Neutral Citation Number: [2022] EWHC 1176 (Admin)

Case No: CO/170/2022

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

Tuesday 17th May 2022

Before:

MR JUSTICE FORDHAM

- -

Between:	
THE QUEEN (on the application of ANDERSON PINHEIRO)	**Claimant**
- and -	
(1) NORTH TYNESIDE MAGISTRATES COURT	
(2) CROWN COURT AT NEWCASTLE	**Defendants**
-and-	
(1) CHIEF CONSTABLE OF NORTHUMBRIA POLICE	**Interested Parties**
(2) CROWN PROSECUTION SERVICE	

- -
- -

Jodie Blackstock (instructed by Crowe Humble Wesencraft) for the Claimant
Oliver Thorne (instructed by Northumbria Police) for the **First Interested Party**
The **Defendants** and **Second Interested Party** did not appear and were not represented

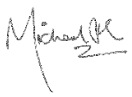
- -

Hearing date: 13.5.22

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



.....

THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This was a remote hearing by Microsoft Teams of an application for permission for judicial review. Because the hearing start-time, necessary to accommodate the parties at short notice, was Friday at 3pm and because 75 minutes were needed to do justice to the oral submissions, I did not proceed to an ex tempore judgment but have put the judgment into writing for circulation on the following Monday and deemed hand-down the next day (Tuesday). The targets for challenge are a series of interim sexual risk orders ("ISROs") made pursuant to section 122E of the Sexual Offences Act 2003 ("the 2003 Act"). They have arisen out of applications made on 7 July 2021 by the First Interested Party ("the Police"). There are a number of outstanding and interrelated matters with which I am not concerned: there is an underlying criminal investigation, in the course of which several people (including the Claimant) have been arrested (the Claimant has not been charged); there is the substantive application for a sexual risk order ("SRO") (section 122A); and there is the criminal prosecution for breaching the ISROs without reasonable excuse. All of these are or will be dealt with elsewhere. None of these are matters for this Court.

The ISROs

2. The first ISRO ("ISRO 1") was made by the First Defendant ("the Magistrates") on 9 July 2021, unopposed by the Claimant. His then solicitors had confirmed by email the previous day that ISRO 1 would not be opposed. ISRO 1 was for a fixed period of five months to 7 December 2021. Facing criminal proceedings for breaching ISRO 1, the Claimant's representatives lodged an appeal (section 122G) to the Second Defendant ("the Crown Court"), out of time. That appeal was determined on 29 October 2021, by way of a "rehearing" and on its substantive merits. The Crown Court (HHJ Moreland, sitting with a Magistrate) dismissed the appeal but made some variations by way of a replacement ISRO ("ISRO 1A"), also to expire on the original date (7 December 2021). At the time when the Crown Court determined the appeal, the Claimant was due to face trial for claimed breaches of ISRO 1, with that trial of breach due to take place in the Crown Court on 1 December 2021. In the event, the trial date was vacated and on 7 December 2021 the Magistrates imposed a further ISRO ("ISRO 2"), mirroring the terms of ISRO 1A, with a four-month duration to 7 April 2022. The judicial review grounds explain that further trial dates of the claimed breaches (fixed for 12.1.22 and 24.1.22) were vacated, pending the outcome of these judicial review proceedings. The custody time limit then expired on 25 January 2022, and the Claimant was released on bail. The case was due for mention in the Crown Court on 22 April 2022 and – I am told – is next due for mention there on 19 May 2022. I was told that the Magistrates continued the ISRO with a new Order on the same terms ("ISRO 3" made on 7.4.22 for 3 months, due to expire on 7.7.22. The essential substantive content of ISRO 1A and ISRO 2 is to prohibit the Claimant from:

> ***1. Having any contact, either directly or indirectly, with any female under the age of 18 years save that which is inadvertent and not reasonably avoidable in the course of normal daily life.***
>
> ***2. Entering or remaining in any dwelling or car where you know or reasonably believe a female under the age of 18 years to be present save that which is inadvertent and not reasonably avoidable in the course of normal daily life.***

The ISROs – from ISRO 1A onwards – go on to make clear that they do not prevent contacts or presence with six named nieces accompanied by a parent or step-parent. ISRO 1 had contained further provision relating to use of a computer or device capable of accessing the Internet, but that prohibition was removed by the Crown Court when dealing with the appeal and imposing ISRO 1A. Nothing turns on that earlier, distinct prohibition.

Judicial review

3. On 12 January 2022 the Claimant's representatives filed an urgent Form N463 in London, seeking interim relief and expedited permission. Interim relief in the event was not pursued. On 20 January 2022, Sweeting J refused expedited permission, pointing out that there had been substantial delay in pursuing the matter before this Court.

