**IN THE CENTRAL CRIMINAL COURT**

**Regina**

**v**

**Michael BURRELL**

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**REASONS FOR REFUSING THE CROWN'S APPLICATION FOR REPORTING RESTICTIONS ON ASPECTS OF THE COMPLAINANT'S EVIDENCE**

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1. On Thursday 2 December 2004, after the trial of Michael Burrell had been in progress for three days, the Crown applied for an order to be made under ***section 4(2)*** of the ***Contempt of Court Act 1981,*** so as to restrict reporting on certain aspects of the evidence that was about to be given by the complainant. I heard argument from Miss Cheema on behalf of the Crown and Miss Marsh QC on behalf of the defendant that day. On the following morning, I heard arguments from Mr William Bennett, who had been instructed on behalf of various national newspapers. That afternoon I announced that I would not grant the order sought. I said that I would give my reasons in writing in due course. These are my reasons for that ruling.

**The Background**

2. On 30 November 2004 the trial of the defendant, Michael Burrell, began. He faced two Counts on the Indictment. Count One alleged that he had raped the complainant, whom I shall call "X", a woman, during the night of 29/30 September 2003. Count Two alleged that he had indecently assaulted X during the same night. Before the jury was sworn I gave guidance to the press on what information they could and could not report concerning this case in the light of the complainant's statutory right to anonymity contained in ***sections 1 and 2*** of the ***Sexual Offences (Amendment) Act 1992.***

3. This guidance was particularly necessary in this case because of the circumstances of the alleged offences. X is a senior civil servant working in a

central government department. The defendant is also a senior civil servant, who, in September 2003, worked as a senior press officer in the Department of Constitutional Affairs ("DCA"). The Cabinet Minister responsible for that department is, of course, the Lord Chancellor.

**The Prosecution Case**

4. The prosecution case, as opened to the jury by Miss Cheema on behalf of the Crown, was that the offences occurred in an office in a central government building after an informal party, or "gathering" in the same building. The party had been organised by civil servants in the DCA in order to meet colleagues in other government departments who were joining their team as a result of the re-organisation of departments following the ministerial reshuffle of June 2003. No ministers were present at any stage of the party, which was organised and paid for entirely by the civil servants. At the party both the defendant and X drank several glasses of wine so that, by the end of the party, both were "merry". At about 10 pm the party was ending and all the other people left.

5. The Crown's case was that the defendant and X were alone in an office. X went into another office and the defendant followed her in. Then he manoeuvred X over to an area where there was a sofa and chairs and he pushed X to the floor. There the defendant raped her vaginally. X was utterly shocked and said "please don't", but she was so scared that she froze. Thereafter her memory of the sequence of events was patchy. But she did recall being forced to perform oral sex on the defendant and remembered that they had vaginal intercourse a second time and also against her will.

6. The Crown's case was that both the defendant and X stayed in that office for several hours. Eventually X left the office whilst the defendant slept. She used her mobile phone to contact a colleague who lived nearby. She then left the building and went to the colleague's home. There, after a long discussion between X and her colleague, X decided that the police should be called. The police were called and X made a complaint of rape and forced oral sex.

7. X was medically examined later that day. During the examination, forceps had to be used to remove a tampon from the upper part of X's vagina. Between September 2003 and January 2004, X was seen by the police on

many occasions when statements were taken from her and recorded interviews were conducted.

**The Defence case**

8. The defendant was arrested on 30 September 2003. He was interviewed the next day and again on 26 January 2004. He was charged with the two offences on 27 April 2004. In interview his account of the evening was that towards the end of the party X had led him from one office to another, where she had sat on the sofa and he had sat on the floor and they had talked. She had lifted her skirt and asked him to masturbate her orally, which he did. Then she had taken off her clothes and had undressed him to some extent. She had performed oral sex on him and she had asked him to be rough with her. They had had vaginal intercourse on the floor. She had asked him to perform anal intercourse, but he did not do so. He may have penetrated her digitally. He said that she was the instigator and was enthusiastic throughout these events.

