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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY 'JR131' FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DOMESTIC PROCEEDINGS COURT

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David Heraghty (instructed by Higgins Hollywood Deazley, Solicitors) for the applicant
Laura McMahon BL (instructed by the Departmental Solicitor's Office) for the respondent

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SCOFFIELD J

Introduction

[1] This is an application in which I granted leave to apply for judicial review (see [2021] NIQB 2) in relation to the question of whether, and in what circumstances, it is open to a district judge to hold an *inter partes* hearing in relation to an application for a non-molestation order (NMO) in cases where the factual circumstances giving rise to the application are also the subject of an ongoing criminal investigation or of extant or anticipated criminal proceedings.

[2] The applicant was represented by Mr Heraghty, of counsel; and the respondent district judge by Ms McMahon, of counsel. I am grateful to each of them for their written submissions and their economical oral submissions.

Factual Background

[3] The background to the applicant's case is set out in my ruling on leave but, for convenience, is replicated below. It arises out of a number of offences alleged to have been committed by the applicant against his wife, including a number of allegations of rape, one of sexual assault and an allegation of administering a poison in April 2019. The applicant was arrested in late June 2019 and interviewed on

suspicion of a number of these offences. His evidence is that he "*answered all questions with respect to all allegations*" in interviews with police. He was granted pre-charge police bail to return to the police station on a later date. However, no further PACE interviews were in fact held. Further interview was a live possibility given that, in particular, at the time of his release on bail the results of toxicology testing were awaited. Presently, the applicant's case is with the Public Prosecution Service for a decision in relation to charging. That was the position when the decision of the district judge which the applicant seeks to impugn in these proceedings was taken.

[4] Since allegations of rape and sexual assault have been made against the applicant, I have anonymised him in this judgment – not to protect his own interests but in light of the prohibition on the publication of matters likely to identify a complainant (here, his wife) who alleges that she is the victim of a sexual offence, pursuant to section 1 of the Sexual Offences (Amendment) Act 1992.

[5] A number of days after the incident in April 2019, the applicant's wife made an application for a NMO on an *ex parte* basis. The application was made on 2 May 2019 and the order was made on that date, to last until 29 May 2019. The case was listed for hearing at Belfast Domestic Proceedings Court on 29 May 2019, with the applicant summonsed to attend. An *inter partes* hearing did not proceed on that date and the applicant's solicitor has said that she would have advised the court that she needed time to apply for legal aid and to take instructions. A further order was granted on 29 May 2019 (in similar terms to the order which had been made on 2 May 2019), without any objection on the applicant's behalf, and was made "*until further ordered*".

[6] The matter was then before the Domestic Proceedings Court (DPC) again on 3 July, 21 August and 16 October 2019. On the third of these dates, the district judge listed the matter for an *inter partes* hearing to be held on 27 November 2019. It was initially common case that, also on 16 October 2019, the earlier NMO which had been granted came to an end; and no further interim order was granted. The applicant's evidence suggests that this was because he had been granted police bail, the conditions of which included that he have no contact, directly or indirectly, with his wife. The proposed respondent's skeleton argument at the leave stage suggested that it was because the district judge took the view that he had no power to extend the interim order.

[7] At any rate, notwithstanding some further contention there then was about this, it appeared to me when I considered the matter at the leave stage that the interim order in favour of the applicant's wife came to an end on 16 October 2019 and had not been revived thereafter, unless and until the matter was brought back before the district judge and a further order made: see paragraphs [65]-[67] of the leave ruling. The position was that there was therefore no ongoing protection for the applicant's wife (save for that provided by any relevant condition of the applicant's

bail) unless and until some further order was granted, either on an interim or final basis.

[8] At a further review hearing before the district judge on 6 November 2019, the applicant's solicitor applied to the judge to have the NMO proceedings adjourned until after his anticipated criminal proceedings had been dealt with – although, at that point, no one knew precisely when or what charges would be preferred, much less when any trial might take place. A comprehensive skeleton argument addressing this issue was provided by Ms Dempsey, the solicitor within the firm representing the applicant who was acting on his behalf in the criminal proceedings. According to the evidence filed by the applicant in these proceedings, the judge refused the application to adjourn the *inter partes* hearing fixed for 27 November, having considered the issue of risk of prejudice to the criminal proceedings, on the basis that there was an obligation on the DPC to deal with the serious matters before it, noting that delaying the NMO application to await the conclusion of the criminal proceedings could give rise to substantial delay. The judge said that he did not believe there was going to be a serious impact on the applicant's right to a fair trial.