Impugning, and disobeying, a court order

4. Sweeting J also observed that the connection being asserted between challenge to the validity of an ISRO and breach of a court order was a "doubtful" one. So far as that is concerned, Mr Thorne pointed out and Ms Blackstock accepted that a judicial review challenge to an ISRO, even if it succeeded, would not of itself provide a defence to criminal proceedings based on breach of that ISRO. Ms Blackstock accepted the applicability, in principle, of R (Majera) v SSHD [2021] UKSC 41 at §44, where the Supreme Court explained that it is a well-established principle of our constitutional law that a court order "must be obeyed unless and until" it has been set aside or varied by a court. However, submitted Ms Blackstock, if the judicial review Court were to conclude that the imposition of the ISROs in this case was unjustified: (a) it would give rise to a question for the Second Interested Party ("CPS") to consider as to whether it was in the public interest to continue to prosecute the breach; and (b) it would, if the breach were prosecuted and the Claimant convicted, serve to inform any sentencing exercise including questions of culpability and harm. Ms Blackstock made a further submission as to avoiding a consequence for registration on the sex offences register but she accepted, on reflection, that this was parasitic on (a). That is because, even if registration did not continue by reference to an ISRO that had been formally quashed, registration would follow as a result of a conviction of a breach of the ISRO prior to it being quashed.

Venue

5. The N463 urgency application having failed, it was recognised in the claim form filed on 25 January 2022 that this judicial review claim belonged in the Administrative Court at Leeds ("ACL"). Following a "minded to transfer order" on 7 February 2022, the case was duly transferred to ACL. As it seems to me, ACL is where the Claimant ought to have originated. There is no reason why urgency (or the location of the Claimant's Counsel in London) should 'drive' the choice of London as a venue for a judicial review case. ACL is able to deal with urgent paper applications. Only if there is some concrete perceived difficulty, having taken steps to contact the Administrative Court Office at ACL, should a judicial review claim connected with the North-East region be issued in London on grounds of "urgency".

Progress before 19 May 2022

6. The Police duly filed their Acknowledgement of Service and Summary Grounds of Resistance on 23 February 2022. No other party takes an active position at this permission stage. The Claimant's solicitors emailed ACL on 29 April 2022 (unfortunately without copying other parties), explaining the position at that stage: that the Claimant has matters pending before the Crown Court which are listed for mention there on 19 May 2022; and that a judge at the Crown Court had given an indication that they should write to ACL saying it would be helpful if the judicial review application were able to "progress before 19 May 2022". Indications between courts of that kind are always helpful and will always be considered, to see what can be done. When this came to my attention as the Liaison Judge I first ensured that the communication had been brought to the attention of all parties in case they wished to make observations, I then considered the papers and ordered that the application for permission for judicial review be adjourned and listed for a hearing in court, which I indicated could be by MS Teams. Adjourning a permission claim into open Court is a useful option, described in the Administrative Court Judicial Review Guide 2021 at §9.2.1.4.

Mode of hearing

7. The representatives of both of the parties actively participating this stage – the Claimant and the Police – stated their preference for an MS Teams remote hearing. That is what has taken place. Like them, I was satisfied that this mode of hearing involved no risk of prejudice to the interests of their clients. I was also satisfied that the open justice principle had been secured. The case and its start time and mode of hearing were all published in the Court's cause list from Thursday afternoon, together with an email address of the ACO at Leeds, usable by any member of the public or press who wished to attend this public hearing.

My approach

8. In dealing with this application for permission I have kept well in mind that I am a single judge, dealing with permission at a single stage. I have not heard argument on this point, but I will proceed on the basis that – although ISROs are civil orders – this case might be said to be a "criminal cause or matter" (and Ms Blackstock agreed, having received this judgment as a confidential draft, that it is). If so, a refusal of permission for judicial review in this Court would be the end of the road: see Administrative Court Judicial Review Guide 2021 paragraph 25.7.5. Circumspection is appropriate.

9. The questions which arise for me to determine are specific. The first is whether it is arguable with a realistic prospect of success that the decision of the Crown Court (which is where everybody agrees the substantive focus belongs) in upholding an ISRO in this case was flawed in public law terms. Judicial review is not a rehearing of the evidence afresh; still less a re-evaluation on fresh evidence. Public law errors are questions of law. They include asking whether there was "no evidence" to support a conclusion; or whether a conclusion or response is "unreasonable"; or whether there was a misdirection in law; or whether there was a legal inadequacy of reasons. The second is whether there is any "discretionary bar" – such as delay or an alternative remedy – which makes it inappropriate for the judicial review Court to entertain a challenge from those decisions. I repeat that I am not determining any extant application for a substantive SRO (section 122A); I am not determining any question of breach of any of the ISROs. I am not determining any issue of criminal guilt (or innocence). I am not determining a substantive judicial review claim.

Discretionary bars

10. So far as concerns the Magistrates' decision on 9 July 2021 to impose ISRO 1 there is a clear discretionary bar. The Claimant had, and ultimately pursued, the alternative remedy of a statutory right of appeal to the Crown Court. The Crown Court conducted a rehearing, on the evidence before that Court. What is more, the Claimant had not opposed ISRO 1 when imposed by the Magistrates. In all those circumstances it is obvious, in my judgment, that the judicial review Court would not entertain a freestanding judicial review challenge to the original ISRO 1 of 9 July 2021. That alone puts the focus on the Crown Court's decision dismissing the appeal and imposing ISRO 1A. So far as concerns the Magistrates' decision of 7 December 2021 to impose ISRO 2, the Claimant could have pursued the same statutory right of appeal to the Crown Court. What is submitted is that the Magistrates' decision to impose ISRO 2 in effect adopted the reasoning of the Crown Court in dismissing the appeal against ISRO 1 and imposing ISRO 1A. The same applies to the Magistrates' recent decision imposing ISRO 3. The Court is essentially invited to focus on the Crown Court decision and reasoning of 29 October 2021 and ISRO 1A which it imposed. Ms Blackstock submits that there are arguable public law flaws in the Crown Court's reasoning and in ISRO 1A which it imposed.