**The Trial**

9. After Miss Cheema had opened the case for the Crown a number of witnesses were called to give evidence about the background to the evening of 29 September 2004 and the events at the party that evening. By the midday adjournment on Wednesday 1 December 2004 it was clear that the complainant would be starting her evidence that afternoon. A direction had already been made that X would give evidence behind screens.[1] Miss Cheema went to introduce herself to the complainant, in accordance with the proper practice. Miss Cheema was then told, for the first time, that the complainant felt that she would be unable to give evidence unless there was a reporting restriction on the intimate details of the alleged offences[2]. Miss Cheema reported this fact to me, sitting in open court, but in the absence of the jury. I decided that the remaining "background" evidence should be called and then the jury sent home for that day. When this was done I ordered that if the Crown wished to make an application for an order under ***section 4(2)*** of

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[1] This "Special Measure" direction had been made before the start of the trial, pursuant to ***section 17(1)*** of the ***Youth Justice and Criminal Evidence Act 1999.***

[2] I was told by Miss Cheema that X had previously expressed a ***wish*** for reporting restrictions, but had been told, on the written advice of Prosecuting Counsel, that there was no basis for such an application.

the ***Contempt of Court Act*** then a statement must be taken from the complainant; a draft order drawn up and an Outline Argument served by the Crown to which the defence could respond. The Crown decided to make the application and I heard argument the following day, as I have already stated.

**The Statement of the Complainant**

10. On 2 December 2004, X herself wrote out a statement (in ***section 9 CJA 1967*** format), explaining which topics of her evidence she wished to be subject to reporting restrictions and why she sought an order for restrictions. Essentially X requested that there be no reporting of two historical matters, the allegation of oral sex on the night of 29/30 September 2003 and the fact that a tampon had had to be removed by forceps. X said that there had already been considerable press coverage of the allegations, both at the time of the events and subsequently at the committal proceedings. She said that this was because of her position as a senior civil servant and because the alleged offences had taken place in central government offices. She said that, in her view, many of her civil service colleagues had ***already*** identified her as the complainant.

11. Her statement continued:

> "*If the details for which I am asking for a reporting restriction are published, there is a large number of people (those who work for me, those who work with me; and those who work in supporting roles eg. security around the buildings) who I see on a daily basis and who will know those details about me.*
> *If that happened I would not be able to face returning to work and I would lose not only my income, but what has been till now a successful and satisfying career.*
> *As a result of this, without the benefit of the restrictions sought, I believe that I will be unable to give evidence in this case. Should they be granted I believe that they will maximise the quality of my evidence and give me the confidence I need to enter the court".*

**The Statutory provisions and the proposed orders**

12. ***Section 4*** of the ***Contempt of Court Act 1981*** provides:

> ***"****(1) Subject to this section a person is not guilty of contempt of court under the strict liability rule*[3] *in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.*

[3] ***Section 1*** of the Act defines "*the strict liability rule"* as "*the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so".*

> *(2) In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any proceedings pending or imminent, order that publication[4] of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.*
> *(3) If publication of a report is postponed as a result of an order under subsection (2), a report published as soon as practicable after the order expires is to be treated as contemporaneous and therefore entitled under subsection (1) to protection from contempt proceedings".*

13. Miss Cheema produced two draft orders. The first, which was known as Draft Order A, would have prevented reporting by the press (or other media) of four classes of evidence. The most relevant were evidence of: (a) the allegations of forced oral sex; and (b) details concerning the tampon and its removal during X's medical examination the following day. "Evidence" was defined as including the evidence of the complainant, the defendant or any other witness. The draft proposed that there should be no reporting of any references to the classes of evidence identified that was made in the course of evidence being given, counsels' speeches, the summing up and (if it became relevant) any sentencing remarks. The draft proposed that the order should remain in force for the lifetime of the complainant.

14. The second draft, called Draft Order B, was in even wider terms. The classes of evidence to which the order would apply were more widely drawn so as to cover all the acts that the defendant said had occurred between X and himself that night with the complainant's consent. Draft Order B contained the same definition of "evidence" and was otherwise in the same terms as Draft Order A.

