Neutral Citation Number: [2021] EWCA Crim 200

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
HER HONOUR JUDGE DHIR QC

201903944A2

AND IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

CO/5082/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2021

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
MRS JUSTICE CUTTS
and
MR JUSTICE SAINI

- -

Between :

KL	**Applicant**
- and -	
REGINA	**Respondent**

- -
- -

Michael Bromley-Martin QC & Joanne Cecil (instructed by **Stokoe Partnership**) for the **Applicant**
Anthony Orchard QC & Joel Smith (instructed by **CPS Criminal Appeals Unit**) for the **Respondent**

Hearing date: 24 November 2020

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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 10:00am on Friday 19 February 2021.

Dame Victoria Sharp P.

Introduction

1. This is judgment of the court.

2. On 6 September 2019, KL (the applicant) was convicted following a trial at the Central Criminal Court before a jury and Her Honour Judge Dhir QC, of the murder of Ayub Hassan, aged 17. At the date of the murder, the applicant was 15 years old. By the time of conviction on 6 September 2019 he was aged 16.

3. Before trial, on 12 June 2019, an order had been made under section 45(3) of the Youth Justice and Criminal Evidence Act 1999 (the 1999 Act) providing for the applicant to remain anonymous. The order provided that no matter relating to the applicant should (while he is under the age of 18) be included in any publication if it was likely to lead members of the public to identify him as a person concerned in the criminal proceedings.

4. On the morning of the sentencing hearing on 27 September 2019, a media representative made an application to the judge for the removal of that order. Following submissions from that representative and from Leading Counsel for the applicant, Mr Bromley-Martin QC, the judge acceded to that application. The judge made what is called an excepting direction under section 45(4) of the 1999 Act, thereby permitting the press to name the applicant (the Excepting Direction).

5. As to sentence, the judge imposed upon the applicant the mandatory sentence of Detention During Her Majesty's Pleasure pursuant to section 90 of the Powers of Criminal Courts (Sentencing) Act 2000 and determined that the minimum term was to be 15 years.

6. The Excepting Direction was stayed by the judge pending the applications to this court, which is sitting both as the Court of Appeal, Criminal Division and as a Divisional Court.

7. In summary, the applicant argues, both by way of an appeal to the Court of Appeal, Criminal Division and by way of a parallel claim for judicial review in the Divisional Court, that the making of the Excepting Direction was unlawful.

8. As part of his appeal to the Court of Appeal, Criminal Division, the applicant makes a separate application for leave to appeal against the 15-year minimum term, contending that it was manifestly excessive.

9. The applications before us in relation to the Excepting Direction require us to resolve the point left open in *R v Aziz (Ayman)* [2019] EWCA Crim 1568 at paras 51 to 57. That is, whether the Court of Appeal, Criminal Division enjoys a concurrent jurisdiction with the Divisional Court in challenges to the making of such directions. Both the applicant and the Crown are agreed that judicial review is available and that there exists a concurrent jurisdiction in the Court of Appeal, Criminal Division to consider the legality of the Excepting Direction. The parties also agree that this jurisdiction on the part of the Court of Appeal, Criminal Division is engaged once an applicant has applied

for leave to appeal against conviction and sentence, and irrespective of the outcome of any such application.

10. In addition to valuable submissions from the Counsel for the parties, including excellent written submissions on jurisdiction from Junior Counsel, Ms Cecil and Mr Smith, we were assisted by oral arguments from Mr Sam Tobin on behalf of PA Media, and a detailed written submission from Mr Dodd, on behalf of PA Media and News Central.

The Facts

11. On Thursday 7 March 2018 at about 2pm, in the Marzell House alleyway at the junction of North End Road with Lanfrey Place, London W14, Ayub Hassan was stabbed once in the chest by the applicant. The "through and through" injury penetrated Ayub Hassan's heart. Although Ayub Hassan received extensive medical treatment at the scene, he was pronounced dead in hospital at 4pm.

12. The events before, after and during, the stabbing were clearly captured on CCTV footage, which we have viewed. The footage shows the deceased and his friend (Idris Mohammed) arriving in North End Road at about 12 noon and later entering the alleyway with three others. Other males came and went and during this time the deceased is seen with a knife which he placed into an internal pocket of his clothing. Another knife (described as a large "Zombie" knife) was placed into a storage cupboard off camera. Idris Mohammed was also seen to pick something up or secrete something in bushes nearby.

13. The applicant and Elijah Oweyo arrived in the North End Road by taxi at 1.57pm. They were joined by other youths (Amrou Greenridge on a "Boris bike", Tajorn Brown and Idris Mohammed, who had previously been with the deceased). After visiting a café and supermarket, this group entered the alleyway where they appeared to be socialising with the other group.

14. The footage shows that the applicant and deceased then began a discussion. The applicant was holding a lock knife. The deceased walked away, further into the alleyway, but was followed by the applicant and others. When the applicant and deceased came face to face again, they appeared to argue and the applicant struck the deceased rapidly once in the chest with his knife. As the deceased moved away, the applicant appeared to be being held back by a larger boy, and when he again tried to approach the deceased with the knife in his hand, he was blocked and trapped in the corner by another youth.

15. The deceased staggered out of the alleyway and collapsed. The applicant immediately left the scene on the "Boris Bike". Whilst waiting for the emergency services, some of the boys went through the deceased's pockets in what may have been an attempt to remove incriminating items such as the knife he had earlier. Elijah Oweyo was seen to pick up a folding lock knife and drop it into a drain from where it was later recovered by police.

16. The applicant went to his sister's address where he was subsequently arrested. In interview, he accepted that it was him in the CCTV footage but answered no further questions.

17. It is shocking to record that two of the other young people in the alleyway at the time of the murder, have been killed since Mr Hassan's death; and criminal proceedings in respect of their deaths are currently pending. This is the context to one of the issues which the media has raised in these proceedings, namely the public interest in the full reporting of knife crime in relation to gang related activity which is a matter of serious concern in London.

18. At his trial, the applicant gave evidence over the course of three days. He said that all of the boys were part of a broad 'group' with two primary friendship groups which overlapped. There was a background of drug dealing. The applicant said he had previously sold cannabis on behalf of the deceased, who was a member of the W12 / 12Anti /12 World Gang. He said he had acted in self-defence. Loss of control and lack of intent were also left to the jury. The applicant said the deceased had accused him of owing £50 and had previously stabbed him in the arm. He claimed that the deceased told him to make up the £50 loss by selling class 'A' drugs on a "county lines" basis and threatened to stab him again if he did not agree to do so. The applicant also said that the day before the murder, a group of people (including the applicant and the deceased) were in a so-called "cuckoo house" where the deceased made threats to him with a large "Zombie" knife (said to be the one recovered from the alleyway cupboard). It was an agreed fact that the deceased and Idris Mohammed were linked to two "cuckoo houses".

19. The applicant said that on the day of the incident he was told that the deceased wanted to see him and that something was planned towards him (described by the applicant as "moving dodgy" against him). He said that at the location, he picked up the knife from the bush because this was known to be the place where the deceased kept weapons. He described the argument that unfolded and said that he stabbed the deceased in self-defence because the deceased had reached towards his waistband, where he believed the deceased had a hidden knife.

20. On 6 September 2019, the jury convicted the applicant of murder. In view of what could be seen on the CCTV footage, this was not a surprising conclusion. Sentencing was adjourned pending the provision of reports.

