Neutral Citation No: [2020] NIQB 22 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **HUM11214** ***Delivered:*** **28/02/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY PATRICK JUDE GREEN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

HUMPHREYS J

BACKGROUND

[1] On 14 March 2019 the Applicant issued proceedings against his sister, Anne Caroline Sweeney, seeking a non-molestation order pursuant to Article 20 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 ("the 1998 Order"). This application was heard and dismissed by District Judge Conway at Londonderry Magistrates' Court on 24 June 2019.

[2] The Applicant exercised his statutory right of appeal to the County Court and the application proceeded by way of a full rehearing before Judge McCaffrey on 18 September 2019. The learned County Court Judge dismissed the appeal.

[3] By this application for leave to apply for judicial review, the Applicant seeks an Order of *certiorari* quashing the decision of Judge McCaffrey and remitting the case back to the County Court for rehearing.

[4] In considering this application, I have had the benefit of the Applicant's detailed Order 53 Statement and grounding affidavit, together with five affidavits sworn by him the course of the proceedings in the County Court and over 100 pages of exhibits. I have also read the proposed Respondent's response to the Pre Action Protocol correspondence and a transcript of the hearing which took place on 18 September 2019. The Applicant has also sent numerous emails to the Judicial Review Office during December 2019 and February 2020. This practice of seeking to admit further evidence by email is to be deprecated but, nonetheless, I have taken all these documents into account.

[5] In the interests of brevity, it will not be possible to recite each and every point made by the Applicant in the course of his contention that he ought to be entitled to leave to pursue this judicial review. However, all the arguments put forward by him have been taken into account in arriving at this decision. I have also received submissions from Counsel for the proposed Respondent, Mr. Sands B.L.

THE LEGAL PRINCIPLES (1) – NON MOLESTATION ORDERS

[6] Article 20 of the 1998 Order provides, insofar as is relevant:

> *"(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;*
>
> *(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 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."*

[7] By virtue of Article 3(3) of the 1998 Order an 'associated person' includes a relative and therefore the Court had jurisdiction to make a non-molestation order.

[8] In *Re T* [2017] EWCA Civ 1889 McFarlane LJ considered the equivalent legislation in England and Wales[1] and commented:

> *"The 1996 Act does not contain any definition of "molestation". When called upon to do so, this court has consistently avoided giving a precise definition. In Horner v Horner [1983] 4 FLR 50 Ormerod LJ said, at page 51 G:*
>
> > *"… I have no doubt that the word "molesting"…does not imply necessarily either violence or threats of violence. It applies to any conduct which can properly be regarded as such a degree of harassment as to call for the intervention of the court."*
>
> *In like terms Sir Stephen Brown, President of the Family Division, in C v B (Non-molestation order: Jurisdiction) [1998] 1 FLR 554:*
>
> > *"…There is no legal definition of "molestation". Indeed, that is quite clear from the various cases which have been cited. It is a matter which has to be considered in relation to the particular facts of particular cases. It implies some quite deliberate conduct which is aimed at a high degree of harassment of the other party, so as to justify the intervention of the court."*

[9] In order therefore to obtain a non-molestation order, an Applicant in any case needs to establish, on the balance of probabilities, that he or she has been the subject of deliberate conduct, whether involving violence, threats of violence or harassment, which would justify the intervention of the Court. It is to be noted that a Court, once satisfied the relevant threshold has been met, still retains a discretion as to whether to make the order sought. In exercising this discretion, the Court is directed by statute to consider all the circumstances of the case, including the need to secure the health, safety and well-being of the Applicant.

[1] Family Law Act 1996, s42

THE LEGAL PRINCIPLES (2) – LEAVE TO APPLY FOR JUDICIAL REVIEW

[10] At this stage, the Court is concerned as to whether the Applicant ought to be granted leave to apply for judicial review. In *Omagh District Council –v- Minister for Health, Social Services and Public Safety* (2004) NICA 10, Nicholson LJ formulated the test for leave thus:

> *"the court will refuse permission to claim judicial review unless satisfied that there is an arguable ground for judicial review on which there is a realistic prospect of success"*[2]

[11] It is incumbent on the Applicant to demonstrate, on the evidence, that there is an arguable case for judicial review.