15. The effect of both the proposed orders, if one or other had been granted, would have been to prevent any reporting of some or all of the critical parts of the evidence in the case during the lifetime of X. Moreover, because of the broad definition of "*publication*" in ***section 2(1)*** of the 1981 Act, the effect of either order would have been to prevent any person (whether a court

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[4] ***Section 2(2)*** of the Act makes it clear that the strict liability rule only applies to "*publications*" which create a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. ***Section 2(1)*** defines a "*publication*" as including "*any speech, writing, programme…which is addressed to the public at large or any section of the public*".

reporter or not) from reporting the proscribed classes of evidence "*to the public at large or any section of the public"* by any speech, writing, radio, television, email or via a web-site. Anyone who did so would have been in contempt of court. So, in practice, the only members of the public who could know of all the evidence would be those actually sitting in the court's public gallery during the case.

**The submissions of the Crown**

16. Miss Cheema's submissions were elegantly simple. She argued that the complainant had said in her statement that without the benefit of a restriction on reporting of various classes of evidence she believed that she would be unable to give evidence in the case. That state of affairs constituted a *"substantial risk of prejudice to the administration of justice"* in this trial. That was because if there was a substantial risk that the complainant might not give evidence then there could not be a trial before a jury of the serious allegations that had been made against the defendant which were the subject of the Indictment, because the continuation of the trial would be impossible. That state of affairs constituted a substantial risk of prejudice to the administration of justice.

17. It was "*necessary"* to impose a reporting restriction to avoid the substantial risk that the complainant would not give evidence because there was no other effective way of averting the risk. A witness summons might be issued and the complainant brought to court, but she could still refuse to testify, even though that would put her in contempt of court. Although the effect of the proposed orders would impugn the principle of "open justice", the need to avoid the risk of prejudice to the administration of justice was of greater importance. Therefore the court should exercise its discretion to make an order that imposed reporting restrictions. Miss Cheema accepted that, in her experience, no such order had ever been made in a trial of alleged rape or indecent assault.

**The arguments of the defence**

18. Miss Marsh accepted that if X was, indeed, refusing to give evidence without reporting restrictions, then that could amount to a "*substantial risk of prejudice to the administration of justice"* in this case, in which the evidence

of X was central. However, she submitted, the Court should look carefully at X's statement, which contrasted with others that she had previously made at various times during her interviews with the police, in which she had stated that she was prepared to come and give evidence. (X had been informed more than once of the need to give evidence in detail and that, although X would have anonymity, there were no grounds for further reporting restrictions). Next, Miss Marsh submitted that a ***section 4(2)*** order was not "*necessary to avoid"* the substantial risk that X would not give evidence. She submitted that a witness summons could be issued and X brought to court to see if she would give evidence or would wish to be in contempt of court.

19. Thirdly, Miss Marsh submitted that even if a reporting restriction order was "*necessary"*, both the proposed orders would so infringe basic principles of the procedure of criminal trials that the court must exercise its discretion not to grant the orders sought. In particular Miss Marsh submitted that criminal trials must be "open", as a matter of common law and under ***Article 6(1)*** of the European Convention on Human Rights ("***ECHR").*** Miss Marsh submitted that it would not be proportionate to invoke the proviso in Article 6 that the press and public could be excluded "*to protect the private lives of the parties*". Against that the court had to balance the right of the defendant to have a trial in public. Miss Marsh submitted that an open trial of these alleged offences did not infringe ***Article 8*** (right to respect of private and family life). However a reporting restriction would be an infringement of ***Article 10*** (freedom of expression).

20. Miss Marsh also submitted that even if it were necessary to impose reporting restrictions to avoid a substantial risk that X would not give evidence, that risk would pass as soon as she had given evidence. Therefore a reporting restriction could only properly be imposed for the period of her evidence, or, at the latest, until the end of the trial. Once the restrictions were lifted after X had completed her evidence (or at the end of the trial) then everything could be reported, including X's evidence and all further evidence. So X's difficulty about her embarrassment would remain. This demonstrated that the application was not being used for a proper purpose, but rather to gag the press so as to hide X's embarrassment.

