Neutral Citation Number: [2020] EWHC 1805 (Fam)

Case No: FA-2020-000029 / ZC16F00658

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Sitting remotely
As from Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/07/2020

Before:

THE HONOURABLE MR JUSTICE COBB

- -

Between:

YUNUS MANJRA	**Appellant**
- and -	
REHMA SHAIKH	**Respondent**

- -
- -

Adnan Mahmood (Solicitor Advocate from **Aman Solicitors**) for the Appellant
The Respondent appeared in person, assisted by a McKenzie Friend, Andrew Danby

Hearing date: 2 July 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 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 Honourable Mr Justice Cobb:

Introduction

1. This is an appeal from an order of Her Honour Judge Hughes QC sitting at the Central Family Court on 7 January 2020. The order under challenge is the refusal of the Judge to discharge a non-molestation order granted in 2016 under *section 42* of the *Family Law Act 1996* ('*FLA 1996*'), and her substitution of an order which was expressed to "continue indefinitely". Permission to Appeal was granted by Gwynneth Knowles J on 19 May 2020.

Facts

2. After years of marriage, the relationship of the Appellant (who I shall refer to, for convenience only, as 'the husband' even though the parties are no longer married), and Respondent ('the wife') deteriorated, and in 2016 it broke down. In November of that year, the wife applied at the Central Family Court for orders under the *FLA 1996* namely (i) a non-molestation order against the husband, and (ii) an occupation order to regulate the continued co-occupation of the matrimonial home (specifically, forbidding the husband from entering the master bedroom). These orders were made *ex parte* by a judge sitting at the Central Family Court on 18 November 2016. Significantly, while the orders were expressed to "begin from the time that the respondent is made aware of the terms of this order", no provision was made in the order for their expiration.

3. The November 2016 non-molestation order contained the following further terms:

> "The respondent [husband] may request a hearing to vary or revoke this order on 48 hours written notice.
>
> The application for a non-molestation order is listed before a District Judge on 13 December 2016 at 10am for mention (time estimate 5 minutes) … and the following directions shall apply
>
> i) Neither the applicant [wife] nor her legal representatives are to attend the mention date;
>
> ii) If the respondent [husband] wishes to request a hearing to vary or revoke this order he must attend court in person on the mention date and the court may then fix a further hearing when both parties may attend to consider whether this order may be continued, varied or revoked."

4. It is accepted that the husband was served with the orders and took no steps to vary or revoke them. Both parties continued to reside together in the matrimonial home for more than two years. No application was made for any further or other order under the *FLA 1996*, nor was there any suggestion that there had been any breach of the November 2016 orders.

5. In or about May 2018, the parties settled their financial remedy proceedings by agreement. Under the agreement, the matrimonial home was to be transferred to the husband. In August 2019, the wife moved out of the home. The parties are now divorced.

6. On 6 November 2019, nearly three years after the order was originally made, the husband applied to the court to discharge the non-molestation and occupation orders. His application was listed for directions on 7 January 2020.

The 7 January 2020 hearing

7. At the hearing on 7 January 2020, the husband was represented by Mr Mahmood, as he was on the appeal. The mother was then, as at the appeal, acting in person; she is an articulate woman who put her case to me clearly and cogently. Before HHJ Hughes QC, the parties agreed, for obvious reasons, that the occupation order should be discharged. The wife opposed the discharge of the non-molestation order. I have been provided with a transcript of the hearing, a note of the judgment, and a copy of the order.

8. At the outset of the hearing, the judge considered with the parties whether the matter would proceed as a final hearing, notwithstanding that it was listed for directions only:

> "…it seems to me… that we should deal with this case today, once and for all. I cannot see why we would have a directions hearing, and then a further hearing. I either decide I am going to discharge the order, or I am not going to discharge the order. But, to come back again to find out if I am going to discharge the order, maybe you file some evidence, it seems to me a bit of a waste of time…"

9. The judge then went on to consider the rationale for the continuation of the order:

> "… what I do not really understand is, if there has been no communication between the couple, why is this so important that it is discharged?"

10. After the presentation of the husband's case, the wife addressed the judge; she explained that she had felt harassed by the husband's solicitors who had repeatedly contacted her seeking her written agreement to the discharge of the orders; she told the judge that she had reported the solicitors to the police. The exchange continued:

JUDGE	"… you would accept would you, that there has been no difficulty from Mr Manjra – this is his solicitors writing to you. But he has not, himself, come and contacted you or caused you -
RESPONDENT [WIFE]	Well, no. But I mean his solicitors only act on his instruction.
JUDGE	I understand that."