[9] A pre-action letter was then sent on the applicant's behalf, evincing an intention to challenge the judge's ruling, on 8 November 2019. On 25 November 2019 the applicant issued his application for leave to apply for judicial review, seeking urgent interim relief in relation to the hearing which was scheduled for 27 November. By email of the same date, the Departmental Solicitor's Office indicated on behalf of the proposed respondent that the NMO proceedings could be adjourned pending the determination of this application, so that these proceedings did not require to be dealt with as a matter of urgency.

The applicant's challenge

[10] The applicant challenges the decision of the district judge to proceed to list an *inter partes* hearing of the NMO application at a time when a related criminal investigation was ongoing, which, it is said, gives rise to a breach of the applicant's common law right to fairness and/or of his fair trial rights under Article 6 ECHR. Mr Heraghty maintained the position that the fairness of *either* hearing might be compromised – that is to say, either the later, expected criminal proceedings if the NMO hearing proceeded in advance *or* the defence of the NMO application itself – although the submissions were largely focused on the applicant's defence of the NMO proceedings. Simply put, the argument was that the applicant, as respondent to the NMO proceedings, would be unduly encumbered in his defence of them for fear of in some way prejudicing his later defence of the related criminal proceedings. He was concerned that evidence he gave in the DPC might be used against him in further PACE interviews by the police; might be used by the PPS to inform charging decisions; or might be used against him in the later criminal proceedings themselves (for instance, if his account was not entirely consistent in every regard across both sets of proceedings).

[11] The applicant contends in his affidavit evidence that the listing of the NMO application for full hearing placed him "*in an extremely difficult position, primarily in terms of hampering [his] capacity to properly and fully contest that application*". This is, he says, because of the impact of the pending criminal investigation and any trial which is likely to flow from that. In particular, he was concerned that anything he might say in the course of the NMO proceedings might be deployed by police in a future PACE interview or by the Crown in any later criminal prosecution. He also says that "*there is a substantial, perhaps complete overlap*" between the facts relied upon by his wife in seeking the NMO and the matters about which he has been interviewed by police. He was concerned, therefore, about being faced with the choice of either not giving evidence in opposition to the NMO application (an option which is, of course, open to him and was the course adopted by the other applicant, Mr Clifford, whose case was dealt with alongside JR131's at the leave stage) or, on the other hand, giving evidence which could then be used by the prosecution or police at a later stage in the criminal investigation or proceedings looking at the same incidents.

[12] The applicant points to the absence, in relation to NMO proceedings, of any protection such as exists in some Children Order proceedings against the use of statements or admissions made in the proceedings as evidence for other offences: see article 171(2) of the Children (Northern Ireland) Order 1995.

[13] The applicant also raises what is essentially a rationality challenge to the district judge's ruling to proceed to a full hearing because, in his view, the protection his wife was afforded through the bail conditions to which he was subject at that time provided her with "*at least the same level of protection as the proposed NMO*".

Discussion

[14] The statutory provisions relevant to the issues before the court were discussed at some length in the ruling in relation to the grant of leave. I do not propose to repeat here the analysis contained in that judgment, to which the reader is referred and to which further brief reference is made below.

[15] As adverted to above, leave was granted on the basis that the applicant's challenge raised an interesting issue as to whether it is procedurally unfair, and/or in breach of fair trial guarantees, to require a respondent to a NMO application to defend that application at the same time as that individual is facing a criminal investigation or criminal charges for precisely the same behaviour on which the application for the NMO is grounded.

[16] I noted when granting leave – and repeat – that this court will be slow to interfere with the case management decisions of lower courts unless they give rise to procedural unfairness, result in some breach of Convention rights or are susceptible to challenge on rationality grounds. District judges are well experienced in running their courts and ought to be afforded a considerable amount of leeway in terms of the proper management of proceedings before them. They will often have a 'feel' for

a case which is not apparent from the affidavit evidence provided to this court in a later judicial review application, particularly where (as here) the lower court has considered the matter at a number of review hearings.

[17] However, it seemed to me that there was an issue which had been raised by this case in respect of which it would be helpful for there to be further legal argument, namely the correct approach to the management of proceedings seeking a NMO at a time when the factual circumstances giving rise to the application are the subject of likely or pending criminal proceedings. This is an issue which may arise relatively frequently. It is perhaps most likely to arise at the return date, after a without-notice order has been made on an emergency basis, when the first on-notice hearing occurs. Where the factual background to the NMO application involves an incident which would amount to a criminal offence, as is often likely to be the case, the police may well have been involved by that stage and criminal proceedings may be underway or anticipated.