11. That is not the end of it so far as the discretionary bar of "alternative remedy" is concerned. In relation to the Crown Court's decision of 29 October 2021, there was the right of appeal by case stated. The Police's Summary Grounds of Resistance raise the "alternative remedy" of case stated, pointing out that the claim provides no explanation for why that avenue was not pursued. There is a further point. Pursuant to section 122E(5) of the 2003 Act the Claimant may by "complaint" apply "to the court that made" the ISRO for the order to be "varied, renewed or discharged". I will need to revisit these points.

Remedies

12. So far as the remedies are concerned, the judicial review claim asks the Court to make a formal quashing order in relation to ISRO 1, ISRO 1A and ISRO 2 (and, I have taken it, now ISRO 3). In the alternative, the claim seeks a remedy which would amend the ISROs to make contact between the Claimant and "Y" permissible.

Key features relied on against the Claimant

13. It is appropriate next to identify and explain the nature of the evidence relied on against the Claimant by the Police, for the purposes of applying for the ISROs. In particular, there is evidence as to each of the following four features of the case. The letters used for individuals have been used by the parties in these proceedings.

    i) First, there was a party on 14 February 2021 at the home of "LM". It was attended by a 17 year old woman "Z". Z had been reported missing from home. Z subsequently (on 24 February 2021) reported that – during the party at LM's house and while intoxicated with alcohol – Z had been raped by two individuals. She identified LM and another man (not the Claimant). Z also disclosed other sexual offences and other trafficking offences, including that adult males had taken her to various addresses in the region for parties, where she had been given drugs and alcohol. Later on 14 February 2021, a taxi driver took Z and three

male adults from LM's address into a town. Two of the males were dropped off in the town. The remaining male and Z were dropped off at a hotel. The Claimant was an associate of LM. He knew Z (which he admitted). He was at the party (which he admitted). He was also in the taxi (which he denied) as one of the two males dropped off in the town. He was aged 23 at that time. (I interpose that it has been pointed out, and accepted by the Judge, that the Crown Court's ex tempore ruling described the Claimant as having been "apprehended" with the other males and Z in the taxi, when it should have said "later identified as having been", and I am satisfied that nothing can turn on this.)

ii) Secondly, messages identified by the Police between 23 January 2021 and 12 February 2021 between the Claimant and LM discussed parties being arranged by the Claimant and LM and discussed the attendance of young females at those parties was also being arranged. The messages referred to "chicks" who were going to be coming. They included the Claimant communicating to LM whether "chicks" would be coming, and how many "chicks" would be coming. The Claimant described one of them who was going to be attending a party as a "hoe". The Claimant also communicated to LM that LM should "try [to] get some too" because "I can't just be getting everything all the time". They also included LM communicating to the Claimant asking whether the Claimant had "banged some poor soul", to which the Claimant replied "of course". The Claimant subsequently "admitted … taking a number of females to gatherings". He also said he was aware that sex had taken place, on occasions, at the gatherings. He claimed that the females were "over 18" and were "consenting adults". He denied taking females to the parties "for the purposes of sexual exploitation".

iii) Thirdly, at 01:00 on 2 June 2021 the Claimant and LM were together in the Claimant's car at a place known as the Quayside, where they were spoken to by police. Later that same night they were joined at the car by "Y" and "S". The Police returned to the car, having received information about this. S and Y were aged 16 (Y had just turned 16). Both S and Y had, according to the Crown Court, been reported as missing from home. Both Y and S were intoxicated with alcohol. Mobile phone calls had been made between the Claimant and Y's mobile phones. The Claimant later told police that he had been going to drive Y and S to Y's home, but he was unable to give the police Y's address.

iv) Fourthly, on 20 June 2021 Y was found by police to be at the Claimant's home (the Claimant's mother was also present). On that occasion, Y had been reported missing from home. The Police had informally warned the Claimant "on a number of occasions" that Y should not be attending his home address.