As the discussion unfolded, the judge addressed the wife:

> JUDGE: "… the injunction was made in 2016. It should have had a date when it would end. Most non-molestation orders last for 12 months. And can be extended if there is trouble. In your case there is no way that I can make the order now because there has been no trouble for a very long time. however, maybe the injunction has had its use because it has kept the peace between you."

The wife did not respond to those remarks.

11. In her judgment, the judge made the following points:

    i) Concerning the November 2016 order "[the judge] did not put a time limit on his order. Nor did he make a return date, both of which are now not considered very good practice";

    ii) Since the orders were made…. "[c]learly there has been no problem and there would be no jurisdiction for the court to extend the order or to make the order today";

    iii) "However, for my part, I see absolutely no reason why the non-molestation order should be interfered with… whilst I accept there has been no trouble, and nothing has happened which would justify any further hearing or any further order, I cannot see that it is going to inconvenience the husband in any way for it to continue. It serves as protection to the wife. They have gone their separate ways and there just does not seem to me any good reason at all advanced by Mr Manjra as to why the non-molestation order should, at this stage, be discharged. It has been in operation for three years and no harm has come to him. No harm has come to her."

    iv) Her concluding words of her judgment were: "The order is there, but it is just there because it was made. It does not seem to me any good reason now … to change it."

12. The order following the hearing on 7 January 2020 contains the following recitals:

> "AND UPON the matter being listed for a directions appointment…
>
> AND UPON the parties agreeing that the Occupation Order dated 16 November 2016 be discharged on the grounds that the Applicant no longer resides at the former matrimonial home.
>
> AND UPON the Applicant informing the Court that there have not been any incidences amounting to threats or intimidation by the Respondent since 16 November 2016;

> AND UPON the Applicant opposing the application to discharge the Non-Molestation Order dated 16 November 2016, no witness statement having been filed…
>
> IT IS ORDERED THAT
>
> 1. The Occupation Order dated 16 November 2016 is hereby discharged
>
> 2. The Non-Molestation Order dated 16 November 2016 shall continue indefinitely."

The Appellant's case

13. The husband's case can be summarised thus:

    i) The original order (2016) had been made without limit of time; the judge rightly regarded this as contrary to good practice; however, the judge then perpetuated that failure of good practice by making a further order which continued the order indefinitely;

    ii) The order had been in place for three years at the time of the directions hearing, with no evidence of any alleged breach or behaviour complained of; the order should simply have been discharged;

    iii) The judge had accepted that had the application for a non-molestation order been made for hearing on 7 January 2020, it would not have succeeded on the facts known at that date ("In your case there is no way that I can make the order now because there has been no trouble for a very long time" [10] above); therefore it was wrong to continue the order;

    iv) By stating that the husband would not be inconvenienced in its continuation, the judge clearly applied the wrong test and had reversed the burden of proof;

    v) It was wrong, and fundamentally unfair, for the judge to make a 'final' non-molestation order, on notice and where the party against whom the order was to be made opposed the continuation of the order, without determining a proper factual basis for such an order; the Judge at the very least should have given directions for the application to be listed for a fact-finding hearing, and require the applicant for the order to demonstrate why such an order was on the facts both appropriate and necessary.

The Respondent's case

14. The wife opposes the appeal. She makes the following points about the order made at the conclusion of the hearing:

    i) An indefinite order is not unprincipled; the wife referred me in this regard to the Court of Appeal decision of *Re B-J (A Child)(Non-Molestation Order: Power of Arrest)* [2001] 1 ALL ER 235; [2001] Fam 415;

ii) The husband had not availed himself of the opportunity to challenge the order in 2016, and should not be given that chance now, so many years later;

iii) The non-molestation order had been effective in "modifying" the husband's behaviour; in that regard, it was *and continues to be* effective;

iv) That said, she still lives "in fear of all forms of domestic abuse";

v) There is no "obvious reason that an effective non-molestation order be discharged now… the non-molestation order does not impinge or limit [the husband] in any way should he simply go about his business as per normal"; she sought to persuade me that it was legitimate to leave it in place because "he is not affected in his day-to-day life by the order", and there would be "little to be gained by setting aside the order";

vi) In her oral submission, she made observed that "protection from abuse may not have an end date".

