

KL V Regina

1. The Court of Appeal Criminal Division and the Divisional Court have confirmed the circumstances in which the Crown, a Defendant, or a third party can challenge the making, variation, or failure to make a reporting restriction for a young person in the criminal justice system.

The power

2. By section 45(3) of the Youth Justice and Criminal Evidence Act 1999 a court dealing with a defendant may order that no matter relating to the defendant (while he is under the age of 18) be included in any publication if it was likely to lead members of the public to identify him as a person concerned in criminal proceedings.
3. However, pursuant to section 45(4) of the same Act a judge can make an Excepting Direction, which means the press can name that defendant. Evidently, the decision as to whether or not an Excepting Direction is made is of importance not only to a Defendant, but also to members of the press, and to a Defendant's family.

How to challenge an Excepting Direction

4. There had been conflicting caselaw about how to challenge the making of an Excepting Direction.
5. In this case, the court set out the following jurisdictional points:
 - a. The making of an Excepting Direction is amendable to judicial review by a Defendant, or other party with an interest in making it, such as the press.
 - b. A Defendant can also challenge the making of an Excepting Direction at the Court of Appeal (Criminal Division) but only if he has been granted leave to appeal his

conviction and/or sentence. There is no freestanding right to appeal the making of an Excluding Direction in the Court of Appeal (Criminal Division).

The test to be applied

6. The Divisional Court then went on to set out the principles to be applied when determining an application for an Excluding Direction, which were as follows:

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

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

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

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

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

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

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

7. Courts should be well aware of these principles, and journalists seeking an Excepting Direction must make their applications in good time, to allow the Defendant to object.

Whilst every effort has been taken to ensure that the law in this article is correct, it is intended to give a general overview of the law for educational purposes. Readers are respectfully reminded that it is not intended to be a substitute for specific legal advice and should not be relied upon for this purpose. No liability is accepted for any error or omission contained herein.



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