14. The Crown Court conducted the appeal by rehearing on 29 October 2021. As the Police submit, and the Claimant does not dispute, no evidence was called by the Claimant, including as to his relationship with Y. The Crown Court hearing ventilated all of the matters to which I have just referred, as is indicated in the Crown Court's ex tempore ruling. In the light of these features and in all the circumstances, the Crown Court dismissed the Claimant's appeal, upholding ISRO 1 with variations (ISRO 1A). The Crown Court explained that it had concluded that it was "just" to impose an ISRO (section 122E(3) of the 2003 Act), having had careful regard to the statutory preconditions for a Sexual Risk Order ("SRO") (section 122A). The Crown Court

explained that the Police, as the "applicant authority", had discharged the onus of "demonstrating" that, having regard to the Home Office Guidance on Part 2 of the 2003 Act (September 2018) (see especially pages 46 to 47), the Claimant had done "acts of a sexual nature", as a result of which it was "necessary" (see section 122A(2)(9)) to make an ISRO "to protect members of the public" – identified as "young women" – from "harm from the Claimant" (see section 122A(6)). The "harm" to young women from the Claimant was identified as follows:

> ***They may be groomed and recruited and be at the risk of being trafficked for sexual exploitation and [at] the risk of attending parties where there is a risk that they will be sexually assaulted or raped.***

15. The matters relied on by the Crown Court were, as to the "acts of a sexual nature", the evidenced matters which I have set out above. As regards the necessity for the order, the Crown Court also made reference to the evidence of the Claimant's actions: in having continued his association with LM; in having "continued to be in the company of drunk girls of 16 or 17"; and, after ISRO 1 was made, being "said by the prosecution" to have gone on to act in "breach" of it. To put that "breach" point in perspective, the witness statement breach evidence by now before the Crown Court – which would be the evidence relied on by the prosecution at any trial of the question of breach – included the following: some 140 attempts by the Claimant to contact Y immediately after ISRO 1, including having attempted to visit her on 11 July 2021; further attempts to contact Y between 16 and 19 July 2021 having been released on 14 July 2021 following arrest for breach, on bail conditions which such attempted contact would breach. That pattern of conduct was said by the Police to involve the use of different SIM cards. This was what was being "said by the prosecution", to which the Crown Court referred in the context of necessity for ISRO 1A.

Grounds for judicial review

16. The claim for judicial review put forward five grounds. Grounds (i) to (iii) are that the Crown Court's reasoning was unlawful in failing properly to consider the meaning of: (i) "sexual act" (as it is put in the Grounds) in section 122A; (ii) "necessary to protect the public from harm" in section 122A; and (iii) "just" in section 122E. Ground (iv) is unreasonableness in the terms of the ISRO extending to include young women "over 16" and specifically the Claimant's "girlfriend" Y. Ground (v) is that the ISROs breached Article 8 ECHR, preventing the Claimant from enjoying his right to private life, specifically as regards Y as his "girlfriend".

17. In the Grounds for Judicial Review and in her oral submissions, Ms Blackstock emphasised a number of features: that the Claimant is of good character; that Y is his "girlfriend"; that this has been "accepted" and that he emailed the Police on 2 June 2021 describing her as his "girlfriend"; that Z did not identify the Claimant as one of the two men who she said had raped her at LM's home (and two other men were identified and were arrested); that Z did not allege that the Claimant had taken her to the party; that Z did not make allegations against the Claimant in relation to other parties or offences; that the Claimant was released on bail conditions (after arrest and interview on 28 April 2021) and is accepted not to have been breach of those bail conditions in his conduct at the Quayside on 2 June 2021, or at his home on 20 June 2021; that this supports his explanation of the Quayside (he was not "facilitating a gathering" with females under 18, but answering a call to give them a lift home, as they told the Police); that the

criminal standard of proof is apt in the context of civil orders like SROs and ISROs; that the implications of an ISRO are "draconian", since breach is a crime which can be imprisonable by up to 5 years and that a conviction for breach will lead to entry on the sexual offences register.

Alternative remedy: appeal by case stated

18. So far as concerns the "alternative remedy" of appeal by case stated the position, as it crystallised at the hearing before me, was as follows. The Police had raised in their Summary Grounds of Resistance appeal by case stated as an alternative remedy. It was common ground that appeal by case stated involved a 21 day time limit. Ms Blackstock's position was that, in light of the particular circumstances of this case – including a prompt notification of the fact that there was to be a challenge, solicitors unfamiliar with this area of procedure, conscious consideration of the appropriate way forward, and a delay in the obtaining of legal aid (granted on 23 December 2021) – together with a proposition which she said was supported by a line of authorities, the availability and non-pursuit of appeal by case stated within 21 days was not a point that should be held against the Claimant if the claim is otherwise arguable. The proposition she advanced was this: where there is a written determination, judicial review can be a more appropriate recourse than appeal by case stated. The line of authorities was said to be Chabliz v CPS [2019] EWHC 3094 (Admin) (at §§2-5) and Sunworld Ltd v Hammersmith and Fulham LBC [2000] 2 All ER 837 (referred to in Chabliz). If it had mattered in this case, I would have wanted to examine with some care whether it could really be said that the need to act within 21 days, reflected in the statutory route of appeal by case stated, could 'be put to one side' and a three month period for pursuit of a judicial review adopted instead, simply on the basis that there was a 'written determination'. But in the end, in this case the point can be left open. That is because, in the particular circumstances of this case, Mr Thorne for the Police very fairly made clear that he would not wish to take his stand on the case stated (or 21 day) point, if the Court concluded that there were arguable grounds for judicial review. He did, however, hold firmly to the position that the route of application to vary the order is a suitable "alternative remedy", constituting a complete answer to Grounds (iv) and (v). I will return to that. But, in the circumstances, I need say no more about appeal by case stated and pursuit of a challenge within 3 months and beyond 21 days. No freestanding delay objection was maintained.