21. In her sentencing remarks the judge said that she had no doubt that the applicant had deliberately armed himself with a knife and was ready to use it if he decided to do so. She said the CCTV footage clearly showed that the applicant had the knife in his hand when he entered the alleyway, that the deceased did not have a knife or weapon of any kind in his hand, that the applicant was the aggressor, that at one stage the deceased walked away but the applicant had followed and stabbed him in the chest with at least moderate force. She also noted that such was his anger that it took two of his friends to restrain him and prevent him from attacking the deceased again. She observed that the applicant had made no comment in interview and in evidence during the trial had sought to portray the deceased as the aggressor. The judge said that she was not satisfied to the criminal standard however that the applicant had intended to kill the deceased. As to the minimum term, the judge said that she had considered the seriousness of the offence,

the general principles of the Criminal Justice Act 2003, Schedule 21, and the Sentencing Council's definitive guideline on sentencing children and young people.

22. In assessing culpability, the following aggravating factors were identified: the applicant arrived at a planned meeting with the deceased, armed with a knife; the stabbing took place in an alleyway off a residential street; the fact that the applicant fled from the scene; that members of the public were left to deal with the situation, upon whom it was likely to have a profound effect; the fact that the applicant had a history of offending; and the applicant's lack of remorse as indicated by the fact that he fled the scene, disposed of the murder weapon, and went to stay with his sister (the judge did not accept the view of the applicant's social worker that the applicant had indeed shown remorse). The judge observed that the applicant had advanced three defences at trial, all of which were rejected by the jury. She did not accept the submission of Mr Bromley-Martin QC that sentence should be passed on the basis that there was an element of provocation and an element of self-defence. Nor did the judge accept that the applicant had been previously stabbed in the arm by the deceased. She noted his account to his father had been that he was stabbed by an unknown assailant during a robbery. The mitigating features were identified as the applicant's youth and lack of maturity, and the matters set out in the detailed report of the applicant's social worker.

Leave to appeal against sentence

23. The application for leave to appeal against sentence was referred to the Full Court by the Registrar to be heard at the same time as the issues raised in relation to the Excepting Direction.

24. On behalf of the applicant, Mr Bromley-Martin QC submitted that the 15-year minimum term was manifestly excessive. He relied in particular on three matters. First, the judge erred in finding a lack of remorse and taking that into account as an aggravating factor. Second, the judge erred in finding that the deceased had not stabbed the applicant on an earlier occasion. Third, the judge referred to the deceased in positive terms in her sentencing remarks when he was in fact an older gang leader with a history of violence and knife possession. We see no arguable merit in any of these points.

25. In relation to remorse, the judge had heard the applicant give oral evidence over three days and was best placed to assess the true position. Similarly, the judge was entitled to find, having heard evidence, that the applicant had not been stabbed on an earlier occasion by the deceased. His claim in this respect was supported only by his evidence, which the judge was entitled to reject. Finally, the judge's sentencing remarks do not demonstrate that she impermissibly took into account the deceased's claimed positive character in arriving at the minimum term. The judge merely recorded, as she was quite entitled to do, the personal statements made by the deceased's mother and sister as to what the deceased had meant to them as well as what could not sensibly be disputed, namely that "Ayub was a much-loved teenager who had his whole life ahead of him. You took that away from him".

26. Apart from these specific matters, there is no arguable basis for contending that the minimum term was manifestly excessive having regard to the aggravating features

correctly identified by the judge, including in particular, that the applicant had brought a knife to the scene. This is a factor that may in an appropriate case justify significant upward movement from the starting point of 12 years when sentencing those under 18 at the date of the commission of such an offence: see *R v Odegbune* [2013] EWCA 711, at para 30, and *R v Huggins* [2016] EWCA Crim 1715 at para 44.

27. The application for leave to appeal against sentence is accordingly refused.

Reporting restrictions: the statutory framework

28. Section 45 of the 1999 Act provides as follows:

> *"***45.— Power to restrict reporting of criminal proceedings involving persons under 18.**
>
> (1) This section applies (subject to subsection (2)) in relation to—
>
> (a) any criminal proceedings in any court (other than a service court) in England and Wales or Northern Ireland; and
>
> (b) any proceedings (whether in the United Kingdom or elsewhere) in any service court.
>
> (2) This section does not apply in relation to any proceedings to which section 49 of the Children and Young Persons Act 1933 applies.
>
> (3) The court may direct that no matter relating to any person concerned in the proceedings shall while he is under the age of 18 be included in any publication if it is likely to lead members of the public to identify him as a person concerned in the proceedings.
>
> (4) 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 direction under subsection (3) if it is satisfied that it is necessary in the interests of justice to do so.
>
> (5) The court or an appellate court may also by direction ("an excepting direction") dispense, to any extent specified in the excepting direction, with the restrictions imposed by a direction under subsection (3) if it is satisfied—
>
> (a) that their effect is to impose a substantial and unreasonable restriction on the reporting of the proceedings, and

(b) that it is in the public interest to remove or relax that restriction;

but no excepting direction shall be given under this subsection by reason only of the fact that the proceedings have been determined in any way or have been abandoned.

(6) When deciding whether to make—

(a) a direction under subsection (3) in relation to a person, or

(b) an excepting direction under subsection (4) or (5) by virtue of which the restrictions imposed by a direction under subsection (3) would be dispensed with (to any extent) in relation to a person,

the court or (as the case may be) the appellate court shall have regard to the welfare of that person.

(7) For the purposes of subsection (3) any reference to a person concerned in the proceedings is to a person—

(a) against or in respect of whom the proceedings are taken, or

(b) who is a witness in the proceedings.

(8) The matters relating to a person in relation to which the restrictions imposed by a direction under subsection (3) apply (if their inclusion in any publication is likely to have the result mentioned in that subsection) include in particular—

(a) his name,

(b) his address,

(c) the identity of any school or other educational establishment attended by him,

(d) the identity of any place of work, and

(e) any still or moving picture of him.

(9) A direction under subsection (3) may be revoked by the court or an appellate court.

(10) An excepting direction—

(a) may be given at the time the direction under subsection (3) is given or subsequently; and

> (b) may be varied or revoked by the court or an appellate court.
>
> (11) In this section "appellate court", in relation to any proceedings in a court, means a court dealing with an appeal (including an appeal by way of case stated) arising out of the proceedings or with any further appeal."

29. The definition of "court" for the purposes of this provision is found in section 63 of the 1999 Act which says: ""court" …means a magistrates' court, the Crown Court or the criminal division of the Court of Appeal".

30. Section 45 came into force on 13 April 2015. Prior to that, the relevant power to restrict reporting in relation to children and young persons was found in section 39 of the Children and Young Persons Act 1933 (the 1933 Act), which provided:

> "**39 Power to prohibit publication of certain matter in newspapers.**
>
> (1) In relation to any proceedings in any court, the court may direct that—
>
> (a) no newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of any child or young person concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness therein:
>
> (b) no picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid;
>
> except in so far (if at all) as may be permitted by the direction of the court.
>
> (2) Any person who publishes any matter in contravention of any such direction shall on summary conviction be liable in respect of each offence to a fine not exceeding level 5 on the standard scale."