Consideration of the authorities cited

[18] Analysis of the cases cited in argument suggests that the relevant principles are now relatively well settled. They suggest that civil proceedings should only be stayed where there is a real risk of serious prejudice to the defendant's right to fair trial in related criminal proceedings which cannot be adequately mitigated by the use of appropriate safeguards; and that this is a fairly high threshold.

[19] *Harris (Ipswich) Ltd v Harrison* [1978] ICR 1256 is an example of the Employment Appeal Tribunal holding that an employer was entitled to proceed with a disciplinary hearing after an employee had been arrested and charged with a criminal offence alleged to have been committed in the course of his employment but before the criminal trial had taken place. The appeal tribunal (Phillips J giving its judgment) recognised that there may be practical difficulties in such cases, and that care was necessary to do nothing to prejudice the subsequent trial, but held that there was nothing in law to prevent the disciplinary process taking place whilst the criminal process was pending.

[20] A similar issue arose in a slightly different context in *Jefferson Ltd v Bhetcha* [1979] 1 WLR 898 where an employer sued a former accounts clerk for return of moneys it considered her to have stolen. The defendant, who was being prosecuted for theft, which she denied, asked the civil court to stay the proceedings and, more particularly, not to place her in a position of having to swear an affidavit disclosing her defence in the criminal proceedings in order to oppose an application for summary judgment in the civil proceedings. The Court of Appeal of England and Wales held that there was no principle of law that a plaintiff in a civil action was to be debarred from pursuing their action in the normal way merely because to do so would or might result in the defendant, if they wished to defend the action, having to give an indication of what their defence was likely to be in contemporaneous criminal proceedings. The civil court in such a situation had a discretion to stay the

civil proceedings if it appeared to the court that justice between the parties so required, having regard to concurrent proceedings arising out of the same subject matter and taking account of the defendant's 'right of silence' in the criminal proceedings. However, that right did not extend to give the defendant, as a matter of right, the same protection in contemporaneous civil proceedings as it gave in the criminal proceedings. Accordingly, the judge's power to stay the civil proceedings was a matter of discretion, not of right.

[21] The *Jefferson v Bhetcha* case, of course, preceded the Human Rights Act 1998 (HRA); but it is a helpful indicator that at common law there is no principle of law that a defendant in civil proceedings – where criminal proceedings are pending against him in respect of the same subject matter – is entitled to be excused from taking in the civil action any procedural step which would, in the ordinary way, be necessary or desirable for him to take in furtherance of his defence in the civil action if that step would (or might) have the result of disclosing in whole or in part what his defence is (or is likely to be) in the criminal proceedings: see the judgment of Megaw LJ at 904D-G. Albeit this analysis preceded the enactment of the HRA, the right to a fair trial at common law was a central consideration; and in my view Article 6 ECHR is unlikely to add much, if anything, to common law fairness in this context – which is a point also conceded by Mr Heraghty on behalf of the applicant.

[22] *Jefferson v Bhetcha* was considered and applied in another case involving an employer's disciplinary process which preceded related criminal proceedings in *R v BBC, ex parte Lavelle* [1983] 1 All ER 241. Although the application for judicial review failed on other grounds, Woolf J nonetheless expressed a view on the merits, namely that, where criminal proceedings were pending against an employee, the court would only require disciplinary proceedings in respect of the same matter to be postponed if there was a real danger that the disciplinary proceedings might cause a miscarriage of justice (or a 'real injustice') in the criminal proceedings. In reaching that view, the judge was influenced by the fact that the employee had the choice whether to cooperate with the disciplinary process or not and would still be entitled to later contend that that process had been unfair.

[23] *In re DPR Futures Ltd* [1989] 1 WLR 778 raised a similar issue, although this time in relation to the application of liquidators to recover monies withdrawn from a company, in circumstances where the company had been wound up and the directors had been charged with conspiracy to defraud. The respondent directors applied for a stay of the proceedings against them until after the trial of the criminal charges they faced. Millett J held that, while there was a real risk of prejudice to the respondents' right to a fair trial if the civil proceedings were heard before the criminal proceedings, nonetheless there was no sufficient reason to stay the proceedings, since the respondents' interests could be safeguarded in other ways and the company's clients would suffer serious injustice if the civil proceedings were delayed. As to the protections which could be afforded to the respondents, these included undertakings by the liquidators not to disclose information obtained in the course of the civil proceedings, save with the written consent of the respondents'

solicitors or the leave of the court; holding any interlocutory proceedings *in camera*; and ensuring that the full hearing of the civil proceedings did not take place before the conclusion of the criminal proceedings. The interlocutory stage of the civil proceedings could continue in the meantime. The real risk of prejudice which was found in that case seems to have been considered to arise because the civil proceedings (and the criminal proceedings) would each attract widespread publicity in the media.

