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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR 231
FOR JUDICIAL REVIEW

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David Heraghty (instructed by Higgins Hollywood Deazley) for the Applicant
Nessa Fee (instructed by the Departmental Solicitor's Office) for the Respondent

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HUMPHREYS J

Introduction

[1] This application for judicial review arises out of the refusal by District Judge (Magistrates' Courts) Meehan ("the DJ") of two applications for ex parte non-molestation orders (NMOs) made by the applicant on 25 August 2022.

[2] I granted leave to apply for judicial review on 2 September 2022 and, on that date, I made two ex parte NMOs, one against the applicant's sister and the other against her brother, by way of interim relief.

[3] At the time of the leave hearing, the legal position regarding appeals from the magistrates' court to the county court in respect of the refusal of such applications was unclear. This has now been resolved by virtue of the judgment of Scoffield J in *Re McDade's Application* [2022] NIKB 14. As a result, the respondent seeks to contend that the applicant at all times enjoyed an adequate and effective alternative remedy to the pursuit of an application for judicial review.

Background

[4] On the morning of 25 August 2022, at 09.23 and 09.26 hours, Emma Gillespie, a paralegal in the firm of Higgins Hollywood Deazley, emailed the Belfast Domestic Proceedings Office attaching applications in Form F1, supported by statements from the applicant, seeking ex parte NMOs pursuant to the Family Homes and Domestic

Violence (Northern Ireland) Order 1998 ('the 1998 Order'). The emails were copied to Nathan Davidson, a solicitor in the same firm.

[5] In the statements, the applicant made the case that she had had an altercation with her sister at their mother's home on 23 August which involved her being struck by a mobile phone and receiving a black eye. She stated that her sister threatened to have her husband harm her and that she was in fear that her sister would further harass her if she was put on notice of the application for an NMO. In relation to her brother, she stated that on 24 August her brother came to her house abusing her and threatening to kill her. She expressed her fear that her brother would carry out this threat or cause her other harm if he was notified of the application. Each of her siblings was arrested by the police.

[6] At 10.37 the DJ replied, stating:

> "This is a court application. Covid-19 exigencies may disguise that for some. A paralegal does not have a right of audience. Papers should be presented by a solicitor."

At 1039 in respect of the second application an email was sent saying:

> "Same point as before re right of audience."

[7] The two applications were then transmitted again, in identical form, by Nathan Davidson to the court office at 10.47 hours. At 11.43 and 11.45 the DJ responded substantively by stating:

> "Leave to proceed ex parte is refused. Summons to issue in the normal way."

[8] The solicitor followed this up by seeking the reasoning underpinning the DJ's decisions not to grant the relief sought in the applications. In respect of the application involving the sister, the DJ stated:

> "I am not persuaded that the applicant is now at imminent risk of (further) significant ('really serious') harm, such that the object of the order will be defeated if not made immediately. I am not persuaded that the respondent will approach her upon service of proceedings. This is very rare in these cases, in my experience. The respondent was arrested. She may or may not have been charged (not disclosed); I think it more likely that on reading the applicant's version of events she will hold back and prepare to defend on the basis that the applicant was the true aggressor. Secondary observations would be that the applicant glides over the trigger argument on the street,

> which continued for some distance as to who said what. The account of the actual fight between these 2 sisters does include the concession that the applicant made first physical contact with the other. Overall, I have the distinct impression that the applicant's account will be disputed by the respondent and, in all the circumstances, hold that it is appropriate to hear both sides before deciding whether to grant any order. Further, the applicant has not established, directly or through her solicitors, whether her sister was actually charged and, indeed, what bail terms there might be."

[9] Insofar as the application relating to the brother is concerned:

> "I am not persuaded that the applicant is now at imminent risk of (further) significant ('really serious') harm from her brother, such that the object of the order will be defeated if not made immediately. I am not persuaded that the respondent will approach her upon service of proceedings. This is very rare in these cases, in my experience. The respondent was arrested. He may or may not have been charged (not disclosed); I think it more likely that on reading the applicant's version of events he will hold back and prepare to defend on the basis that the applicant was the true aggressor. I note that he would allege, of the applicant's case against her sister, that the latter sustained 2 black eyes; this is neither conceded nor explained by the applicant. Overall, I have the distinct impression that the applicant's account will be disputed by the respondent and, in all the circumstances, hold that it is appropriate to hear both sides before deciding whether to grant any order. Further, the applicant has not established, directly or through her solicitors, whether her brother was actually charged and, indeed, what bail terms there might be."