Discussion and conclusion

15. The statutory jurisdiction for the making of a non-molestation order is found in *section 42 Family Law Act 1996*. The relevant provisions are as follows:

> (1) In this Part a 'non-molestation order' means an order containing either or both of the following provisions –
>
> (a) provision prohibiting a person ('the respondent') from molesting another person who is associated with the respondent;
>
> (b) provision prohibiting the respondent from molesting a relevant child.
>
> (2) The court may make a non-molestation order –
>
> (a) if an application for the order has been made (whether in other family proceedings or without any other family proceedings being instituted) by a person who is associated with the respondent; or
>
> (b) if in any family proceedings to which the respondent is a party the court considers that the order should be made for the benefit of any other party to the proceedings or any relevant child even though no such application has been made.
>
> …
>
> (5) In deciding whether to exercise its powers under this section and, if so, in what manner, the court shall have

> regard to all the circumstances including the need to secure the health, safety and well-being –
>
> (a) of the applicant; and
>
> (b) of any relevant child.
>
> (6) A non-molestation order may be expressed so as to refer to molestation in general, to particular acts of molestation, or to both.
>
> (7) A non-molestation order may be made for a specified period or until further order.
>
> (8) A non-molestation order which is made in other family proceedings ceases to have effect if those proceedings are withdrawn or dismissed.

16. Molestation is not defined in the statute. In determining whether conduct complained of amounts to molestation, the essential question is whether the act complained of fits within the purpose for which the *FLA 1996* was enacted, namely to ensure that the victim of the conduct is not at risk of harm by violence, intimidation, harassment, pestering or interference which is sufficiently serious to warrant the intervention of the court. These orders are routinely made to protect applicants from all forms of 'domestic abuse'; that term has over the years been understood to include a wide range of behaviours, finding its most comprehensive definition in *PD12J FPR 2010*, as including:

> "… any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment".[1]

17. Victims of molestation or domestic abuse, in its many and varied forms, are entitled to the protection of the court through the grant of injunctions under the *FLA 1996*. It is well known that domestic abuse can and often does continue well beyond the point of relationship breakdown; many victims describe domestic abuse escalating after the point of separation. It seems to me, therefore, that protective orders should be made of a length which correlates to the risk which it is intended to guard against, and should be proportionate. Those accused of abusive behaviours are entitled to protections too: for a fair hearing, for a determination as required of the facts which

[1] The terms 'abandonment', 'coercive behaviour', 'controlling behaviour', 'harm' and 'ill-treatment' are all separately defined in PD12J

are alleged, and against unwarranted restriction or interference of the State in their lives.

18. The language of *section 42(7)* might reasonably be interpreted as suggesting that a non-molestation order should have a finite limit in time, brought to an end either at a named or specified point, or at the latest by the making of a 'further order'. This was the interpretation of the legislation given by Cazalet J in *M v W (Non-Molestation Order: Duration)* [2000] 1 FLR 107[2]. However, Cazalet J's decision was specifically disapproved by the Court of Appeal in *Re B-J*, cited to me by the wife (for citation see above), as "too restrictive" and not representing the intention of Parliament[3]. Hale LJ (as she then was) giving the lead judgment in *Re B-J* (dismissing an appeal against the making of a non-molestation order of indefinite duration) said this:

> "A non-molestation order is indeed sometimes, even often, designed to give a breathing space after which the tensions between the parties may settle down so that it is no longer needed. But in other cases it may be appropriate for a much longer period, and it is not helpful to oblige the courts to consider whether such cases are "exceptional" or "unusual" (at [2000] 2 FLR 443 at [29]).

Having cited the legislation, and the Law Commission report (Law Com No.207, at para.3.28) which had foreshadowed it, Hale LJ continued:

> "There are obviously cases, of which this is one, in which the continuing feelings between parties who separated long ago are such that a long term or indefinite order is justified." ([33]) (emphasis by underlining added).

19. Although not cited to me by the wife, I also located and considered the case of *Galan v Galan* [1985] FLR 905 in which the Court of Appeal confirmed that "[n]ormally an order for a short, fixed period will be the appropriate order, if any, for the court to make", and that while an order unlimited in time will not normally be appropriate, "there is nothing in the *1976 Act*[4] expressly to limit the discretion of the court as regards the duration of the order" (Slade LJ).

20. I suggest that these appellate judgments (*Re B-J* and *Galan*) must now, however, be considered in the light of two significant developments in this area:

    i) First, amendments to the *FLA 1996* were introduced on 1 July 2007 by the *Domestic Violence, Crime and Victims Act 2004* ('*DVCVA 2004*'); *section 1* of

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[2] Cazalet J: "the object of non-molestation orders is designed to give a breathing space for the parties and, unless there are exceptional or unusual circumstances, it should be for a specified period of time. If this latter course is not taken, then many years may go by and a party may find himself or herself suddenly arrested under an order made many years previously when much has since changed, and the original order has lost the substance of its main purpose" (at p.111)