31. Section 159 of the Criminal Justice Act 1988 (the CJA 1988) provides, so far as is relevant:

> "159.— Crown Court proceedings— orders restricting or preventing reports or restricting public access.
>
> (1) A person aggrieved may appeal to the Court of Appeal, if that court grants leave, against—
>
> (a) an order under section 4 or 11 of the Contempt of Court Act 1981 made in relation to a trial on indictment;
>
> (aa) an order made by the Crown Court under section 58(7) or (8) of the Criminal Procedure and Investigations Act 1996 in a case where the Court has convicted a person on a trial on indictment;.
>
> (b) any order restricting the access of the public to the whole or any part of a trial on indictment or to any proceedings ancillary to such a trial; and
>
> (c) any order restricting the publication of any report of the whole or any part of a trial on indictment or any such ancillary proceedings;
>
> and the decision of the Court of Appeal shall be final.
>
> …
>
> (5) On the hearing of an appeal under this section the Court of Appeal shall have power—
>
> (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…"

Judicial Review of the Crown Court

32. In *R v. Aziz* [2019] EWCA Crim 1568 at para 52, Lord Burnett CJ observed, without argument, that there is a body of authority which makes it plain that orders concerning the issue of whether a child convicted of a criminal offence may be named are susceptible to judicial review, at the very least after conviction. It is common ground that these observations were *obiter*.

33. Lord Burnett CJ went on to note at para 57 that "it may become necessary to revisit whether decisions in this area are properly subject to judicial review". That is the exercise which we need to undertake in the present case. But we emphasise at the outset that the *specific* question before us is whether a Crown Court Judge's decision to make an excepting direction under section 45(5) of the 1999 Act after a defendant's conviction, is susceptible to judicial review. Both the applicant and the Crown are

agreed that such a decision *is* subject to judicial review. However, no court in England and Wales has decided the point, though there is substantial authority, considered in more detail below, which has addressed the related issue of the availability of judicial review to challenges to orders made by the Crown Court under section 39 of the 1933 Act.

34. The starting point is Section 29(3) of the Senior Courts Act 1981 (the 1981 Act), which provides as follows:

> "(3) In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make mandatory, prohibiting or quashing orders as the High Court possesses in relation to the jurisdiction of an inferior court."
>
> (Emphasis added)

35. Accordingly, judicial review is not available to challenge a decision of a judge sitting in the Crown Court, if that decision is "relating to a trial on indictment". The interpretation of this wording in Section 29(3) has proved problematic, as is clear from Rose LJ's observation in *R v Crown Court at Manchester, ex parte H* [2000] 1 WLR, 760 at p766C, where he said that this section has "…attracted perhaps more judicial consideration, in not always apparently reconcilable decisions, than any other statutory provision".

36. In *Re Smalley* [1985] A.C. 622, at p640H to 641, Lord Bridge explained that as a matter of history the Crown Court inherited the functions of the courts of quarter sessions and assize court. The former had always been subject to the supervisory jurisdiction of the High Court, exercised by the prerogative writs, while the assize courts, as superior courts of record, were not. Against that background, he observed that there was nothing wrong in principle with the Crown Court being subject to judicial review. Lord Bridge considered that in interpreting section 29(3) of the 1981 Act (and in deciding what was excluded from such review) a "helpful pointer" would be to ask whether the decision of the Crown Court was one affecting the conduct of a trial on indictment given in the course of the trial or by way of pre-trial directions: see p642F, p643E-H and p644A.

37. In *Re Sampson* [1987] 1 W.L.R. 194, Lord Bridge returned to this question and emphasised again that the question whether the decision had affected the conduct of the trial was a "pointer" and not a test. So, in that case the House of Lords held that a costs order was an order relating to trial on indictment, as it was "an integral part of the trial process": see p197F.

38. In *R v. Manchester Crown Court, ex p. DPP* [1993] 1 W.L.R 1524, *Lord Browne-Wilkinson suggested a* further "helpful pointer" was the answer to this question: is the decision sought to be reviewed one arising in the issue between the Crown and the defendant formulated by the indictment (including the costs of such issue)? If the answer is 'yes' then to permit the decision to be challenged by judicial review may lead to delay in the trial and the matter is therefore probably excluded from review by the section. If the answer is 'no', the decision of the Crown Court is truly collateral to the

indictment and judicial review of that decision will not delay the trial, therefore it may well not be excluded by the section": see p467.

39. In *R v. Central Criminal Court ex parte Crook and another* (The Times 8 November 1984) a Divisional Court considered a challenge to an order made under section 11 of the Contempt of Court Act 1981. The order prevented the reporting of the identity of a witness who was the victim of offending alleged to amount to kidnap, false imprisonment, robbery, and sexual offending. The order was made before the jury was empanelled and was revisited during the course of the witness's evidence. Stephen Brown LJ, giving the judgment of the Court, found that judicial review was not available. He said:

> "I am satisfied that the Judge's order in this case was made in relation to a trial on indictment; the trial had commenced although the jury had not yet been empanelled. He made his order intending it to influence the conduct of the trial by ensuring that the witness in question, who was the principal witness for the Crown, should be protected by an order designed to safeguard her anonymity outside the court. Accordingly, I feel bound to hold that this court has no jurisdiction to entertain this application for judicial review."

40. Stephen Brown LJ said that he had come to this conclusion with "considerable reluctance". Watkins LJ, concurring, expressed "regret" that he was "driven" to the same view.

41. In *R v. Leicester Crown Court ex parte S (a minor)* [1993] 1 W.L.R 111, a minor sought to challenge by way of judicial review a decision made after his conviction by the Crown Court, to discharge a section 39 order which prevented the reporting of matters leading to his identification. The Divisional Court concluded that the power conferred by section 39 was "neither an integral part of the trial process nor does it affect the course or conduct of the trial" and it was therefore subject to judicial review (p113H). Further, the power conferred by section 39 was "a power designed for use whenever and wherever in some kind of judicial proceeding a curb needs to be imposed publicly in the interests of a child or young person and the broader public interest".

42. In *R v. Lee* [1993] 1 W.L.R 103, the Court of Appeal considered an appeal by a convicted juvenile against a decision to lift a reporting restriction order made under section 39 of the 1933 Act. In summary, it decided that:

    (1) Whilst section 39 permitted "any court" to make an order in relation to "any proceedings", a proper construction of the section was that the "proceedings" were the proceedings in the court making the order and, therefore, the Court of Appeal was not able to make an order in relation to proceedings in the Crown Court (p108E).

(2) Whilst a member of the press aggrieved at a restriction on reporting might appeal to the Court of Appeal pursuant to section 159 of the CJA 1988, a defendant aggrieved at the withholding or discharge of such an order should challenge it by way judicial review (p110H).

In that case, the jurisdiction to seek a remedy by way of judicial review was assumed without argument.

43. Following the decision in *Lee* the position was therefore tolerably clear. Orders made under section 39 of the 1933 Act were open to challenge in the Court of Appeal pursuant to section 159. However, a refusal to make such an order, or an order discharging an order made under section 39 of the 1933 Act was only amenable to challenge by way of judicial review.

44. In *R v Harrow Crown Court, ex parte Perkins and R v. Cardiff Crown Court, ex parte M (a minor)* (1998) 162 JP 162 the judge refused to make a section 39 order after sentence. The Divisional Court found his decision was amenable to challenge by way of judicial review as the decision did not "relate to a trial on indictment". The analysis of Sullivan J (with whom Rose LJ agreed) is of some importance to the issues before us. It was as follows:

(1) The words ("relate to a trial on indictment") should not be given an extended meaning: p541G.

(2) An order made after the conclusion of the trial "will have no possible effect upon the conduct of that trial" and is "not an integral part of the trial process": p542A.