The Statutory Provisions

[10] Insofar as is material, Article 20 of the 1998 Order provides as follows:

> "(1) In this Order 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;

(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 Article 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 or, in a case falling within paragraph (2)(b), the person for whose benefit the order would be made; 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.

(6A) A non-molestation order may exclude the respondent from a defined area in which a dwelling-house is included, any other defined area and any premises specified in the order.

(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."

[11] An NMO may be made on an ex parte basis by virtue of Article 23 of the 1998 Order:

"(1) The court may, in any case where it considers that it is just and convenient to do so, make an occupation order or a non-molestation order even though the respondent

has not been given such notice of the proceedings as would otherwise be required by rules of court.

(2) In determining whether to exercise its powers under paragraph (1), the court shall have regard to all the circumstances including—

(a) any risk of significant harm to the applicant or a relevant child, attributable to conduct of the respondent, if the order is not made immediately,

(b) whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately, and

(c) whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and that the applicant or a relevant child will be seriously prejudiced by the delay involved—

(i) where the court is a court of summary jurisdiction, in effecting service of proceedings, or

(ii) in any other case, in effecting substituted service.

(3) If the court makes an order by virtue of paragraph (1), it shall specify a date for a full hearing."

[12] The statute therefore adopts the familiar "just and convenient" test for the grant of injunctive relief enshrined in section 91 of the Judicature Act (NI) 1978. In the context of domestic violence, the court is mandated to have regard to all the circumstances including the health, safety and well-being of the applicant. When considering an ex parte application, Article 23 provides a non-exhaustive list of factors to be considered including any risk of significant harm to the applicant, attributable to the conduct of the respondent, if the order is not made immediately.

[13] In *R v R* [2014] EWFC 48 Jackson J cautioned that such ex parte orders should only be made in exceptional circumstances and with due regard to the interests of the absent party.

The Grounds for Judicial Review

[14] The applicant seeks to impugn the refusal of the ex parte orders by the DJ on the grounds that:

(i) The DJ's reasoning and application of Article 23 of the 1998 Order disclosed an error of law;

(ii) The approach of the DJ to the presentation of the ex parte applications was irrational;

(iii) The DJ unlawfully fettered his discretion; and

(iv) The procedure adopted by the DJ was unfair.

The Respondent's Evidence

[15] The DJ has deposed to the legal test applied by him in considering the applications. He states that he did not equate "really serious harm" to the criminal concept of grievous bodily harm but considered there to be many forms of really serious harm including psychiatric harm and that exerted by way of coercive control. He avers that he considered all the circumstances of the cases, including the Article 23(2) factors, and found that the threshold was not met in either application. He specifically states:

> "I did not consider these applications to be the kind of cases where immediate, serious, significant harm would be inflicted…
>
> I am entitled to clarify what significant harm may mean in layman's terms i.e. really serious harm."

[16] In relation to the presentation of the applications, the DJ states in his sworn evidence that he refused to hear applications which have been emailed or transmitted to court by a paralegal as he requires to know that a solicitor has prepared and is presenting the application to the court. This principle is founded on the particular duties which a solicitor owes to the court and the gravity attached to this type of application. Strikingly, the DJ says nothing in his affidavit in relation to a right of audience which was the sole reason to reject the applications as initially presented.