[24] In the course of his judgment, Millett J made the following observation (at 790H):

> "*The respondents' main concern has been to avoid any need to file evidence on affidavit which relates to their conduct of the company's affairs. Understandably they wish to avoid any possible risk of incriminating themselves or giving the prosecution advance notice of the line their defence is going to take. It is, however, important not to confuse the privilege against self-incrimination, of which the respondents cannot be deprived, with the so-called right of silence, which does not apply in civil proceedings.*"

[25] *H v C (Contempt and Criminal Proceedings)* [1993] 1 FLR 787 is an authority which arises in a context more similar to the present case. That was a case where the plaintiff applied to commit the defendant to prison for alleged breach of a non-molestation order which had been made against him. The defendant's solicitor applied for a stay of the committal proceedings until the conclusion of criminal proceedings which arose out of the same facts. The defendant brought a judicial review in relation to this issue which was unsuccessful and he then appealed to the Court of Appeal. It held that, where there were committal and criminal proceedings arising out of the same facts, the committal proceedings should be dealt with swiftly and decisively. In doing so, it followed an earlier authority of the English Court of Appeal to similar effect: *Szcepanski v Szcepanski* [1985] FLR 468. However, where one set of proceedings, if allowed to proceed, was likely to prejudice the fairness of the trial of the other proceedings, there was a discretion to adjourn; but this discretion was only to be exercised where there was a real risk of serious prejudice which might lead to injustice. Again, the chief concern appears to have been that of publicity of the committal proceedings, which might prejudice a jury hearing the criminal case.

[26] In a similar vein is the case of *Keeber v Keeber* [1995] 2 FLR 748, where a wife applied to commit her husband to prison for contempt of court following an alleged breach of an undertaking not to assault or molest her. A criminal prosecution based on the same facts was pending. The Court of Appeal allowed an appeal against an order staying the contempt proceedings. Again, it was held that contempt proceedings should be dealt with quickly and decisively, and should be adjourned

only where there was a real risk of serious prejudice which might lead to injustice in related criminal proceedings.

[27] Having considered a number of the cases discussed above, Butler-Sloss LJ applied the now established test of whether there was a real risk of serious prejudice which may lead to injustice if the civil proceedings proceeded. She accepted that in the committal proceedings the defendant would have to disclose the defence that he would have in due course to the criminal proceedings. The defendant argued that this would allow witnesses in the later criminal trial to adapt their evidence; would arm those cross-examining him in the later criminal trial with far more information; and would give rise to potential interference with defence witnesses by prosecution witnesses. (Some of these considerations, in particular the second, chime with the points made by the applicant in these proceedings.) Butler-Sloss LJ did not find these risks persuasive, the first being a risk in every criminal trial; and observed that "*the fact of the criminal trial is not, in the line of cases to which I have already referred, a reason not to proceed with the civil proceedings…*" In addition, she considered that the sort of defences that one would expect in the criminal trial were "*all pretty obvious*", as would the potential for cross-examining on them. Otton LJ agreed and observed that there was no evidence to suggest that any such prejudice to the criminal trial existed or, if so, what it was.

[28] A case raising the same type of issue but where a stay was granted and upheld is *M v M (Contempt: committal)* [1997] 1 FLR 762. In that case, a husband was alleged to have breached an undertaking not to use violence on his wife or enter her home. The wife alleged the husband had breached the undertaking, including by breaking into her house and attempting to rape her. He was arrested and released on bail pending trial. In the meantime, however, his wife applied to commit him to prison for contempt in light of the breaches of his earlier undertaking. The defendant applied for the contempt proceedings to be stayed. The recorder granted a stay on the grounds that, in a complex case, the continuance of the contempt proceedings could result in severe prejudice to both parties. The complainant wife appealed.

