such an order.

    (iii) It is possible that in an exceptional case were it established that an affected person would suffer clear and identified prejudice by reason of that passage of time and in particular were it established that such prejudice is causally linked to that passage of time, such an order could be refused. The circumstances in which this will occur are likely to be exceptional.

89. In these circumstances, this Court will make an order dismissing the appeal.