(3) The power being exercised was a "separate child protection power, which is distinct from [the] proceedings", and was "fairly described as collateral to those proceedings": p542G.

(4) The decision was not one which arose in the issue between the Crown and the defendant formulated by the indictment: p542C-D.

45. Thus far, save for *Crook,* the approach was all "one way". In *R v Winchester Crown Court ex parte B (a minor)* [1999] 1 W.L.R 788 however a divergent approach was taken. In that case, a convicted minor attempted to challenge by way of judicial review a decision made by the Crown Court to discharge a reporting restriction order made pursuant to section 39. In the Divisional Court, Simon Brown LJ giving the judgment of the Court held:

(1) That previous consideration of the issue had overlooked the ruling in *Crook,* in which the Divisional Court had found that an order preventing the reporting of the identity of a witness pursuant to section 11 of the Contempt of Court Act 1981 was "relating to a trial on indictment" and "not amenable to judicial review" (see p791G-H). He explained that the decision in *Crook* had led to the enactment of section 159 of the CJA 1988.

(2) After the enactment of section 159, a person aggrieved by an order restricting reporting could appeal to the Court of Appeal, but there was no equivalent provision allowing for an appeal by a person aggrieved by the failure to make such an order, or the discharge of such an order (p792E).

(3) That the remedy of judicial review had been found to be appropriate, or assumed to be so without argument, in a number of previous cases concerning the discharge of section 39 orders (p794G to 795A).

(4) However, adopting the reasoning in *Crook*, a discharge of a section 39 order would amount to a matter relating to trial on indictment and judicial review was not available.

46. The divergent approach between the decision in *Winchester* and the cases which followed *Lee* was considered in *Ex parte H (a minor)*. Rose LJ (with whom Forbes J agreed) said that the courts had "done their best" to resolve the issue of jurisdiction to review reporting orders, and it was "time now for Parliament to introduce, as a matter of urgency, clarifying legislation which addresses the problems arising not only from section 29(3) of the Supreme Court Act 1981 itself, but also from its relationship with other legislation, in particular, section 39 of the Act of 1933 and the provisions of section 159 of the Criminal Justice Act 1988…" (p765H to 766A).

47. Rose LJ concluded that, whilst some orders made at the outset of proceedings to protect witnesses would "relate to a trial on indictment", a decision to lift reporting restrictions after conviction and sentence would not fall within that prohibition (p767E), and would be amenable to judicial review. To this extent the *Winchester* case was not followed. Rose LJ also endorsed the approach taken by the Divisional Court in *Cardiff Crown Court ex parte M* (see 768D). Forbes J said further, that permitting a challenge by way of judicial review was also consistent with the protections afforded by the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). He added that were the decision to discharge the reporting restrictions not to be susceptible to challenge by way of judicial review, a juvenile offender would be left with no route of appeal against an order permitting the press to report his name. Such a position would, at least arguably, conflict with the offender's article 6 Convention rights (p770-1).

48. In *R(Y) v Aylesbury Youth Court* [2012] EWHC 1140 (Admin) the Divisional Court assumed (without contrary argument) that the decision of the Crown Court to vary an order made under section 39 of the 1933 Act (thereby permitting the identification of the claimant, a minor) was susceptible to judicial review; and the order made by the Crown Court was quashed on the grounds that insufficient reasons had been given for making it. At para 21, Hooper LJ said that although there had been doubts expressed in the past, it seemed clear that the High Court had jurisdiction to entertain an application for judicial review of the judge's order.

49. A similar view was expressed by Sir Brian Leveson P in *R (JC and another) v. Central Criminal Court* [2014] 1 W.L.R 3697. In that case, the Crown Court had decided that a section 39 order made in relation to youths convicted of terrorist offences would automatically expire for each of them, on their 18th birthday. This decision was

challenged by way of judicial review. Sir Brian Leveson P summarised the position that the courts had reached on the issue of the jurisdiction in this way:

> "40. By way of addendum to this judgment, it is worth adding one further point. Although not argued before us, there has been some doubt whether, in England and Wales, it is open to these claimants to commence proceedings for judicial review in relation to this order: see Archbold's Criminal Pleading, Evidence and Practice, 2014 ed, para 7-13. That is a reflection of R v Winchester Crown Court, Ex p B (A Minor) [1999] 1 WLR 788. Simon Brown LJ held that, while those aggrieved by an order restricting publication had a remedy by way of appeal to the Court of Appeal (Criminal Division) under section 159 of the Criminal Justice Act 1988 , those aggrieved by a failure to restrain publication had no such remedy, and must apply to the trial judge to reconsider that decision: that was a consequence of the operation of section 29(3) of the Senior Courts Act 1981 that the High Court had no jurisdiction "in matters relating to trial on indictment".
>
> 41. This court has, in fact, tended to consider that section 39 orders (and orders discharging such orders) are amenable to judicial review by the child affected (see R v Leicester Crown Court, Ex p S (A Minor) (Note) [1993] 1 WLR 111 ; R v Inner London Crown Court, Ex p Barnes The Times, 7 August 1995 ; R v Central Criminal Court, Ex p S [1999] 1 FLR 480 ; R v Harrow Crown Court, Ex p Perkins (1998) 162 JP 527 ; R v Manchester Crown Court, Ex p H (A Minor) [2000] 1 WLR 760 ; Ex p W [2001] Cr App R 2 ; R (T) v St Albans Crown Court [2002] EWHC 1129 (Admin); and R (Y) v Aylesbury Crown Court [2012] EMLR 642 in which Hooper LJ acknowledged at para 21 that there had been doubts but that it now "seems clear" that there was jurisdiction. That view is entirely consistent with the decision of the Court of Appeal in R v Lee [1993] 1 WLR 103).
>
> 42. In Northern Ireland, on the other hand, where the Crown Court cannot be judicially reviewed (by virtue of section 1 of the Judicature (Northern Ireland) Act 1978), the Northern Ireland Court of Appeal has relied on section 3 of the Human Rights Act 1998 to read into section 159(1)(c) of the 1988 Act a right of appeal for the child aggrieved by the withholding or discharge of a section 39 order: see R v McGreechan [2014] NICA 5 at [24]. Thus, section 159 has a different meaning in different jurisdictions, which cannot be sensible. This also points to the requirement of urgent legislative intervention."

50. Turning to the 1999 Act, in *R v. Markham* [2017] EWCA Crim 739; [2017] 2 Cr. App. R. (S.) 30, the Court of Appeal allowed an appeal against sentence and, in the same

proceedings, considered the propriety of an excepting direction made pursuant to section 45 of the 1999 Act. The excepting direction had been challenged by way of judicial review, and permission had been granted to apply for judicial review in those proceedings. However, the appeal against sentence was considered to "carr[y] with it the need for [the Court of Appeal] to make its own assessment of the position", and this therefore "superseded the full hearing with the result that the proceedings in the Administrative Court become academic" : para 2. As was later said in *Aziz:* "The report of *Markham* does not spell this out, but we infer that the Appellants in that case were invoking the power conferred by s.45 (10)…".

51. In *Markham* the Court of Appeal reviewed the decision of the trial judge and exercised their "own discretion independently" when reviewing the excepting direction:see para 88. It is important to note however that at the time the court in *Markham* undertook this exercise they were seised of a substantive appeal against sentence, leave to appeal having been granted earlier by the single judge: see para 4. So, the court was there clearly "dealing with an appeal" within section 45(11) of the 1999 Act. This point is relevant to our analysis of the Court of Appeal's jurisdiction, considered below.