[29] The Court of Appeal dismissed the appeal in *M v M*. It took account of the overriding principle that orders of the court must be obeyed, in particular orders made for the protection of a party, and that breaches of orders should be dealt with swiftly and decisively. However, it also had regard to the principle that a defendant should not be prejudiced in the conduct of his defence to what might be a serious charge. It held that the recorder's conclusion that the husband would be prejudiced if allegations in the criminal trial had already been the subject of contested civil proceedings, perhaps with different evidence, and that therefore the contempt proceedings should be stayed, had been a sustainable exercise of discretion.

[30] Lord Bingham CJ helpfully summarised the principles laid down by the relevant authorities (including the cases referred to above), which were not the subject of dispute. He said:

> *"It would appear that those authorities establish three principles. The first is that there is no absolute rule that civil proceedings (including contempt proceedings) should not proceed when criminal proceedings are pending. The second is that there is a general rule that contempt proceedings should be deal with 'swiftly and decisively'… The third principle is that the test as to whether or not contempt proceedings should proceed in advance of criminal proceedings is whether there is a real risk of serious prejudice leading to injustice if the contempt proceedings go ahead… If the answer is that there is no real risk of serious prejudice leading to injustice, then in the ordinary way the contempt proceedings should go ahead. If, on the other hand, there is judged to be a real risk of serious prejudice leading to injustice if the contempt proceedings go ahead, the court may properly stay the contempt proceedings and would ordinarily do so."*

[31] The recorder in the *M* case had been highly influenced by the complexity of the issues in the criminal proceedings and by the fact that the strict bail conditions to which the husband was subject pending the criminal trial provided the wife with considerable protection in the meantime. The Court of Appeal was not persuaded that the exercise of the recorder's discretion, having properly directed himself on the law, had been plainly wrong and therefore dismissed the appeal.

Application of the principles in the present case

[32] The applicant submits that many of the cases discussed above relate to criminal proceedings and concurrent proceedings for contempt of court, which arise out of the same or similar facts; and that there is a special importance to contempt proceedings being dealt with swiftly and decisively. That may be so. However, the principles established in the cases mentioned above are of more general application to civil proceedings which overlap with the issues in pending criminal proceedings. In any event, I also consider that there is a particular importance to applications for non-molestation orders being dealt with swiftly and decisively as a general rule. Indeed, the decisions of the Court of Appeal in this jurisdiction in *Wallace v Kennedy* [2003] NI 367 and *Murphy v Murphy* [2018] NICA 15 make clear that, all else being equal, the statutory scheme under the 1998 Order envisages an on-notice hearing occurring expeditiously and that there should be full adjudication on a NMO application rapidly, in light of the protective nature of the jurisdiction. As Ms McMahon submitted, it is unsurprising that there is no statutory bar on NMO applications proceeding in advance of related criminal proceedings since they are directed to securing the immediate safety of persons who are at risk.

[33] The risk of undue interference with pending criminal proceedings, such as it is, is also likely to be capable of being managed in a range of ways. In the first instance, it is important not to over-estimate this risk in the context of NMO

proceedings in the DPC. In the generality of cases, it will probably be a risk with a low chance of materialising; or with a low chance of causing prejudice to the later criminal proceedings which is likely to be serious. The respondent observed that the DPC is not a court of record. There will accordingly rarely if ever be a transcript of evidence which can be obtained, or at least one which is entirely comprehensive or reliable. Any notes taken during the hearing would be difficult for interested third parties to obtain.

[34] Although the applicant pointed to the fact that, under rule 12(1) of the Magistrates' Courts (Domestic Proceedings) Rules (Northern Ireland) 1996, a record of the hearing must be made in Form F6, consideration of that form suggests that the formal record made of the hearing is likely to be cursory. It should include whether the hearing is *ex parte* or on notice; and both who the attendees at the hearing were and who the representatives were. The section of the form dealing with evidence notes that it is "*to be completed only when the court makes a finding of fact*" and, in those circumstances, appears to envisage only an indication of the reports or statements read by the court and the identities of those from whom it heard oral evidence. The judge may have made notes of any oral evidence given, but such court documents are generally exempt from any form of disclosure: see section 32(1) of the Freedom of Information Act 2000 and paragraph 14(2) of Schedule 2 to the Data Protection Act 2018.

[35] The relevant procedural rules also suggest that the attendance of those in court for domestic proceedings should be limited: see article 89(2) of the Magistrates' Courts (Northern Ireland) Order 1981. The hearing will not be in public in the usual way. It is correct that media representatives are permitted to attend; but what they are permitted to report is restricted by virtue of article 90 of the 1981 Order. Although this may include a "*concise statement of the charges, defences and counter-charges in support of which evidence has been given*" and "*the decisions of the court, and any observations made by the court in giving its decision*", the press are not free to report the full detail of evidence given by parties or witnesses in domestic proceedings.