Essence of the Claimant's submissions

19. I turn to seek to encapsulate the key points advanced in support of the five Grounds for Judicial Review, identified above.

    i) In support of the first ground for judicial review (described as "sexual act"), Ms Blackstock's written and oral submissions in essence in my judgment came to this. The Crown Court was right to address the statutory precondition for a substantive SRO, namely whether to be demonstrated that the Claimant had done an "act of a sexual nature". But the Crown Court committed public law errors in concluding that it was satisfied on that point. The evidence was simply "too scant" to support that conclusion. There was legally insufficient evidence. Alternatively, the conclusion was unreasonable in a public law sense. The analysis must be informed by the statutory purpose, and bearing in mind that the "act of a sexual nature" needs to be one involving "harm". The Home Office

Guidance was misapplied by the Crown Court. That was because there was no evidential basis for any finding that the Claimant had engaged – as described in the Guidance – in any acts suggestive of "grooming"; or acts which may be suggestive of "exploitation", such as "inviting young people to social gatherings that involve predominantly older men", or providing presents, drink and drugs to young people (citing the Guidance at page 47). Read fairly and as a whole, the messages between the Claimant and LM reflected "invitations" being made to young women, and "choices" being made by those young women, all in the context of "normal" and "consensual behaviour", albeit that those young women were being described in "derogatory language". No further evidence was (or has been) adduced by the Police, including from any of the electronic devices which they retained from the Claimant, nor from any other source, supporting a conclusion that the Claimant has done any "act of a sexual nature". The only relevant "gathering" – on 14 February 2021 – was one as to which it is accepted that Z has, at no stage, accused the Claimant of any sexual assault, any trafficking, or any harm towards her. There is no evidence of any such acts done in relation to any other gathering. The incident involving Y and S in the Claimant's car – on 2 June 2021 – is not even a "gathering", as is accepted by the fact that it is not said to have been a breach of the bail condition. The Claimant's actions at the Quayside on 2 June 2021 and at his home on 20 June 2021 could not and did not constitute any "act of a sexual nature".

ii) In support of the second ground for judicial review ("necessary to protect the public from harm") Ms Blackstock submitted as follows. Again, the Crown Court was right in dealing with this interim order to address the substantive limb for an SRO (section 122A), namely necessity for the order to be made for the purpose of protecting the public or any particular members of the public from harm from the Claimant and necessity of any prohibitions imposed for the purposes of protecting the public or any particular members of the public from harm from the Claimant. The test of necessity to protect the public from harm from the Claimant needed to be satisfied in three respects (mirroring what was said, in a related context, in R v Smith [2011] EWCA Crim 1772 [2012] 1 WLR 1316 at §8): whether the making of an order was necessary for the relevant protective purpose; whether the terms were not oppressive; and whether overall the terms were proportionate. Again, the Guidance was misapplied by the Crown Court, given the emphasis (Guidance p.48) on: the nature of behaviour giving rise to concern; any pattern associated with the behaviour; the nature and extent of potential harm; previous, convictions, cautions, reprimands or final warnings; and compliance with previous court orders. Even if there were a basis for finding that the Claimant had done any "act of a sexual nature", there was (and is) a complete lack of evidence to find that any ISRO – still less, of these durations and with these prohibitions – were necessary to protect the public from harm from the Claimant. There was (and is) no evidence of any allegations against the Claimant, whether made by Z or by Y or by S or by anyone else, still less of any allegations involving any "harm". Y was (and is) the Claimant's "girlfriend", now aged 17, who is able to consent and who has made no disclosures of any concern as regards the Claimant. And (as it was put in the Grounds for Judicial Review), the CPS allegations of "breach" of the ISROs could not themselves "legitimately be relied upon to satisfy the requirement that

the order is necessary, given that those breaches related solely to contact with [the Claimant's] girlfriend".

iii) In support of the third ground for judicial review ("just"), Ms Blackstock submitted as follows. The test for an "interim" order in section 122D(3) – of it being "just to do so" – connotes a "broad test" which engage the interests of justice, and which needs an evidential basis. The Crown Court conclusion in this regard was "unreasonable" in a public law sense. The purposes of an "interim" order – which has to be necessary – is as a 'holding position' (albeit that the Claimant's solicitors were not pressing either the Magistrates or the Crown Court to get the hearing of the substantive SRO listed and determined).

iv) In support of the fourth ground for judicial review Ms Blackstock submitted as follows. The Crown Court decision upholding ISRO 1 and imposing ISRO 1A (later replicated by ISRO 2 and ISRO3) constitutes unreasonable, oppressive and/or disproportionate action. The young women who feature in the events relied on were all over 16 at the time: Z was aged 17; Y and S were both aged 16. There are no allegations in this case against the Claimant of exploitation, assault, coercion or control; nor of any specific harm. An ISRO and its terms and duration must be necessary and proportionate. There is no identifiable risk of any 'contact offence'. Most strikingly, the ISROs are unreasonable, oppressive and/or disproportionate when viewed in the light of the impact on the relationship of boyfriend and girlfriend between the Claimant and Y. The need for a careful focus on these legal standards in the context of pre-existing relationships is illustrated by a case like R v MEM [2016] EWCA Crim 1290 where, in a related context, careful regard was had (§21) in the case of a person convicted of sex offences to existing relationships with their own children. Having regard in particular to the age of Y (now turned 17) and the Claimant's relationship with her, the ISROs are unreasonable, disproportionate and/or oppressive. The Police have not disputed a relationship between the Claimant and Y. It is supported by the mobile phone traffic between the Claimant and Y earlier on 2 June 2021, and by the explanation given by Y and her friend S to the Police about the events of that night: that they had contacted the Claimant to get a lift home. Also, the communications relied on as the evidence of breach of ISRO 1 are to some extent 'two-way', with some attempts in July 2021 by Y to make contact with the Claimant.