THE GROUNDS FOR JUDICIAL REVIEW

[12] In the instant case, the Applicant has advanced a number of grounds of challenge of the decision of the learned County Court Judge. Firstly, he says that his right to a fair trial pursuant to Article 6 of the European Convention on Human Rights ("ECHR") was breached. Secondly, he submits that the evidence adduced did not support the decision reached. Thirdly, it is claimed that the decision was unreasonable in the *Wednesbury* sense. Fourthly, he says that the Judge acted disproportionately in declining to admit evidence and in the weighing up of the evidence which was admitted. Fifthly, and separately, he argues that Article 61 of the County Courts (Northern Ireland) Order 1980 ("the 1980 Order") is incompatible with Article 6 ECHR. This latter point is connected to the question of alternative remedy and I will return to it later in this judgment.

[13] There are a number of aspects to the Applicant's claim that he was denied a fair trial. Central to this is the complaint that he was denied the opportunity to call witnesses. Questioning of the Applicant revealed that he would like to have questioned four individuals – his brother Charles, his sister Frances, her daughter Nicola and his uncle Father McIntyre. Only two of these individuals were in the County Court on the day in question. When interrogated in relation to the relevant evidence which any of these individuals could have given, the Applicant admitted that each of them would have been implacably hostile to his case. Nonetheless, the Applicant reasoned that he would have been able to cross-examine the witnesses and expose them as having told untruths.

[14] The general rule at common law is that a party may not cross-examine his own witness in an effort to discredit – see Phipson on Evidence[3] at 12-58. There is an exception to this principle in the case of a witness who has 'changed sides', namely

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[2] Paragraph 5

[3] 19th Edition

where sworn testimony is given which is at variance with what was previously said in a statement. This is what is meant by an application to treat a witness as hostile. In this situation, a Judge has a discretion to allow a party to cross-examine his own witness.

[15] The position is entirely different where a party decides to call a witness whom he knows to be hostile to the case which he seeks to advance. In such circumstances, there is no 'changing sides' and no basis therefore for any application to the Court to have the witness treated as hostile. In this case, none of the evidence which the proposed witnesses could have given would have supported the Applicant's case for a non-molestation order under Article 20 of the 1998 Order. As such, therefore, there was no unfairness in the learned County Court Judge's decision not to permit such witnesses to be called.

[16] The Applicant also complains that evidence which he wished to rely upon from a Mr. Alan Todd was not considered by the Court. This took the form of an email from Mr. Todd, who has a degree in Mathematics, which purports to assess the probability of a certain event occurring. Such evidence was not in the form of an expert report, he was not available to be cross-examined and the issue which he addressed was manifestly not one upon which expert testimony was either necessary or admissible. In the event, the Applicant was able to give direct evidence as to the inherent improbability (as he saw it) of his sister arriving at his home only 10 minutes after he had returned from Court after filing his Article 20 application. There was no unfairness occasioned to the Applicant by reason of the exclusion of the email from Mr. Todd.

[17] The Applicant also asserted that, at the hearing in the County Court, the Respondent to that application was permitted to read out a pre-prepared statement when giving her sworn evidence. I have had the opportunity to consider the transcript of the entire hearing. Judge McCaffrey did not admit the statement itself in evidence but allowed the Respondent to read from it, before affording the Applicant an opportunity to cross-examine. In doing so, the Applicant was able to question the Respondent about her credibility and any previous inconsistent statements made in the Magistrates' Court. There was no unfairness occasioned to the Applicant by this approach.

[18] Furthermore, the Applicant made repeated complaints that he was not permitted to refer to events surrounding civil disorder in Londonderry in the late 1960's, nor was he allowed to make reference to issues which had occurred in his family in 2016. A consideration of the transcript reveals that the learned County Court Judge was careful to identify evidence which would be relevant to the question of whether a non-molestation order would be granted to the Applicant. Such evidence necessarily related to actual acts of molestation which had occurred and the need to make such an order to secure the health, safety and well-being of the Applicant. In my judgment, the approach taken by the learned County Court Judge to the issues which she had to determine and the evidence which was relevant to

these is unimpeachable. I note, in particular, that the Applicant had made a previous application under Article 20 for a non-molestation order against his sister arising out of the events of 2016, but this was withdrawn in 2017. There has been no arguable case made out that the Applicant's Article 6 rights have been breached.