[3] "To seek to limit the great variety of factual circumstances in which these orders may be needed by such words as 'exceptional or unusual' is to invite just the sort of argument which took place in this court in respect of an order which was clearly justified by the circumstances of the case in the interests of the little girl concerned" ([35])

[4] The Domestic Violence and Matrimonial Proceedings Act 1976; *section 1* made no reference to the need for an order to be made for a specified time or until further order.

the *DVCVA 2004* introduced a new *section 42A* to the *FLA 1996* which imported a criminal sanction for breach of a non-molestation order, which became punishable as an offence by up to five years imprisonment. This change in the law accentuated the gravity of the order and the consequences of breach, and to my mind underlines the importance of orders being clear in their terms, leaving no ambiguity about their provisions, and/or, I suggest, as to their duration;

ii) Secondly on 13 October 2014, Sir James Munby P issued guidance about the duration of *ex parte* (without notice) orders; this guidance was in force at the time the original non-molestation order was made in this case. The guidance is currently contained in a similar but expanded form in the *President's Practice Guidance: Family Court – Duration of Ex Parte (Without Notice) Orders* [2017] (18.1.2017). As its name suggests, this guidance specifically applies to *ex parte* (without notice) orders but contains principles which, it seems to me, apply equally to on notice orders; this is particularly emphasised by the fact that, as Sir James Munby P reflected in the guidance, "the respondent frequently neither applies to set aside or vary the order nor attends the hearing on the return day".

21. Two points of principle, or good practice, emerge from the *2017 Guidance* which have relevance to these facts:

i) "An *ex parte* (without notice) injunctive order must <u>never be made without limit of time</u>. <u>There must be a fixed end date</u>. It is not sufficient merely to specify a return day";

ii) "Careful consideration needs to be given to the duration of any order made *ex parte* (without notice). Many orders will be of short duration, typically no more than 14 days. But in appropriate cases involving personal protection, such as non-molestation injunctions granted in accordance with *Part IV* of the *Family Law Act 1996*, <u>the order itself</u> <u>can be for a longer period, such as 6 or even 12 months</u>, provided that the order specifies a return day within no more than 14 days. <u>This must be a matter for the discretion of the judge, but a period longer than 6 months is likely to be appropriate only where the allegation is of long-term abuse or where some other good reason is shown</u>. Conversely, a period shorter than 6 months may be appropriate in a case where there appears to be a one-off problem that may subside in weeks rather than months" (emphasis added by underlining).

The President was clear that compliance with this guidance is "essential" (see paragraph 5 ibid.). The approved standard form orders (see Form 10.1) which are in widespread use, correspond with this guidance and notably contemplate (per para.22) an order with a finite end.

22. Drawing these points together:

i) The *FLA 1996* contemplates first and foremost that an order may be made for a specified period, or until "further order"; the expectation is that if there is no end date specified in the order, there will be an order bringing the injunction to an end;

ii) Adherence to the *Practice Guidance: Family Court – Duration of Ex Parte (Without Notice) Orders* is essential for all ex parte orders, and the principles should apply equally to on notice orders;

iii) It is, and has been for some time, good practice for orders to stipulate an end date; that date is likely to be no more than 12 months following the making of the order;

iv) There may still be circumstances where the court is entitled to conclude that a non-molestation order for a longer, or even an indefinite period, is justified; Hale LJ deprecated the suggestion that these orders should be made only 'exceptionally'. I suggest that the circumstances in which such orders are made will include cases where there is evidence of persistent molestation after the initial injunctive order; put another way, there may be cases where the court takes the view, on the facts, and as the wife submitted to me in this case as a general point, that the requirement for protection from abuse has no foreseeable "end date".

23. Given the above, it was contrary to common good practice of the Family Court, and unusual, for a non-molestation order to have been made, in November 2016, without limit of time. It was therefore rare for an application for the discharge of a non-molestation order to be issued many years after the date of the order. In this regard, the application made to HHJ Hughes QC on 7 January 2020 was an extraordinary one.

24. The judge resolved to determine the application summarily. Although I detected from the transcript no explicit agreement to this course, I consider that she was entitled to adopt this approach as her starting point, at least until it was apparent whether evidence needed to be called on any disputed fact. In my judgment her approach fell well within an acceptable spectrum of procedure (*Re B (Minors) (Contact)* [1994] 2 FLR 1 at p.6[5]).

25. However, I consider that the judge then fell into error in two major respects in determining the husband's application.