52. As Sir Brian Leveson said in *R (JC and another)* the courts in this jurisdiction have tended to consider that section 39 orders made by the Crown Court were amenable to judicial review by the child affected. The parties are agreed that by parity of reasoning, this power of review should be available in respect of excepting directions made under the 1999 Act. We agree. If there remains any doubt about it, in our judgment, the reasoning in *Winchester* (and *Crook)* should no longer to be followed.

53. We would reach the same conclusion as a matter of principle. Confining ourselves to the specific question we have identified at para 33 above, in our judgment for the purposes of section 29(3) of the 1981 Act the making of an excepting direction after convictgion in this case was not a matter relating to trial on indictment and is therefore amenable to judicial review. This is for the following reasons:

    (1) First, the decision being reviewed was plainly not one arising in the issue between the Crown and the defendant formulated in the indictment (using Lord Browne-Wilkinson's "helpful pointer": see para 38 above). The Excepting Direction was made after the verdict had been returned and at the sentencing hearing. It could have been made immediately after sentencing was concluded.

    (2) Second, the applicant's challenge is to the variation of an earlier order, which had provided protection to a child's rights, incidental and collateral to the trial process. In this connection, we would adopt the reasoning of the court in *R v Harrow Crown Court, ex parte Perkins and R v. Cardiff Crown Court, ex parte M (a minor)* (see para 44 above). In our view, this reasoning applies with equal force to section 45 challenges.

    (3) Third, the fact that decisions in this category of cases can be subject to judicial review does not undermine the rationale prohibiting such challenges, namely: (i) the need to discourage the sort of satellite litigation which is capable of disrupting criminal trials (see *Smalley* at p642E-H): the decision here is made after the trial process is complete; and (ii) the fact that the defendant in criminal proceedings has available an adequate alternative remedy or route of appeal against conviction or sentence under the Criminal Appeal Act 1968.

54. We conclude therefore that the Excepting Direction made in respect of the applicant is susceptible to Judicial review (a decision we have reached without needing to decide whether such an outcome more generally is necessary to protect the Convention rights of juvenile defendants).

Does a defendant have a right of appeal to the Court of Appeal, Criminal Division in respect of excepting directions made under section 45 of the 1999 Act?

55. Before turning to this next question, it is helpful to identify the general jurisdiction of this court.

56. The jurisdiction of the Court of Appeal is governed by the 1981 Act under which it is part of the Senior Courts of England and Wales: section 1(1) of the 1981 Act. The Court of Appeal is a superior court of record: section 15(1) of the 1981 Act. The general jurisdiction of the Court of Appeal is "all such jurisdiction (whether civil or criminal) as is conferred on it by or under [the 1981 Act] or by any other Act", and "all such other jurisdiction (whether civil or criminal) as was exercisable by it immediately before the commencement of the [1981] Act": section 15(1)(a) of the 1981 Act. The jurisdiction of the Court of Appeal, Criminal Division is, accordingly, entirely statutory: *R v Jefferies* (1968) 52 Cr. App. R 654. See also the helpful exposition in *The Court of Appeal Criminal Division (A Practitioner's Guide)* (2nd Edition) at para 3-001.

57. No jurisdiction to review an excepting direction is conferred on the Court of Appeal, Criminal Division by the Criminal Appeal Act 1968 (the main jurisdictional statute) as an excepting direction is not an order made by the court when dealing with the offender in respect of the offence: *Aziz* at para 54 and *R v McGreechan* [2014] NICA 5*:* paras 16 to 19. Section 159 of the CJA 1988, permits only a party aggrieved by an order *"restricting"* publication, and not to a party aggrieved by an order *discharging or revoking* reporting restrictions, to appeal to the Court of Appeal, Criminal Division: *Aziz***,** para 55. So, a person in the position of the applicant in this case could not use section 159 of the CJA 1988 to bring his challenge before the Court of Appeal, Criminal Division.

58. As we have found, in the circumstances of this case, the Divisional Court has supervisory jurisdiction in relation to the making of an excepting direction. This means there is no lacuna in the protection of the rights of children (and indeed other vulnerable persons) who might be aggrieved at the making of excepting directions in the Crown Court. This also means that the problem which arose in Northern Ireland and which was addressed in *McGreechan* at para 15 namely that the High Court cannot review decisions of the Crown Court, does not arise in this jurisdiction.

59. Against this background, our conclusions on the question posed above are as follows:

    (1) As a matter of natural and ordinary meaning, section 45 of the 1999 Act does not provide a defendant with the right to appeal to the Court of Appeal, Criminal Division against the making of an excepting direction. This is because there is no language such as that found in section 1(1) of the Criminal Appeal Act 1968 ("…a person convicted of an offence on indictment may appeal to the Court of

Appeal against his conviction), or in section 159 of the CJA 1988 ("A person aggrieved may appeal to the Court of Appeal…").

(2) The Court of Appeal, Criminal Division enjoys no appellate jurisdiction beyond that specifically conferred on it by statute. The wording of the 1999 Act therefore firmly resolves the question of the lack of appellate jurisdiction. It is additionally to be noted that the 1999 Act contains no statutory mechanism for the operation of such an appellate jurisdiction (with regard to matters such as leave, and whether it would be required, the grounds for an appeal and whether it would be a review or de novo, the time limits for any appeal and so on).

(3) Though no appellate jurisdiction is conferred by the 1999 Act, Parliament clearly intended that in *some* situations the Court of Appeal, Criminal Division would have the power to "dispense" with a restriction imposed by the Crown Court under section 45(3), to make an excepting direction itself and to "vary or revoke" excepting directions made by the Crown: see sections 45(4), 45(6) and 45(10) of the 1999 Act.

(4) These provisions do not however confer a discrete right of appeal, but are rather powers which fall to be exercised in the limited situation defined in the legislation, that is when the Court of Appeal, Criminal Division is "…dealing with an appeal…arising out of the proceedings or with any further appeal": see section 45(11) of the 1999 Act.

(5) In our judgment, both the specific nature of these powers and the time at which they may be exercised, point clearly to the conclusion that Parliament's intention in enacting section 45 of the 1999 Act was to equip the Court of Appeal, Criminal Division with the necessary power to make *ancillary* orders as regards reporting restrictions and excepting directions when dealing with a substantive appeal. No freestanding appellate jurisdiction has been conferred.

(6) The fact that section 45 confers powers on what is called an "appellate court" does not mean that it creates an appellate jurisdiction. An appellate court could reach a decision on an appeal, or make specific findings, or hear evidence which would make it appropriate to vary or revoke an excepting direction (if for example, an appeal against conviction was allowed and a retrial ordered, or where there was evidence as to the mental health of a convicted child) in circumstances where there was no discrete appeal against the making of an excepting direction itself.

(7) Further, the wording of section 45(11) refers only to an appeal. In contrast, the Criminal Appeal Act 1968 differentiates between an "appeal" and an "application". A "decision of the Court of Appeal on appeal" in section 33 of that Act refers only to a decision *following* the grant of leave: *R v Garwood* [2017] EWCA Crim 59; [2017] 1 WLR 3182 at para 7.