[19] Equally, any claim that there was no evidential basis for the Judge's finding is unarguable. Having heard both the parties, it was a matter for the Judge to weigh up the evidence and make a determination. The Judicial Review Court is exercising a supervisory jurisdiction and cannot act as a further appeal against the refusal of a non-molestation order. There was clearly evidence before the Court which entitled the learned County Court Judge to reach the decision which she did.

[20] The claim that the decision itself was unreasonable in the *Wednesbury* sense is simply hopeless. The conclusion reached by the Judge, based on her consideration of the evidence, was evidently one which was open to the reasonable decision maker.

[21] The decision to refuse to admit evidence was not a disproportionate interference with the Applicant's Article 6 rights. The Court is obliged to confine itself to evidence which is relevant to the application under Article 20 of the 1998 Order to weigh it up in considering whether the statutory test has been met.

[22] For the reasons outlined, I have come to the conclusion that the Applicant does not have an arguable case which has a reasonable prospect of success and accordingly the application for judicial review is dismissed.

ALTERNATIVE REMEDY AND DELAY

[23] There are subsidiary issues around alternative remedy and delay. It was conceded by the proposed Respondent that the County Courts in Northern Ireland are amenable to judicial review but it was asserted that this Applicant enjoyed an alternative remedy by way of the case stated procedure set out in Article 61 of the 1980 Order. This provides:

> *"…any party dissatisfied with the decision of a county court judge upon any point of law may question that decision by applying to the judge to state a case for the opinion of the Court of Appeal on the point of law involved."*

[24] Article 61(2) requires such an application to be made in writing to the chief clerk within 21 days commencing on the date the decision was given. This time limit was increased from the previous period of 14 days by section 75 of the Justice (Northern Ireland) Order 2002.

[25] It is well established that judicial review is a remedy of last resort and that Applicants ought to pursue any alterative remedy which is open to them prior to

issuing judicial review proceedings. The leading case in this jurisdiction is *Re DPP's Application* [2000] NI 74 in which the Applicant sought to set aside the grant of leave on the basis that an alternative remedy was available by way of a case stated from the Magistrates' Court. The Court in that case held that 'special circumstances' should exist before judicial review should be permitted to be used ahead of a statutory remedy. The Court considered that the wider public interest, the relative cost of proceedings and the scope of the required enquiry may all be factors to be taken into account in determining whether an application for judicial review would lie.

[26] In this case, the Applicant has asserted that he was simply unable to comply with the 21 day time limit imposed by the 1980 Order. He also refers to his particular family circumstances as constituting 'special circumstances'.

[27] At the leave stage, it is at least arguable that the Applicant was entitled to pursue relief by way of judicial review rather than being restricted to remedy under Article 61, particularly in circumstances where his complaint was principally one of procedural unfairness. As a result, I do not need to consider the Applicant's contention that Article 61 is incompatible with Article 6 ECHR.

[28] The question also arose as to the Applicant's delay in commencing these judicial review proceedings. Under Order 53 rule 4 of the Rules of the Court of Judicature (NI) 1980, an application for leave to apply for judicial review must be made within three months from the date when the grounds for the application first arose, unless the Court considers that there is good reason for extending the period.

[29] The delay in this case was a matter of a few days, and the proposed Respondent accepted that no prejudice was occasioned thereby. The Applicant put forward a number of reasons for the delay which related to his health, his finances, computer glitches and his unfamiliarity with the complexities of judicial review. In these circumstances, I would be prepared to extend the time for the making of the application for leave.

CONCLUSION

[30] For the reasons set out in this judgment, the test for leave to apply for judicial review has not been met and the application is dismissed. I make no order as to costs *inter partes*.