21. In the light of this last submission I asked that further questions be put to X and she set out her answers in a further statement dated 3 December 2004, which she prepared herself. In that statement X said that even if reporting restrictions were to be lifted after her evidence or at the end of the trial, she confirmed the last paragraph of her first statement, which I have quoted above. I took this to mean that she would give evidence if there was a reporting restriction, even though that might be lifted after she had completed her evidence or at the end of the trial. X also said that she would wish the restrictions to be sufficiently wide to cover the defendant's case about the events of 29/30 September 2003. X said that this could only be achieved by making a reporting ban in the wider form of Draft Order B and that is what she sought.

**Submissions on behalf of the press**

22. On behalf of the press, Mr Bennett submitted that it had long been accepted that the press (and other media) were an extension of the public gallery and the two were indivisible[5]. He said that there were four parties whose interests lay in upholding "open" or "public" justice in this case. First, the prosecution, so that it could say publicly, as a "minister of justice", that the prosecution was proper and fair. Secondly, the defendant; for him an open trial enables the public to see he has a fair trial. If the press could not report the major part of the trial then injustices could go uncorrected. Thirdly the court itself; an open trial enabled the court to show the world that there had been no undue pressures on it. In a criminal trial in front of a jury, "the court" must mean both judge and jury. Mr Bennett submitted that this aspect is particularly important in this case where the complainant and the defendant are senior civil servants and the cabinet minister responsible for the department in which the defendant works is the Lord Chancellor. Lastly, the public itself is an interested party. Trials, particularly one like this, need to be "open" so that the public can have confidence in the independence of judges and the administration of justice from the Executive.

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[5] Mr Bennett cited the speech of Lord Halsbury, Lord Chancellor, in ***MacDougall v Knight (1889) 14 App Cas 194 at 200: "****…the publication of what takes place [in court]….is allowed because such publication is merely enlarging the area of the court, and communicating to all that which all had the right to know".*

23. Mr Bennett also submitted that the cases demonstrate that reporting restrictions have never been imposed simply to avoid embarrassment to a party and that was all that was involved here. Furthermore, the Crown's opening of the case had put in the public domain at least some of the embarrassing facts that concerned the complainant. Therefore it would be wrong to impose reporting restrictions now.

**Analysis and Conclusions**

24. All counsel told me that, in their experience, an application of this nature had never before been made in a criminal trial. I have also not been able to find a precedent for it. In general, it has long been the law of England and Wales that criminal trials will be tried openly and in public unless justice cannot be done in a public trial[6]. As Lord Shaw of Dunfirmline pointed out in his powerful speech in the leading case of ***Scott v Scott [1913] AC 417 at 477,*** some commentators have ranked the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security. Jeremy Bentham, also referred to by Lord Shaw[7], stated: "*Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial"*. At one point in her argument, Miss Cheema tentatively suggested that the public was only entitled to know those things that went on in this trial that it "needed to know". I said at the time that such arguments frequently seem alluring, but they were the means by which autocratic regimes down the ages had justified secrecy and avoided exposing the workings of the state to the public in whose name actions were taken. Again, I agree with Lord Shaw's view that such arguments, if generally accepted, would lead to unwarranted encroachments on the general principle of public justice and could result in "*impair[ing] the rights, safety and freedom of the citizen and the open administration of the law"*.[8]

25. The public is admitted to criminal jury trials so that it can see that justice is being done by the prosecution and the court and so that the defendant can have

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6 Historically, this may not have been so in Scotland before 1689, or in most European countries: see the speech of Lord Fitzgerald in ***MacDougall v Knight (1889) 14 App Cas 194 at 207.***

7 In ***Scott v Scott at page 477.***

8 Per Lord Shaw in ***Scott v Scott at page 478.***

his case tried by a jury in public. The public gallery is extended through press reporting and other media coverage of trials, so that the public at large knows what is going on[9]. In ***R v Sherwood ex p The Telegraph Group [2001] EWCA Crim 1075,*** Longmore LJ, giving the judgment of the court, stated that the jurisprudence of the European Court of Human Rights had fully acknowledged that the press and other media "*have a positive duty to act as a "watchdog" or as "the eyes and ears" of the general public, and thus to inform their readers and viewers about issues of public interest including the administration of justice"*[10].