26. First, she wrongly approached the question of whether the order should continue or be discharged not by reference whether it was necessary for the court to continue to protect the legal right of the wife from "conduct which clearly harasses and affects the applicant to such a degree that the intervention of the court is called for" (*C v C (Non-molestation Order: Jurisdiction)* [1998] 1 FLR 554), but by considering whether there was any prejudice to the husband in its continuation. This error in her approach is evidenced by her comments:

i) "why is this so important that it is discharged?" ([9] above);

ii) "I cannot see that it is going to inconvenience the husband in any way for it to continue." ([11](iii) above);

[5] "There is a spectrum of procedure for family cases from the ex parte application on minimal evidence to the full and detailed investigations on oral evidence which may be prolonged. Where on that spectrum a judge decides a particular application should be placed is a matter for his discretion": Butler Sloss LJ

iii) "it has been in operation for three years and no harm has come to him" ([11](iii));

iv) "It does not seem to me any good reason now… to change it" ([11](iv)).

27. Secondly, having particular regard to:

i) The length of time the order had been in place (i.e. more than three years);

ii) The fact that very different circumstances pertained at the date of the application for discharge in 2020 than existed at the time of the order in 2016;

iii) The fact that the wife was making no material complaints to HHJ Hughes QC about the conduct of the husband in the intervening period;

iv) The judge's conclusion that on the material before her "there would be no jurisdiction for the court to make the order today";

v) The judge's own acknowledgement that indefinite orders were not 'good practice';

it was manifestly wrong in my judgment for the judge to dispose of the application by continuing the non-molestation order, particularly by extending it for an indefinite period. She failed to embark on anything approaching an adequate analysis of whether this case did justify the making of an open-ended order. Indeed, had she done so, on the facts as they presented to HHJ Hughes QC, the proper outcome would, in my judgment, and on the information before her, have been the discharge of the order.

28. On the basis of these two significant errors in the judge's approach to the case, I therefore propose to allow the appeal.

29. During her oral submissions to me on this appeal, and as an unrepresented litigant unacquainted of the conventions about adducing fresh evidence at an appeal, the wife told me that she still felt intimidated by the husband, and that this intimidation had a continuing psychological impact on her. The wife volunteered illustrations of the husband's alleged more recent behaviour[6], which, I was later told by Mr Mahmood, the husband disputes. This complaint had not been made to HHJ Hughes QC, nor did it feature in her written submission prepared for this hearing. Mr. Mahmood pointed out that in her written submission the wife had maintained a contrary, or probably contrary, position, namely that the 2016 order had been "effective" in "modifying" the husband's behaviour, and achieving a situation in which there "have not been any incidences (sic.)". It is not for me at this appeal hearing to assess the truth or otherwise of these complaints of continued intimidation, nor do I make any judgment

[6] In addition to the stresses caused by some correspondence from the husband's solicitor which she described to Judge Hughes QC, she cited: (i) financial abuse/control, with the husband ceasing to pay child maintenance for their 16 year old child, and late payment of a sum due under the financial remedy order, (ii) coercive or controlling behaviour in the form of denigration of her in her family and local community, causing her to feel isolated, (iii) discomfort at seeing him outside her house when he collects the children for contact (although she says in her written Skeleton Argument for this appeal in relation to this point: "he is entitled to travel where he likes and I do not consider this a breach" of the current order), (iv) an incident in 2017 when the husband's aunt shouted at her in the street.

about the fact that the wife did not report this alleged behaviour at the earlier court hearing, or the apparent inconsistency in her case before me; I am conscious that many victims of domestic abuse find it difficult to raise such allegations, particularly of non-physical abuse, hence many delay reporting. This is a complex area and the effects of trauma on the victim even long after separation can take many forms.

30. I consider therefore that the proper course is for me to direct the wife to file evidence of the alleged continuing intimidation, and for the husband to have the chance to file evidence in reply. To justify the continuation of the order on this new factual basis, the wife will of course need to satisfy the court that judicial intervention is required to control the behaviour about which she complains, and to protect her. As McFarlane LJ said in *Re T* [2017] EWCA Civ 1889 at [42]:

> "When determining whether or not particular conduct is sufficient to justify granting a non-molestation order, the primary focus, as established in the consistent approach of earlier authority, is upon the 'harassment' or 'alarm and distress' caused to those on the receiving end. It must be conduct of 'such a degree of harassment as to call for the intervention of the court' (*Horner v Horner* [1983] 4 FLR 50 and *C v B* [1998] 1 FLR 554)."

31. I shall therefore remit the husband's application for discharge of the 2016 non-molestation order to the Central Family Court for a re-hearing, before a Circuit Judge. In the meantime, I propose to substitute Judge Hughes' order with one which provides for the continuation of the non-molestation order until further order.

32. That is my judgment.