[17] Reference is made to the Covid-19 Guidance for Courts, Family Proceedings, from the Office of the Lady Chief Justice dated 8 January 2021. In relation to NMOs, it states:

> "As a temporary measure, which will be kept under review, where an affidavit cannot be obtained, courts are content to accept a statement providing the solicitor must firstly confirm they have read through the statement

> carefully with the applicant and confirm it is completely accurate, and secondly, if the statement is unsigned, provide an undertaking to lodge a signed statement as soon as is practicable.
>
> Similarly, as a temporary measure subject to review, to verify grounding statements in ex-parte applications in the Domestic Proceedings Court, a solicitor may provide written confirmation from the applicant, including by text or email, to confirm that (s)he agrees the Statement, or, if that is not feasible for reasons stated, a written assurance from the solicitor that the Statement has been read to the applicant and approved.
>
> On receipt of the required papers, the judge will determine whether the matter can be dealt with administratively or will require a hearing, and the court office will contact the parties to make any necessary arrangements"

[18] The DJ denied that he had fettered his discretion in any way. By bringing his considerable experience on the bench in relation to this type of application to bear, he was not fettering the discretion afforded to him by Article 23 but rather engaging in a process of weighing the evidence and applying it to the statutory factors. He asserted an entitlement, on this basis, to find that the test for an ex parte application was not met and the cases should proceed to inter partes hearings.

[19] The DJ also denied that there was any procedural unfairness in the manner in which the applications were considered. On his analysis, it remains an option for a decision maker to have an applicant examined orally on foot of an ex parte application, but this is not a procedural requirement, and the court is entitled to form a reasoned decision on the basis of the written evidence submitted to it.

Alternative Remedy

[20] In *Re Alpha Resource Management Limited's Application* [2022] NICA 27, the Court of Appeal distilled the following principles from the relevant authorities on the question of alternative remedy:

> "(i) Judicial review is a remedy of last resort and may not be the only available avenue of challenging a particular decision. That is because statute may have provided an appellate machinery to deal with appeals against decisions of public bodies.
>
> (ii) A court may, in its discretion, refuse to grant permission to apply for judicial review or refuse a remedy

> at the substantive hearing if an adequate alternative remedy exists, or if such a remedy existed but the claimant had failed to use it.
>
> (iii) The general principle is that an individual should normally use alternative remedies where these are available rather than judicial review. The courts take the view that save in the most exceptional circumstances, the judicial review jurisdiction will not be exercised where other remedies were available and have not been used.
>
> (iv) The rationale for the exhaustion of alternative remedies principle is that it is not for the courts to usurp the functions of the appellate body which has the expertise and ability to determine disputes.
>
> (v) The courts will not insist that claimants pursue an alternative remedy which is inadequate. The principle can be defined as one that requires the use of adequate alternative remedies, or the fact that an alternative remedy is inadequate may be seen as an exceptional reason why judicial review may be used.
>
> (vi) There may be other exceptional reasons why judicial review is the preferred course as each case is fact sensitive and the court must consider in exercising its discretion to hear a judicial review where an alternative remedy is available the overall circumstances including in some cases the urgency of the case, delay, cost, or public interest concerns." [para 20]

[21] In light of the judgment in *Re McDade*, the applicant now accepts that an appeal lies, on an ex parte basis, from a refusal of a district judge to grant an ex parte NMO under Article 23 of the 1998 Order to the county court. On appeal, the county court judge has all the powers of the judge determining the matter at first instance and hears the case on a de novo basis.

[22] Further, the applicant accepts that this appeal route represents an adequate and effective remedy and that she needs to establish exceptional or special reasons why the judicial review court should exercise its discretion to nonetheless hear and determine this application.

[23] The following grounds are advanced by the applicant as representing such exceptional reasons:

(i) The appeal to the county court would not be capable of adjudicating on the serious issues of public law raised by this application;

(ii) There is a strong public interest in this court giving guidance, in exercise of its supervisory jurisdiction, to those practising in this field;

(iii) Leave having already been granted, and the costs of the application incurred, the court ought to engage with the issues raised by the applicant in a manner consonant with the overriding objective;

(iv) Where there are issues of procedural unfairness, the judicial review court should be readier to intervene.

[24] On the latter point, reliance was placed on *R v Hereford Magistrates Court ex p Rowlands* [1998] QB 110 in which Lord Bingham CJ held that where there are allegations of a breach of natural justice or bias, the judicial review court should not leave an aggrieved defendant to his remedy by way of appeal from the magistrates' court but should intervene and, in an appropriate case, grant relief. He commented:

> "The crucial role of the magistrates' courts, mentioned above, makes it the more important that that jurisdiction should be retained with a view to ensuring that high standards of procedural fairness and impartiality are maintained."