26. The right of a defendant to have a public hearing (subject to qualifications) is now set out in ***Article 6*** of the ***ECHR.*** The right to make a fair and accurate report of legal proceedings held in public, (provided that the report is contemporaneous and in good faith) has been given statutory recognition by ***section 4(1)*** of the ***Contempt of Court Act 1981.*** But these rights are subject to "*a yet more fundamental principle that the chief object of Courts of Justice must be to secure that justice is done",* as Viscount Haldane LC stated in ***Scott v Scott*** at ***page 487.*** That fundamental common law principle is reflected in the provisions of ***section 4(2)*** of the ***Contempt of Court Act 1981,*** which I have already quoted. It is also consistent with the qualifications on the right to a public trial set out in ***Article 6(1)*** of the ***ECHR*** and the qualifications to the general right to freedom of expression that is guaranteed by ***Article 10.***[11]

27. In ***R v Sherwood ex p The Telegraph Group,*** the Court of Appeal (Criminal Division) reviewed the cases that have considered the principles applicable to applications for an order under ***section 4(2)*** of the ***Contempt of Court Act*** imposing press restrictions. Longmore LJ suggested[12] that applications under ***section 4(2)*** should be approached in the following way:

> *"(1) The first question is whether reporting would give rise to a "not insubstantial" risk of prejudice to the administration of justice in the relevant proceedings. If not, that will be the end of the matter.*
> *(2) If such a risk is perceived to exist, then the second question arises: would a s. 4(2) order eliminate it? If not, obviously there*

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9 See the speech of Lord Halsbury in ***MacDougall v Knight: cited supra.***
10 See para 17 of the judgment.
11 See ***Article 10(2)*** of the ***ECHR.***
12 At para 22 of the judgment.

> *could be no necessity to impose such a ban. Again, that would be the end of the matter. On the other hand, even if the judge is satisfied that an order would achieve the objective, he or she would still have to consider whether the risk could satisfactorily be overcome by some less restrictive means. If so it could not be said to be "necessary" to take the more drastic approach: see* ***Re Central Independent Television Plc [1991] 1 WLR 4, 8D –G (per Lord Lane CJ).***
> *(3) Suppose that the judge concludes that there is indeed no other way of eliminating the perceived risk of prejudice; it still does not follow* ***necessarily*** *that an order has to be made. The judge may still have to ask whether the degree of risk contemplated should be regarded as tolerable in the sense of being "the lesser of two evils". It is at this stage that value judgments may have to be made as to the priority between "competing public interests": see* ***Ex parte The Telegraph Plc [1993] 1 WLR 980, 986 B-C".***[13]

I respectfully follow that approach and ask the same questions in this case.

28. Would unrestricted reporting (whilst observing the requirement of anonymity of course) give rise to a "*not insubstantial"* risk of prejudice to the administration of justice in the present trial of Mr Burrell? Having considered the two statements that X has written and signed in relation to this issue, I am satisfied that, if there were unrestricted reporting, then there would be an appreciable risk that X might not give evidence at all. I am not satisfied that it is certain that she would not do so, given her previous statements to the police that she wished to give evidence in court, which were made in the knowledge that there would be reporting. I accept that if X did not give evidence in this trial, then it would mean that the trial could not continue. That would lead to one of two results. Either the prosecution would say that it offered no evidence against the defendant; in which case I would have to direct the jury to enter a "not guilty" verdict, as there would be no prosecution case to answer. Alternatively, I would have to discharge the jury and bring this trial to an end, but give the prosecution time to consider what to do next.