60. We consider therefore that the Court of Appeal, Criminal Division does not enjoy a concurrent jurisdiction with the Divisional Court to entertain freestanding appellate challenges to excepting directions. It does however enjoy a limited power to consider an excepting direction as an ancillary matter when "dealing with an appeal" against conviction and sentence. However, this power is ancillary to an appeal: it does not exist

unless and until leave to appeal has been granted and can never be invoked as the basis for an appeal to the Court of Appeal, Criminal Division.

61. In practical terms, we consider section 45 of the 1999 Act is intended to operate as follows. If an applicant for permission to appeal against conviction or sentence considers that the outcome of *that* appeal (once decided following leave) may require the Court of Appeal, Criminal Division to revisit or vary reporting restrictions under the 1999 Act, they can ask the court to use its ancillary powers under section 45 to do so. But the applicant cannot base any aspect of his appeal to that court on a complaint about an excepting direction. Equally, if leave to appeal has not been granted or has been refused, these ancillary powers cannot be exercised. In neither of those situations is the Court of Appeal, Criminal Division "dealing with an appeal". We accordingly do not accept the submissions made on behalf of the Crown and the applicant that once an application for leave is before the Court of Appeal, Criminal Division (and whether leave has been granted and even if it is refused), this Court has jurisdiction to hear an appeal against an excepting direction. The contrary position would be problematic. An application for leave to appeal (against conviction or sentence) which is otherwise hopeless, might then be made simply so the applicant could get his "foot in the door" and challenge the excepting direction. Further, such a challenge could then be pursued, presumably as of right, without the need for leave (there being no statutory regime prescribing such a condition) and regardless of issues such as delay which are regulated by the Criminal Appeal Act 1968.

62. We would add these further points. First, the availability of judicial review means it is unnecessary to adopt a strained construction of the 1999 Act to enable a challenge to an excepting direction to be made. Second, having regard to the issues they encompass, we consider challenges to excepting directions are better dealt with by the Divisional Court, where there are procedural and other safeguards to the rights for example of interested parties (which would normally include the media). Third, the availability of judicial review, means that that persons involved in a trial other than the defendant (victims and witnesses for example who have no recourse to the Court of Appeal, Criminal Division) have a route of challenge to excepting directions which may directly affect them. See sections 45A(10) and 46(9) of the 1999 Act which concern excepting directions which respectively remove lifetime anonymity afforded to witnesses and victims until they are 18, and enable the anonymisation of adult witnesses.

The challenge to the Excepting Direction in this case

63. By an Order dated 20 February 2020, Supperstone J directed that the judicial review claim be heard on a "rolled-up" basis by the Divisional Court at the same time as the applicant's appeal to the Court of Appeal, Criminal Division. For the purposes of considering the claim we sat as a Divisional Court.

64. In his Detailed Grounds, the applicant makes three core complaints about the making of the Excepting Direction and the proceedings before the judge: (i) procedural unfairness; (ii) failure to take into account relevant factors including the applicant's welfare, leading to an error in finding that it was in the public interest to remove the restrictions; and (iii) a failure by the judge to give sufficient reasons for making the Excepting Direction.

65. We start by setting out in brief the legal principles which govern the making of such directions and the principles applied by the Divisional Court in a public law review.

66. As to the legal principles, these were comprehensively considered in *Markham* at para 73 to 90 and in *Aziz* at para 30 to 40 and are now well-established. They have been developed taking full account of Convention case law and other international law obligations of the United Kingdom. The international dimension relating to the protection of children is given significant weight in the domestic law balancing exercise and there is no need to recite the international law materials in every case where this issue arises*: Markham* at para 80.

67. Drawing upon those two decisions, the relevant principles may be summarised as follows:

(1) The general approach to be taken is that reports of proceedings in open court should not be restricted unless there are reasons to do so which outweigh the legitimate interests of the public in receiving fair and accurate reports of criminal proceedings and in knowing the identity of those in the community who have been guilty of criminal conduct.

(2) The fact that the person before the court is a child or young person will normally be a good reason for restricting reports of the proceedings in the way permitted by the legislation; and it will only be in rare cases that a direction under section 45(3) of the 1999 Act will not be given or, having been given, will be discharged.

(3) The reason why removal of a restriction will be rare is the very great weight that the court must give to the welfare of a child or young person. In practical terms, this means that the power to dispense with anonymity must be exercised with "very great care, caution and circumspection". See the guidance given by Lord Bingham CJ in the context of the 1933 Act in *McKerry v. Teesdale and Wear Valley Justice* (2000) 164 JP 355; [2001] EMLR 5 at para 19.

(4) However, the welfare of the child or young person will not always trump other considerations. Even in the Youth Court, where the regime requires that proceedings should be held in private, with the public excluded, the court has power to lift restrictions. When a juvenile is tried on indictment in the Crown Court there is a strong presumption that justice takes place in open court and the press may report the proceedings.

(5) The decision for the trial judge is a case specific and discretionary assessment where, guided by the above considerations, a balance falls to be struck between the interests of the child and the wider public interest in open justice and unrestricted reporting.

(6) When considering a challenge to an excepting direction made by the Crown Court by way of judicial review, the Divisional Court will "respect the trial judge's assessment of the weight to be given to particular factors, interfering only where an error of principle is identified, or the decision is plainly wrong": see *Markham* at para 36.

(7) To this standard public law approach must be added the conventional public law requirements that: (i) a fair process should be adopted by the judge in considering an application remove a restriction; and (ii) the judge should give reasons sufficient to explain why the balance has come down in favour of removal of the restriction. This latter point is particularly important because the judge's reasons are the only indicator that the parties (and a reviewing court) will have to satisfy themselves that the judge has indeed performed a lawful balancing exercise.

68. We turn to the first ground, procedural fairness. The original anonymity order was made before trial on 12 June 2019. The applicant was convicted on 6 September 2019 and the sentencing hearing was adjourned to 27 September 2019, for the preparation of pre-sentence reports. The first indication that the media wished to apply for an excepting direction came from a communication to the judge in open court on the morning of 27 September 2019, at a time when so Mr Bromley-Martin QC told us, he was with his client in the cells.

69. Once he was in court, the application was made orally by a journalist, Mr Cameron Charters of Central News. We were taken to the transcript of the hearing which included the judge's consideration of the application. The basis for his application was that the press had been prevented in many cases from fully reporting and providing an analysis of knife crime in London. Mr Charters submitted that this meant most knife murders remained "secret and anonymous and those responsible often used masks and shadows to hide their identity"; in essence, he argued that the public interest demanded full reporting on a matter of pressing concern within the city. The fact that these crimes had become so common was a matter which made it even more pressing that there be full and unrestricted reporting. At the hearing before the judge, the Crown remained neutral on the issue, as they have before us.

70. Having heard Mr Charters, the judge indicated to the defence that she was aware of the decision in *Markham* and the principles set out in that case, and she asked Mr Bromley-Martin QC if he had any submissions. The following exchanges then took place:

> "MR BROMLEY-MARTIN: You should also know we have received information in particular from [KL's] half sister, [name redacted], that there had been threats made against her and her family, and also towards [KL] himself. We would suggest that the danger to members of [KL's] family would be increased by the publication of his name in the press, and that that is another matter which I raise in the interests of justice as being a good reason to retain the restriction. Would Your Honour allow me just a moment? I make no complaint of course, but we've only just had notice of this application. As I say, I make no complaint.
>
> JUDGE DHIR: It is not unusual.
>
> MR BROMLEY-MARTIN: No.