[25] The respondent argued that no such special reasons exist in this case and that the county court presents a swift, cost efficient and effective route to remedy any injustice which has been alleged to have been caused to an applicant for an NMO in the magistrates' court.

[26] On balance, I am persuaded in this case that I should exercise my discretion to determine this application for judicial review. I had the benefit of full written and oral argument on all issues, and they reveal important questions of the applicable legal test and procedures to be adopted. It is evident that guidance on these matters will be beneficial to practitioners and decision makers.

Error of Law

[27] The first question to be considered is whether the DJ committed an error of law in the application of Article 23 to the facts of these cases. He was required, by the statute, to have regard to "any risk of significant harm to the applicant…if the order is not made immediately" in considering whether in all the circumstances it was just and convenient to make an ex parte NMO.

[28] The words "significant harm" are familiar to lawyers practising in the area of family law. The existence or likelihood of significant harm represents the threshold

for court intervention under Article 50 of the Children (Northern Ireland) Order 1995. In *Re B (A Child)* [2013] UKSC 33, the Supreme Court observed that whilst "harm" in this context carries a statutory definition, "significant" does not. Lord Wilson cautioned against attempting to explain the adjective although Lady Hale did reference the dictionary definition as being "considerable, noteworthy or important." Self-evidently "significant" must mean more than trivial or unimportant harm.

[29] The phrase "really serious harm" will be equally familiar to lawyers of a different hue, being most commonly found in the sphere of criminal law. In *DPP v Smith* [1961] AC 290 the House of Lords held that the ordinary and natural meaning of the words "grievous bodily harm" was "really serious harm", whether for the purposes of the Offences Against the Person Act 1861 or the Homicide Act 1957. It is well established that psychiatric injury can constitute really serious harm.

[30] Whilst the DJ states that he did not equate "really serious harm" in the context of proceedings under the 1998 Order with the type of harm which would qualify as grievous bodily harm in the criminal law, there can be no doubt that the two thresholds are quite distinct. The natural and ordinary meaning of the word "significant" is not "really serious." Both in his reasons sent to the applicant's solicitors and in his affidavit evidence in this application the DJ treated the two as synonymous. In doing so, he has clearly fallen into error. This is not mere judicial gloss on the words of the statute; it serves to set the bar for the grant of an ex parte NMO at a level higher than that decreed by the legislature.

[31] Since the question of significant harm is of central importance to the determination of whether or not to make an NMO under Article 23, this error operates to vitiate the decisions to refuse to make NMOs in these circumstances.

Irrationality

[32] As the Divisional Court recently recognised in *Re McKinney's Application* [2022] NIQB 23 the concept of irrationality in public law is not confined to decisions which defy comprehension but extends to errors of reasoning which rob decisions of logic. The applicant in this case asserts that the decision to refuse to accept the NMO applications on the basis that they were transmitted to the court office by a para-legal falls into this category.

[33] Whilst the DJ originally asserted that the applications would not be considered because a paralegal had no rights of audience, this could not be correct. Sending documents to a court office by email cannot constitute the exercise of a right of audience which is concerned with the ability to appear and conduct proceedings in court. The DJ was correct, however, to say that the court required to be satisfied that a solicitor had prepared the application since this was consistent with the extant Covid-19 guidance.

[34] There is nothing wrong with a paralegal sending documents to court by email or indeed by hand delivering documents to the court office. This does not offend against any principle of procedure provided the steps outlined in the Covid-19 guidance are complied with.

[35] Given the fact the 'paralegal' issue only served to delay matters by about an hour, I would not in my discretion have intervened and granted any relief.

Fettering of Discretion

[36] The applicant has relied on the judgment of Kerr J in *Re Herdman's Application* [2003] NIQB 46:

> "[19] A public body endowed with a statutory discretion may legitimately adopt general rules or principles of policy to guide itself as to the manner of exercising its own discretion in individual cases, provided that such rules or principles are legally relevant to the exercise of its powers, consistent with the purpose of the enabling legislation and not arbitrary, capricious or unjust – Halsbury's Laws of England Vol 1 (1) para 32. But the decision maker must be prepared to consider the individual circumstances of each case and be prepared, if the circumstances demand it, to make an exception to the policy - *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610.
>
> [20] A policy may operate to place an illegitimate fetter on the exercise of discretion in two ways. The policy may be intrinsically inflexible in erecting an unacceptably high threshold for an applicant to cross. Alternatively, if the policy is applied too rigorously and there is a lack of preparedness on the part of the decision maker to entertain exceptions to it."