29. It does not follow that there would ***necessarily*** be prejudice to the administration of justice if one or other of the above courses had to be taken. That would be to assume that there ***must*** be prejudice to the administration of justice simply because the trial did not go ahead. But we cannot know at that

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[13] At para 20 of the judgment, Longmore LJ states that at this stage of considering the matter: "*Sometimes wider considerations of public policy come into play such as to justify the refusal of a banning order even though there is no other way of eliminating the prejudice anticipated".*

stage what might have happened if the trial were to go ahead; the administration of justice might be prejudiced by other matters. But I do accept that if there is an appreciable risk that X might not give evidence were there unrestricted reporting, leading to the consequences outlined above, then that would constitute a "*not insubstantial risk"* of prejudice to the administration of justice.

30. Would an order under ***section 4(2)*** of the ***Contempt of Court Act*** eliminate this perceived risk of prejudice to the administration of justice? A banning order, made in terms of Draft Order B, would place a ban on reporting of all sensitive and embarrassing evidence relating to the events of 29/30 September 2003, including the defendant's account of that evening. That Draft Order would impose a ban for the whole of X's lifetime. I am prepared to accept that a lifetime ban in the wide terms of Draft B would eliminate the perceived risk of X not giving evidence. I accept that service of a witness summons on X might well not overcome that risk, because X might still refuse to give evidence, despite the risk of being held in contempt of court is she did not do so.

31. However, I must deal with the point that if there is a risk of prejudice to the administration of justice, that arises because X says that "*without the benefit of the restrictions sought, [she] believes that [she] will be unable to give evidence in this case"*. That risk obviously disappears once X has given her evidence. So, logically, there could be no justification for maintaining reporting restrictions after X had given her evidence. Indeed, ***section 4(2)*** of the ***Contempt of Court Act*** requires that any reporting restrictions should only be postponed **"***for such period as the court thinks necessary for"* the purpose of avoiding a substantial risk of prejudice to the administration of justice. Therefore, after X had given evidence any ban would have to be lifted; its maintenance would not thereafter be ***necessary*** to avoid a risk of prejudice to the administration of justice.

32. But X's reason for wishing to give evidence only if reporting restrictions are in place is that, without them, she cannot face returning to work with colleagues who had ***already*** identified her as the complainant before she started to give evidence and would read the details of the allegations as

reported. Yet if the reporting restrictions were only in place for the period ***necessary*** to avoid the risk of X not giving evidence (which is what gives rise to the risk of prejudice to the administration of justice), then the risk of X's embarrassment will remain. The press and other media would be free to report her evidence as soon as the reporting restrictions were lifted. And they could report the evidence of further witnesses (such as the doctor who examined X the next day) which deal with the intimate details which cause X her embarrassment.

33. X tried to deal with this dilemma in her second statement by saying (in effect) that she would give evidence even if the reporting restrictions only applied during the time she gave evidence (or until the end of the trial). That statement is entirely illogical and I cannot accept it. It undermines the very basis for X's unwillingness to give evidence in the first place; ie. that unrestricted reporting will cause her such embarrassment that she will be unable to face returning to work.

34. Therefore, if the court is to make an order that eliminates the risk of prejudice to the administration of justice in this case, the order must be in the widest possible terms and must be for the period of X's lifetime. Anything less would not eliminate the perceived risk. That being so, I have to consider the third of the questions posed by the court in ***R v Sherwood, ex p The Telegraph Group***. In short, is a wide, life – time ban "*necessary*", taking into account the facts in this case, and the wider public policy considerations encapsulated in ***Articles 6, 8 and 10(2)*** of the ***ECHR,*** as well as the general common law principles I have touched on above?

35. I have concluded that, taking all these matters into account, the balance comes down firmly against making a life – time ban on reporting. Moreover, as nothing less than that would eliminate the perceived risk of prejudice to the administration of justice, no order under ***section 4(2)*** of the ***Contempt of Court Act*** should be made.