> JUDGE DHIR: I do not think anyone got notice, but they are not unusual applications, are they?
>
> MR BROMLEY-MARTIN: As I say, there's absolutely no criticism whatsoever, and, as I say, I do have here (Ms Cecil has very kindly provided it to me) a note in relation to the application of section 45, and I would, if I may, like a short pause while I consider whether or not it would assist Your Ladyship if we were to upload it now.
>
> JUDGE DHIR: Right.
>
> MR BROMLEY-MARTIN Could I ask Your…
>
> JUDGE DHIR: Mr Bromley-Martin, I really do want to sentence your client today, but I am sitting for a limited period of time this morning, and that is why I asked for the case to be listed at 9.30. It would be a real shame if this case had to be put back for any reason. This application is one that you will be familiar with. It is not uncommon at all. Certainly when it was mentioned to me this morning for the first time it came as no surprise. It is a matter for you. If you want me to look at it, I will, but can you just be aware of the fact there is a limited amount of time. I do not mind. It just means that we will not deal with the sentence today: it will just need to be put off, that is all. I am back in this court on 28 October.
>
> MR MARTIN-BROMLEY: Can I suggest, please, that we put this application back until after the sentence and deal with it later?
>
> JUDGE DHIR: We are not going to deal with it later. The application has been made today. They get dealt with at the beginning. Otherwise, I am afraid people who are here just do not know what the position is going to be…"

71. The note to which Mr Bromley-Martin QC referred dealt with the legal test. As can be seen from the transcript it was provided to the judge via the DCS as she sat in court. This note concerned the guidance given by Haddon-Cave J in *Pearce* in a ruling given at that trial on 7 December 2017. That ruling contained a detailed exposition of the principles Haddon-Cave J had originally set out at first instance in *Markham* (and which were approved by the Court of Appeal in the appeal from this decision [2017] EWCA Crim 739 as a "detailed and comprehensive analysis" of the law at para 75).

72. Following the exchanges referred to above, Mr Bromley-Martin QC then made brief submissions as to the risks faced by the applicant's family (based on a witness statement from the applicant's mother) and referred to the pre-sentence reports as well as to the risk of the applicant self-harming. The judge then made her ruling, in which she acceded to the application made by Mr Charters. She granted a stay pending the appeal/review

application which it was intimated to the judge would be made on behalf of the applicant to the Court of Appeal, Criminal Division or the Divisional Court.

73. We recognise that the judge was faced with a somewhat difficult procedural situation. Moreover, one would expect counsel appearing in cases such as this one to be cognisant of the possibility either that an application may be made for an excepting direction or that the court may require submissions about it of its own motion, and to be prepared for that eventuality. As the judge pointed out, applications for an excepting direction are not uncommon. Nonetheless more notice should have been given of the application; and given its lateness, and having regard to the "very great care, caution and circumspection" which is required by a court when considering whether to remove the anonymity of a child, we are prepared to proceed on the basis that fairness required that the defence should have been be given more time to deal with it, including, if there was no other option, by the judge sentencing the applicant on that day and addressing the substance of the application at a later date. Albeit any report about the murder and its surrounding events would have been of less immediate interest, the cause would have been the very late notice of the application, made on the day of sentencing itself, and some weeks after the applicant's conviction.

74. In this connection, it is to be noted that the application in this case did not comply with the requirements of the Criminal Procedure Rules at Part 6 which sets out a detailed code for the imposition and removal of restrictions including those under section 45 of the 1999 Act, including that:

> "6.5.—(1) This rule applies where the court can vary or remove a reporting or access restriction. (2) Unless other legislation otherwise provides, the court may do so— (a) on application by a party or person directly affected; or (b) on its own initiative. (3) A party or person who wants the court to do so must— (a) apply as soon as reasonably practicable; (b) notify— (i) each other party, and (ii) such other person (if any) as the court directs; (c) specify the restriction; (d) explain, as appropriate, why it should be varied or removed".

75. Though the purport of this rule is clear, for the future, we consider that in cases of this nature, it would be helpful for a judge to indicate in open court after a conviction, the court's intention (if it be such) to consider the section 45 restrictions at the sentencing hearing; and further, that any specific applications with regard to the relevant restrictions must be made and notified to the parties as soon as reasonably practicable in accordance with the process identified in the Criminal Procedure Rules.

Failure to give sufficient weight to the Applicant's welfare and the public interest

76. The second and third grounds are a challenge to the merits of the judge's decision and the weight she gave to the material factors. In considering this ground, the guidance in *Markham* requires us to respect the trial judge's assessment of the weight to be given to particular factors, interfering only where an error of principle is identified or the decision is plainly wrong.

77. Additional evidence that was not before the judge and going to these factors has been put before us. That additional evidence is material which Mr Bromley-Martin QC submitted would have been relied upon if proper notice had been given of the application to remove the applicant's anonymity and would have "demanded" a refusal of the application. While judicial review challenges must be based upon evidence which was before the original decision-maker (and not new material) when there is a valid procedural complaint about an inability to submit evidence below, judicial review principles permit a reviewing court to consider the material which (but for the procedural breach) would have been placed before the decision-maker. Having regard to the view we have taken of procedural fairness, we therefore take this further evidence into account in considering these grounds of challenge.

78. The additional evidence may be summarised as follows. Threats had been made to the applicant's family, in particular to his siblings and their children. This had resulted in the Local Authority taking steps to protect them by moving them to a different residence. Mr Bromley-Martin QC relied upon a written statement from the Local Authority obtained after the sentencing of the applicant. The statement includes the following:

> "The Local Authority are deeply worried about reprisals towards [KL's sister] and her children, as well as her siblings and her mother. This is particularly after being present during Court Proceedings, and being seen to be associated with [KL]. Following the conclusion of Proceedings in September 2019, the Local Authority was so concerned about the welfare of [KL's sister] and her children that an emergency move was arranged. [KL's sister] and her children stayed in emergency accommodation until suitable temporary accommodation was located in what was considered a safe area. This move was finalised on 17 September 2019. The family are now living out of Borough. Other measures, such as taxis, were arranged to ensure that [KL's sister] did not travel alone on public transport.…It is my firm belief and worry that releasing any information on the trial or about [her] brother would seriously jeopardise any safety planning we have put in place for the family. We have seen reprisals for family members and one of [the sister's] brothers has now been attacked twice. [She] suffers from severe anxiety and this would impair her ability to care for the children, if she becomes pre-occupied about their immediate safety. The children are under five and they would be subjected

> to comments and possible ridicule and pre-judgment about their Uncle by those who do not understand the context and circumstances…".

79. Reliance was also placed on a statement from the Youth Offending Team (YOT) obtained after the sentencing hearing. The YOT witness said that the team had 'grave concerns' if the applicant were to be identified in the press. She said that the murder had had a significant impact on the local community, with a number of families having to be relocated out of the Borough due to safety concerns. She said that it is anticipated that these issues may create more conflict in the community and she also raised welfare concerns with regards to the applicant and his vulnerabilities and prospects of rehabilitation. The witness does not elaborate upon this point, however by explaining for example, how it is said the applicant's rehabilitation will be impeded if he remains anonymous for another 18 months and in circumstances where he is to remain in custody for the next 15 years.