[37] The applicant states in this case that the DJ has fettered his discretion by concluding that it is "very rare in these cases, in my experience" for the respondent to an NMO application to approach the applicant as a reaction to being served with proceedings. It is contended that this represents a rigid policy adopted by the DJ which then causes applicants to have to cross an unacceptably high threshold.

[38] The DJ is quite entitled to bring his experience to bear when he is exercising a discretion such as is created by Article 23 of the 1998 Order. By using such experience to conclude that certain events are rare, or very rare, does not mean he is not prepared to consider evidence which goes to the issue set out in Article 23(2)(b). In his affidavit, the DJ avers that he was alive to the need to balance the evidence before him against the potential deterrent effect of the refusal to grant an ex parte NMO. In light of this,

I am not persuaded that the DJ did adopt a rigid policy or otherwise fetter his discretion in the manner alleged.

Procedural Fairness

[39] In his own judgment, *H v W* [2017] NIMag 1, the DJ stated in relation to NMO applications:

> "My own practice when dealing with an application for leave to proceed ex parte is not to admit the Applicant to chambers while I consider the merits from the papers alone. If, as is usually the case, I cannot find a basis for granting leave, I invite the Applicant's Solicitor to come in and respond to my reasoning. Sometimes the Solicitor will indicate that the Applicant would then wish to amplify upon the written statement and ask that I permit oral evidence to be taken. My response is to suggest instead an amendment to the paperwork. More usually, the Solicitor accepts the ruling, sometimes even adding that (s)he was simply "following instructions." These applications for what is properly understood to be truly exceptional relief are quite common nowadays." [para 4]

[40] The instant applications occurred during the pandemic-imposed restrictions and were determined solely on paper with no opportunity to make oral representations or give oral evidence. The applicant contends that this was procedurally unfair since such a step could have been facilitated remotely, as many applications were dealt with at that time.

[41] In *Re B (Minors): Contact* [1994] 2 FLR 1, Butler-Sloss LJ outlined the broad discretion which a judge hearing an application under the Children Act has in terms of procedure, comments which apply equally to the instant type of application. An appellate or supervisory court will be slow to interfere with the procedures adopted by a judge at first instance provided those met the basic standard of fairness.

[42] There is no statutory right to be heard in relation to an ex parte application of this nature. The receipt of oral evidence on such applications generally is the exception rather than the rule. However, it should be recognised that as a matter of good practice, a decision maker ought to afford a legal representative the opportunity to make representations if he is minded to refuse an application for an ex parte NMO, in line with this DJ's own stated practice. There may be cases which are irredeemably bad but where, as in these cases, there are issues requiring clarification, the DJ should afford the opportunity to provide this. The fact that this step could have been taken by the use of remote technology actually ought to have facilitated rather than hindered this process.

[43] Questions regarding procedural fairness are particularly fact sensitive. Given the inferences which the DJ was prepared to draw from the evidence presented by the applicant in relation to the future behaviour of the respondents, he ought to have raised these issues with the applicant's representative and allowed an opportunity to make further submissions and, if necessary, receive oral evidence. This reflects the gravity of applications for NMOs and the fact that, on her evidence, this applicant had been physically attacked and threatened.

Conclusion

[44] I have therefore determined that the application for judicial review succeeds to the extent that the decisions made by the DJ were infected by an error of law and that the procedure adopted by him in refusing the applications was procedurally unfair.

[45] In terms of relief, it is not necessary to make any order since the ex parte NMO applications were granted by this court by way of interim relief. I will direct that those continue in force pending the inter partes hearings of the applications, and I further direct that those be remitted back to the magistrates' court to be heard and determined by a different District Judge (Magistrates' Courts). Otherwise, this judgment speaks for itself.

[46] I will hear the parties on the question of costs.