v) In support of the fifth ground for judicial review Ms Blackstock relies on the same considerations as arise under the fourth ground but this time through the prism of Article 8 ECHR. Based on the same considerations, the essential submission is that the ISROs and their terms are a disproportionate interference with the Claimant's right to respect for private life, in particular given the intrusive and unjustified impact on his relationship with Y.

20. In relation to all of the grounds, Ms Blackstock rightly reminds me that for the purposes of this permission stage it is sufficient for her to be able to identify an arguable case for judicial review. She also submits that insofar as there is any gap in the evidence adduced by the Claimant, the opportunity could and should be given to provide that evidence following the grant of permission for judicial review.

My conclusion

21. In my judgment, there is no realistic prospect of this claim for judicial review succeeding. I am therefore going to refuse permission for judicial review in this case. I will explain why I have arrived at that view.

Two key topics

22. The five Grounds really involve two key topics. The first topic concerns the general position. It relates to the statutory preconditions and Guidance, the evidence as a whole, and the key conclusions. The second topic concerns a specific position. It relates specifically to the effect of the ISROs on the relationship of boyfriend and girlfriend between the Claimant and Y. I will discuss them in turn. But I make clear that I have considered both topics 'in the round', not least because the position of Y as "girlfriend" is relevant to the general topic: there is an overlap and interrelationship. I start with the first topic: the general position.

First topic: the general picture

23. The starting point, as Mr Thorne rightly reminded me, is that the ISROs (imposed under section 122E) were in their nature "interim" orders. They are not SROs (imposed on section 122A). There is an extant application by the Police for an SRO. That has not been determined. It could have been. It forms no part of this claim for judicial review that the Magistrates or the Crown Court have breached some public law duty in not taking steps more urgently to list and deal with the substantive application for an SRO. Ms Blackstock accepts that. She also accepts that she cannot point to any communication on behalf of the Claimant asking for urgent or speedy resolution of the extant substantive application for an SRO. In the initial email on 8 July 2021, when the Claimant's former solicitors confirmed the Claimant's non-opposition to ISRO 1, they raised the question of an early substantive determination. Since then, the procedural approach on behalf of the Claimant has taken a different approach. It is not difficult to see why. The Police say they have clear evidence that the Claimant immediately acted in multiple breach of the order (ISRO 1) which had been made by the Magistrates. The Claimant's new representatives have focused on trying to challenge the "interim" order; not the listing and determination of the substantive SRO application; and not the hearing of the breach trial. But because these were "interim" orders, the Crown Court – on the rehearing from the Magistrates – was entitled to look at the statutory question in section 122E(3) (whether imposition of the ISRO was "just") broadly and look for what Mr Thorne called a "prima facie" case. In fact, the Crown Court clearly and carefully grappled with the section 122A criteria, saying it "intended to deal with the final order criteria". Its approach was unimpeachable.

24. Next, the Crown Court's ruling is a determination which, in my judgment and beyond reasonable argument, contains a set of relevant, sufficient and evidentially-justified findings in relation to the substantive criteria arising under section 122A, which the Crown Court properly and appropriately addressed. The "act of a sexual nature" in this case is – as Mr Thorne submitted – the recruiting of vulnerable young women so as to place them in a position of sexual exploitation and at risk of sexual assault in the context of their attending gatherings. That, in my judgment and beyond argument, is plainly what the Crown court had in mind in its reasoned determination. That, moreover, is the action which gave rise to the relevant harm from the Claimant, to the relevant members of the public – namely young women – against which the ISRO was necessary to protect

those young women. As I have explained, the Crown Court described, in terms, the harm to young women from the Claimant as being:

> ***They may be groomed and recruited and be at the risk of being trafficked for sexual exploitation and [at] the risk of attending parties where there is a risk that they will be sexually assaulted or raped.***

It made perfect sense in this case that there should be this equivalence in relation to the question of "act of a sexual nature" and "harm from the [Claimant]" to the public", for the purpose of protecting against which the ISRO was necessary.