36. The points I have taken into account in reaching this conclusion are these:

    (1) X is entitled by statute to lifetime anonymity by virtue of ***sections 1 and 2*** of the ***Sexual Offences (Amendment) Act 1992.*** But in making those provisions, Parliament has expressly provided that there

may be publication of a report of criminal proceedings of a trial in which the accused is charged with a sexual offence: see ***section 1(4)*** of the ***1992 Act.*** This means that whilst Parliament has forbidden the public from knowing the identity of a complainant, it has not placed any general reporting restrictions on trials of sexual offences. Parliament must be presumed to know that it will be both distressing and most embarrassing for any complainant to have to give evidence of allegations of rape and indecent assault in the detail needed in a trial by jury. Yet Parliament has not said that there should be a general restriction on reporting of such intimate matters of evidence.

(2) Furthermore, a "Special Measures" direction had been made by the court under the provisions of ***Part II, Chapter 1*** of the ***Youth Justice and Criminal Evidence Act 1999.*** The purpose of those provisions, as set out in ***section 17(1),*** is to assist witnesses "*if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings"*. Yet these provisions of the 1999 Act do not impose any general regime of reporting restrictions of the evidence of witnesses who are eligible for "Special Measures"[14].

(3) The reason for this is, in my view, clear. It is because public justice is the rule in England and Wales. That general rule is healthy. Public trials subject both the prosecution and the court to public scrutiny; they enable the defendant to have his case heard in public; and they mean that the public can see what is being done in its name.

(4) Parliament has passed the ***Human Rights Act 1998,*** which, by ***section 6,*** makes it unlawful for a "*public authority to act in a way that is incompatible with a Convention right"*. That Act obliges a court, as a public authority, to ensure that a defendant has a public

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[14] Miss Cheema drew my attention to ***section 46*** of the ***Youth Justice and Criminal Evidence Act 1999,*** which came into force for all criminal proceedings ***instituted*** after 7 October 2004. ***Section 46*** permits a court to make reporting restrictions in relation to the evidence of adult witnesses (other than the accused). The restriction, if granted, will be for the witness' lifetime. But the object of the exercise is not to prevent reporting of the events that are the subject of evidence. It is only to ensure that the public cannot identify the person concerned as a witness in the proceedings: ***see section 46 (6).***

trial in accordance with ***Article 6(1)*** of the Convention, subject to the qualifications set out there.[15] The court must also give effect to the right of freedom of expression conferred by ***Article 10(1),*** subject to the "*duties and responsibilities"* and "*restrictions"* set out in ***Article 10(2).*** But the court is also obliged to protect a person's respect for private and family life, pursuant to ***Article 8(1),*** although this right is subject to the qualifications set out in ***Article 8(2).*** It is well established that none of these rights "trumps" any other. Counsel did not refer me to any cases where these different provisions of the ***ECHR*** had been considered in the context of the specific issue raised in this case. However, it seems to me that, in the context of a criminal trial, a Court should give due weight to the right of a defendant to have a public trial under ***Article 6(1)***. Mr Burrell wishes to exercise this right in his case. As Miss Marsh pointed out, this is understandable in a case concerning two senior civil servants. The defendant would wish to ensure that the jury and the public see that the court was not being put under any pressure by the Executive in such a sensitive case.

(5) There are a number of cases in which the court has considered whether an order should be made under ***section 11*** of the ***Contempt of Court Act,*** to give anonymity to a party to litigation where the proceedings might be embarrassing to a party for personal or financial reasons. The courts have refused to grant such an order unless it is shown that otherwise the administration of justice would be frustrated or made impracticable[16] or the health of the applicant would be damaged[17]. By analogy, a court should be reluctant to grant an order under ***section 4(2)*** of the ***Contempt of Court Act*** simply because the evidence will be embarrassing to the complainant.

(6) In her first statement (on this issue) X said that if reporting restrictions were granted "*I believe that they will maximise the quality of my*

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[15] ***Article 6(1)*** expressly provides that the press and public may be excluded from all or any part of the trial "*to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice"*.