80. As it is, on the material before her the judge ruled as follows:

> "1. On 6 September 2019 the jury convicted the defendant (referred to in this judgement as A) of the murder of Ayub Hassan. He was 15 at the time of the murder and is now 16. This morning, on the day of sentence, the press have made an oral application to publish the name of A.
>
> 2. On 12 June 2019 an order was made under subsection 45(3) of the Youth Justice and Criminal Evidence Act 1999 ("the Order"). It provides that no matter relating to A shall while he is under the age of 18 be included in any publication if it is likely to lead members of the public to identify him as a person concerned in these proceedings.
>
> 3. I have power to make an excepting direction, dispensing with any of the restrictions imposed by the Order: a. under subsection 45(4), if I am satisfied that it is necessary in the interests of justice to do so; or b under subsection 45(5), if I am satisfied:
>
> i. that the effect of the restriction 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 the restriction.
>
> 4. In either case, I am obliged to have regard to A's welfare. The mere fact that the proceedings have now been determined and that A has been convicted is not in itself a reason for making an excepting direction.

5. I also have power under subsection 45(9) to revoke the Order entirely, which is equivalent to making an excepting direction which dispenses with all of the restrictions imposed by the Order.

6. That is what the Evening Standard Newspaper and Central News say I should do. Counsel for A, Mr Bromley Martin QC, opposes their application. They have not referred me to the law but they do say that, at the very least, the requirements of section 45 (5) are satisfied.

7. I have been referred by the defence to a decision of the High Court, R v Pearce (unreported 7th December 2017), in which Haddon Cave J (as he then was) presided over. They say.

a. There is 'good reason' to maintain the direction restricting reporting of A's identity under Article 2 and 8.

b. The additional element of identifying A by name adds little to the reporting in this particular case.

8. I have also considered the decision of the Court of Appeal of R v Markham [2017] 2 Cr.App.R. (S.) 30. which gives guidance to Crown Court judges as to who to approach applications such as this. I do not propose to repeat that guidance, but I have it very much in mind.

9. In summary, I have to balance the interests of the public in the full reporting of criminal proceedings against the desirability of not causing harm to a child concerned in the proceedings.

10. I start with the factors relied on in support of the application. The context is, of course, the open justice principle. There is a strong public interest in open justice. This includes the reporting of criminal proceedings, including the identity of defendants. Exceptions to the open justice principle should be confined to what is necessary to protect other, competing interests.

11. Against that background, Evening Standard and Central News rely, in particular, on the following matters: (a) Knife crime is rightly a matter of considerable public concern at present (b) To a lesser extent, identifying the defendant to proceedings is part of the reporting of proceedings in any case and the naming of defendants who have been convicted of knife crime has a deterrent effect.

12. I have listened to the arguments and considered the law and I have taken all relevant factors into account. In doing so, I

> bear in mind that it is suggested that there is a risk of reprisals to A's family and that there have been threats made to them.
>
> 13. Overall, I consider that the balance comes down in favour of allowing the application to report the name of A and I do so. I am satisfied to the required standard that the two condition in section 45(5) are met".

81. In our judgment it is clear that the judge directed herself correctly on the law by reference to both *Markham* and *Pearce*; and it not arguable that she was unaware of the substantial weight to be given to the child's interests and welfare. The case law the judge considered repeatedly emphasises that very weighty interest and the judge made specific reference to the child welfare considerations in her ruling. Further, the judge expressly identified the public interest factors relied upon by the media and applied the balancing test. We note that judgment in *Aziz* was handed down on 17 September 2019, a few days therefore before the judge's ruling. It did not however alter or modify the principles to be derived from the cases cited by the judge

82. Although the judge's reasons could have been more detailed, we do not consider her decision was plainly wrong on the material she considered or that she failed to take into account the evidence before her.

83. We must however consider whether the additional evidence now relied on would have justified maintaining the applicant's anonymity in a fresh balancing exercise.

84. Two points should be made. First, in our judgment, the additional evidence does not add anything new; instead it relies on essentially the same points as were in evidence before the judge, particularly, the welfare of the applicant's family. Second, what is now said does not materially assist the applicant. The identities of the family members are well-known by those who might cause them harm. Not naming the applicant would not give his family any greater protection than that which the Local Authority have provided by relocating them. We are also not persuaded that identifying the applicant will create further conflict within the community: it is plain that those who are already causing conflict (gang members) already, and know well, his identity.

85. As for the applicant's rehabilitation, which is capable of being an important factor, as in *Markham* (see para 89) there is no specific evidence before us, nor was there before the judge, that the reporting of the applicant's identity would adversely affect his future rehabilitation. In reaching this conclusion we have considered the material before the judge and the additional evidence. Other than highly generalised assertions to the effect that "publication of his identity will impact on his future progress and rehabilitation", no particulars are given as to how this affects the issue of the maintenance of the applicant's anonymity until he reaches the age of 18 in July 2022. The length of time before the child affected reaches 18 is a relevant consideration: see Markham at para 89. In this case, the applicant would (absent the Excepting Direction) enjoy about 18 months more of anonymity. He is also due to serve a minimum of 15 years in custody. In these circumstances, it is difficult to see how naming him now will inhibit his rehabilitation. No written or oral argument (or evidence) grappled with this issue. On

the other side of the balance is the substantial public interest in reporting horrific gang related murders such as the present and the open justice principle.

86. Looking at the matter in the round we do not consider that the judge's decision was wrong, either on the material before her, or with the benefit of the additional evidence which has been put before this court. We would add that it is not necessary in every case to demonstrate as some form of condition of removal of anonymity that the public needs to know the defendant's identity in order to understand the case. Each case depends on its own facts. The *case-specific* balance between the open justice principle and the welfare rights of the child in issue on the facts of the case was underlined in *Markham* at para 84.

87. Finally, we should address the submission that anonymity cannot be removed unless the facts are "exceptional". In our judgment, though the facts in cases such as *Markham* and *Aziz* were indeed truly shocking, there is no rule of law or iron clad principle which requires this to be the case before an excepting direction can be made. So, when the Court of Appeal in *Aziz* observed at para 43 that the crime was regarded by the judge as "exceptionally serious", and explained at para 41, that *Markham* was "exceptional on its facts" it was not identifying some form of additional condition that had to be satisfied before an excepting direction could be made. In our judgment, this approach is not inconsistent with the principles we have summarised at para 67 above: these give *very* substantial weight to the interests of the child which is why it will be rare for an excepting direction to made.

88. The fact that such murders are now so common cannot be sensibly prayed in aid to say that there is nothing "exceptional" about this murder, even if, contrary to our view, there was some form of exceptionality requirement. We note the statistics presented on behalf of the media in this case that knife crime in England and Wales was at a record level in September 2020, and that offences recorded involving a knife or sharp instrument are now at the highest level ever recorded. This issue is clearly a matter of substantial public interest.

Reasons

89. We can deal with this matter briefly. We consider the judge's reasons could have been more detailed, in particular as they addressed the factors telling in favour of continued anonymisation. However, we do not consider her ruling fell below public law standards. On a fair reading, it is clear that she did consider the relevant welfare considerations in coming to her decision and the importance of the child's interests emphasised in *Markham* at para 36.

90. By way of conclusion on the judicial review application, we grant permission to apply for judicial review. However, applying section 31(2A) of the Senior Courts 1981 we are satisfied that the outcome for the applicant would have been the same even if there had been no procedural unfairness. Taking into account the additional evidence before us, the judge's decision was not plainly wrong. The judicial review claim is accordingly dismissed.

Conclusion

91. Sitting as the Court of Appeal, Criminal Division, the application for leave to appeal against sentence is refused. Sitting as the Divisional Court, we grant permission to apply for judicial review but dismiss the claim. The stay of the Excepting Direction will be removed, subject to any further applications.