25. There was, beyond reasonable argument, no misinterpretation or misapplication of the statute, nor of the Home Office Guidance, on any aspect of the case. As to the latter, the document contains "guidance". The contents of the Guidance regarding "necessity" and "harm" were not misunderstood or misapplied; nor regarding "act of a sexual nature". On the latter topic, the Guidance provides a "list" which is deliberately "not exhaustive or prescriptive", but which serves "as an indication" of what "examples of such behaviour" might be expected to include, emphasising that the assessment "will depend on the circumstances of the individual case". Within that non-exhaustive and non-prescriptive list, there is the example of "acts which may be suggestive of exploitation", which are said to be acts "such as" acts involving "inviting young people to social gatherings that involve predominantly older men". There is a clear relationship to that sort of example of conduct and the nature of the conduct evidenced in the present case. As the Crown Court said, it viewed the evidence "as a whole" and "not in discrete compartments". The evidence included the four evidenced features which I set out earlier in this judgment. As has been seen, it includes evidence in support of each of the following. The Claimant was aged 23. He was at a party at his friend LM's house on the night of 24 February 2021. Z had – as she alleged – been raped by two men at that party. One of those two men was – as Z alleged – the Claimant's friend LM. Z was 17, had been reported missing, and was intoxicated. The Claimant was in the taxi later that same night, with the intoxicated Z and two other men, one of whom was dropped off with the Claimant, and the other of whom accompanied Z to the hotel. The Claimant and LM were in the Claimant's car in the early hours of 2 June 2020. Y and S were with them, following telephone contact between Y and the Claimant. Y and S were 16. They were intoxicated. Both had been reported missing from home. Common features are the ages of Z, Y and S; the presence of the Claimant and LM; the fact of intoxication; and the fact of being reported missing from home. Then on 20 June 2021, despite several warnings from the Police, Y was found at the Claimant's home. She had, again, been reported missing from home. The Claimant and LM had made arrangements for parties and for young women to attend those parties, with the Claimant being a lead 'arranger' – involved in taking young females to gatherings, where sex would take place – and with the clear overtones of sex with young women involving "banging some poor soul".

26. As I have explained, the judicial review Court does not have a "substitutionary" jurisdiction, which would step into the shoes of the Crown Court. Judicial review is a restricted supervisory jurisdiction, for good reason. There is no appeal by rehearing to this Court. In my judgment, beyond reasonable argument, there was an evidential basis and a reasonable justification for the Crown Court to be satisfied, in the context of making and upholding an ISRO, that there was in this case "action of a sexual nature" by the Claimant and a "necessity" to protect young women from harm from him arising

from further such action. In my judgment, it is not arguable with any realistic prospect of success that there was an insufficiency of evidence, an unreasonableness of conclusion, or a legal inadequacy of reasoning which could sustain a successful claim for judicial review on any of the Grounds for judicial review. That includes when consideration is given to the distinct topic of the Claimant's asserted "relationship" with Y as his "girlfriend", to which I will turn below.

27. So far as concerns the point about the Crown Court's reliance on the evidence of the Claimant's alleged "breach" of ISRO 1, the Crown Court did not even arguably fall into the 'trap' of treating evidence of breach of an interim order as being the evidence justifying the imposition of that order. The Crown court, in my judgment and beyond reasonable argument, was entitled to have regard to all the circumstances – at what was a "rehearing" – in addressing the question of necessity. All the circumstances included the evidence relating to the Claimant's enduring conduct across relevant time-lines and in light of relevant possible inhibitors. That included his continuing association with LM. It included the fact that Y was at the Claimant's house, after repeated warnings from the police that she should not be. And it included that – on the face of it – the Claimant had acted in breach: in multiple breach; of the very ISRO (ISRO 1) to which he had consented on 9 July 2021; including by 140 attempts to contact Y and an attempt to visit her within the immediately following days; including by the use of different SIM cards; and including (between 16 and 19 July 2021) in defiance of a relevant bail condition just imposed (14 July 2021). These evidenced aspects of the circumstances cannot be legal irrelevancies. Evidence of – on the face of it – responsible, insightful and compliant action might properly have been relied on at the "rehearing" in the Claimant's favour, in order to assist the Crown Court on questions such as necessity and proportionality (and alternative responses). By the same token evidence – on the face of it – of the opposite was relevant to consider, alongside the other evidence and circumstances of the case.

Second topic: boyfriend-girlfriend relationship

28. I turn to the impact and implications of Y being the Claimant's "girlfriend", and the intrusion for their relationship which the ISROs are said to involve. The Claimant has asserted, and his representatives have argued, that the relationship between him and Y is that Y is his "girlfriend". But I was able to find no evidence adduced before the Crown Court on behalf of the Claimant directed to establishing this asserted relationship of boyfriend and "girlfriend". The evidence of what happened on 2 June 2021 was telephone contact between Y and the Claimant, immediately prior to Y and S being in the Claimant's car with LM, and an email the next day to the police describing Y as his "girlfriend". The evidence is that Y was at his house (with his mother also present) on 20 June 2021. And the July 2021 'breach' evidence involves attempted contact between them, in both directions. I have mentioned that – when questioned on 2 June 2021 – the Claimant did not know Y's home address. Nor, evidently, did he know her age. Ms Blackstock's position at the hearing before me – on instructions – was that the Claimant could not say what Y's date of birth was. The statement of facts and grounds asserted that Y was, at that stage, aged 17. In fact, she was still 16 – on the evidence – having only recently turned 16 in July 2021. I could find no concrete evidence being put forward to address the nature of the relationship, so as to assist the Crown Court in relation to Y and the ISROs. Nor had such evidence provided to the Magistrates.