[16] ***R v Evesham JJ ex p McDonagh [1988] 1 QB 553 at 562 per Watkins LJ.***

[17] ***H v Ministry of Health [1991] 2 QB 103 at 107 per Lord Donaldson MR.***

*evidence and give me the confidence I need to enter the court".*[18]
Miss Marsh submitted that if X had given evidence with the benefit of reporting restrictions then I would have to give a direction to the jury about this fact, by analogy with the direction that must be given when a witness has given evidence under "Special Measures": see ***section 32*** of the ***Youth Justice and Criminal Evidence Act 1999.*** Although Miss Cheema did not accept this, I am sure I would have had to give some kind of direction, although the precise form would need careful thought. In a "Special Measures" direction the judge says that giving evidence in this way is normal in cases involving allegations of sexual assault. But it is not normal to give evidence with a life - time reporting restriction in place at the complainant's request. Would one have to explain to the jury that reporting restrictions had been in place and why? I think that a direction which ensured that the jury appreciated that the complainant had had the unusual benefit of reporting restrictions; warned them that this was not done as a special favour because of her position as a senior civil servant; told them to consider her credibility and her evidence in the light of the special circumstances in which she gave it; and reminded them that the defendant had no such protection would be long, convoluted and could easily be misinterpreted. Even a most carefully worded direction might not avoid the jury being influenced against the defendant once they know that the complainant had given evidence under reporting restrictions.

(7) In the course of argument, whilst urging that each case must be considered on its own facts, Miss Cheema accepted a number of general principles: first, that the court must not be influenced by the fact that X is a senior civil servant employed in a central government department or that the defendant is a senior press officer in the Department of Constitutional Affairs, whose ministerial head is the

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[18] The words (doubtless unwittingly) follow those of ***section 46(2)(b)(i) and (ii)*** of the ***Youth Justice and Criminal Evidence Act 1999.*** Those provisions state that in deciding whether to grant reporting restrictions in relation to the evidence of an adult witness the court has to consider whether a restriction will improve the quality of the evidence of a witness; or his co-operation with a party in the case.

Lord Chancellor. Secondly, she accepted that if it is right to grant an order restricting press reporting in this case because the complainant would be so embarrassed on a return to work as a civil servant, then the same principles must apply to a complainant who works in the private sector. Thirdly, Miss Cheema accepted that the same principles must apply whether a complainant is in a senior position or is in a junior position. Fourthly, Miss Cheema accepted that if it was right to make a life – time reporting restriction in this case because of X's fears, then the same reasoning could be used to support reporting restrictions in many cases of alleged rape or indecent assault which were said to have taken place eg. at an office party at Christmas time or in other similar circumstances. Lastly, Miss Cheema acknowledged that, so far as she was aware, no such order had ever been made in cases of that kind.

37. Having taken all these factors into account and considered the "*value judgments that may have to be made as to the priority between "competing public interests",*[19] I have come to the firm conclusion that a life – time reporting restriction in the form of Draft Order B should not be made. The countervailing public interests, which I have attempted to identify above, are so strongly against such an order that, overall, it is not in the interests of justice that such an order should be made. The application is therefore refused.

38. **Postcript.** After I made my ruling in the afternoon of Friday 3 December 2004, Miss Cheema told me that the complainant wished to consider the matter over the weekend. On Monday 6 December 2004 the complainant said that she wished to give evidence. She did so (behind screens) on Monday 6 December and Tuesday 7 December. By the end of that day she had completed her examination in chief and much of her cross examination. On Wednesday 8 December I was told that the complainant was too unwell to continue her evidence. She was examined by Dr Beata Cybulska, a medical practitioner who is very experienced in dealing with complainants of sexual assault. Dr Cybulska's opinion was that the complainant was not fit to

[19] The phrase used by the court at para 22(3) of his judgment in ***R v Sherwood ex p The Telegraph Group, supra.***

continue to give evidence and would not be so for the foreseeable future. Having heard submissions from counsel on what course I should take, I decided I must discharge the jury, which I did on Thursday 9 December 2004.