29. There are clear implications of substance. If an ISRO really did involve a serious intrusion in a relationship of boyfriend and girlfriend, then that would have been an important point as to the scope and design of the order to which the Claimant was consenting on 9 July 2021. The Claimant's Article 8 rights would have been interfered with, and so would Y's, in the context of that relationship. There was ample opportunity to provide such evidence, throughout. Indeed, as Mr Thorne cogently points out, the Crown Court varied ISRO 1 and substituted ISRO 1A, an order which contained specific provision allowing the Claimant to have contact with six cousins, all named in the order. Information and evidence could at any stage have been provided to the Courts in relation to why and a relationship with Y. In preparing for the Crown Court appeal, although there was an extant prohibition on contact between the Claimant and Y, nothing would have precluded the Claimant from providing concrete evidence, or evidence being obtained from Y by the Claimant's representatives, or evidence being provided from third parties. At the hearing before me, this was not a new point. The Police's February 2022 Summary Grounds of Resistance, in terms, took the point that:

> ***There was no evidence called by the Claimant, either to rebut the application or to go to his relationship with Y.***

30. Human rights arguments and unreasonableness arguments are raised before this Court. They are advanced by the Claimant based on the same assertions by him as to the relationship which he says has been and continues to be impaired. The remedy sought includes an order requiring the ISRO be varied to allow contact with Y. There are circumstances in which 'fresh evidence' can be considered in judicial review. But there is no attempt to adduce proper evidence on this aspect of the case, even as to impact or as to remedy. Nor can it be appropriate to adjourn or grant permission for judicial review, to allow this obvious deficiency in the evidence – throughout – to be sought to be repaired.

31. The position is that there are the features of the evidence which I have described. The Police recognise that there was a "relationship" of sorts between the Claimant and Y. The application on 7 July 2021 recorded that the Police were told by Y and S that they had contacted the Claimant on 2 June 2021 to get a lift home. But none of that, even arguably, provides proper evidential support for arguments that there is an interference with a relationship of boyfriend and girlfriend.

32. There are obvious reasons why – in cases involving orders under the 2003 Act and similar matters – all courts will act with proper circumspection, in the context of concerns raised about vulnerability and risk. Indeed, this is an aspect of the consideration of the position that was being described in MEM. Questions of reasonableness, necessity, oppression and proportionality – in the context of questions of risk, vulnerability, protection and harm – involve the need for evidenced clarity as to what facts and impacts are being asserted by those who claim an interference with private life rights. Moreover, any court would be astute to examine whether facts, circumstances and events were not themselves indicative of risk, vulnerability, protection and harm. The Magistrates were given nothing of evidential substance. Nor was the Crown Court. Nor was this Court. In my judgment, that fatally undermines the viability of judicial review on this aspect of the case, as a matter of substance.

The statutory entitlement to apply for a variation

33. It is at this point that one of the "discretionary bars", discussed earlier, comes to the fore. As Mr Thorne submits, there is, in my judgment, a complete procedural answer in the circumstances of the present case to the points made about the ISROs and their impact on the asserted relationship of boyfriend (the Claimant) and girlfriend (Y). The Claimant has – throughout – had a statutory entitlement pursuant to section 122B(5) to apply to the court that made the ISRO, asking for the order to be varied. The Claimant could have provided evidence of Y being his "girlfriend" to the Magistrates on 8 July 2021. But he could also have provided such evidence, in support of a section 122B(5) application, at any time during the ten months after that, when the ISROs have been in force and having the impacts of which he complains. An application pursuant to section 122B(5) is one which could still be made. The point is that the Claimant has had – and still has – an "alternative remedy" to the claim for judicial review of the ISROs seeking a remedy which includes requiring variation to allow contact with Y. A section 122B(5) would be considered, in the appropriate forum, on appropriate evidence. Moreover, as Mr Thorne rightly submits, had such an application been made and succeeded, the Claimant's representatives could have then attempted to rely on that variation in 'mitigation' in relation to sentencing following any conviction for a breach of an ISRO. In my judgment, that fatally undermines the viability of judicial review on this aspect of the case, as a matter of procedure.

Footnote

34. I should make this clear. I have referred to the the availability of a section 122B(5) application for an ISRO variation, which the Claimant's representatives could have pursued at any time. But I am not saying that the pursuit of such a variation now would stand as a basis for introducing any delay into any extant proceedings in any other court.

Conclusion

35. For all those reasons the application for permission for judicial review is refused. No claim for costs was made in the Police's Acknowledgement of Service and Summary Grounds. No directions arise for consideration in this Court. This judgment can now be available to the criminal courts who are dealing with the related proceedings, where other matters will be able now to be progressed.

Anonymity

36. When circulating this judgment as a confidential draft, I was able to confirm whether any party wished to make an application for an anonymity order. In the event, Mr Thorne for the Police sought an order for anonymity: that no person shall publish the name, personal details or anything else which might lead to the identification of the persons referred to in the judgment as "Z", "Y" or "S". Their names had not been used at the hearing. Ms Blackstock agreed that such an anonymity order was necessary and appropriate. So do I. The precise terms of the Order will be on the court file.