[36] The type of prejudice considered in many of the authorities, therefore, namely the publication in the media of evidence from the civil proceedings which is likely to affect the impartiality of a jury hearing a later criminal case on the same facts, is likely to arise only very rarely. The likelihood of the police or prosecution obtaining clear details of the evidence given by a respondent in NMO proceedings and using that against them could also be expected to be low. Neither party was able to cite an instance of this having happened or having been attempted. One route for this to occur may, of course, be through disclosure by the complainant or (perhaps more likely) their lawyers. However, as the *DPR Futures Ltd* case in particular illustrates, that concern can be addressed by the provision of appropriate undertakings as to non-disclosure. Moreover, one must also bear in mind that the judge overseeing any later criminal trial also has a discretion to exclude evidence on a number of bases in order to ensure the fairness and propriety of the trial.

[37] The applicant still remains concerned about being 'required' to give evidence in defence of the NMO proceedings in relation to factual matters which are the subject of criminal investigation. He initially submitted that, if he decided to give evidence at the NMO hearing in order to increase his prospects of successfully defending his wife's application, he would not enjoy any right against self-incrimination. At the hearing, Mr Heraghty was prepared to concede (rightly, in my view) that this might not be correct. I see no reason why the usual approach to the privilege against self-incrimination should not apply where the applicant chose to give evidence in defence of his wife's NMO application. That is supported by the observations of Millett J in the *DPR Futures* case quoted at paragraph [24] above. Where the privilege is to be removed or abrogated this is generally provided for by way of specific statutory provision (see, for instance, section 94A of the Judicature (Northern Ireland) Act 1978 and article 171(1) of the Children (Northern Ireland) Order 1995). Although Mr Heraghty submitted that reliance on the privilege is "*not a good look*", as a matter of law no adverse inference can be drawn by reason of a claim of such privilege.

[38] The points remain, however, that if the applicant wishes to increase his prospects of successfully defending the NMO application, he ought to give evidence and give an account in order to persuade the judge that the making of an order is unnecessary or inappropriate; and that, in doing so, the applicant could be asked a range of questions relevant to his likely evidence in the later criminal proceedings. The evidential territory covered might also be more wide-ranging than that in the criminal proceedings.

[39] As a result of all of this, the applicant contends that he is faced with Hobson's choice. I reject that submission, since the applicant does have a real choice and not merely one course open to him. He can choose to give evidence; or he can choose not to. I cannot accept the submission that, should he choose not to give evidence at the NMO hearing for fear of prejudicing his defence of the criminal charges at a later date, the NMO hearing is thereby automatically rendered unfair. The applicant's prospects of successfully opposing the application may be reduced; but that is the consequence of his own election. It would still be open to him to challenge and probe his wife's evidence, including by way of cross-examination, to call other witnesses (as appropriate) and/or to adduce evidence under the Civil Evidence (Northern Ireland) Order 1997 which supports his case. He can also choose to give evidence if he wishes and rely on the privilege against self-incrimination if and when he considers it necessary. There is, of course, no general right to avoid having inconsistent statements put to you if a defendant has chosen to give an account of events which differs from that given by him at some other stage.

[40] In addition, the holding of an *inter partes* NMO hearing may also be a double-edged sword for the complainant, in that it might provide an opportunity for inconsistencies in their account to be exploited; and the respondent's representatives might use the hearing as a 'dry run' for cross-examination of the complainant in a

later criminal trial. There is probably good sense in both parties seeking to avoid a contested hearing on the facts if a later criminal trial is to follow; but if an applicant for a NMO seeks the protection of the court and is prepared to substantiate their claim, there should be a high bar for depriving them of that opportunity.

[41] In this case, the applicant has a well-made point that the relevant bail conditions to which he was subject already provided some protection to his wife. In fact, it prevented him from even contacting his wife, rather than merely enjoining him not to molest her. That is plainly a factor which a district judge who is asked to adjourn or stay a NMO hearing can and should take into account. However, there is not direct equivalence between a NMO granted by the DPC and a condition of bail prohibiting contact between two parties. For instance, a NMO may prohibit a range of acts which would constitute molestation under the 1998 Order which may not have been prohibited by way of bail condition (depending on its precise wording); and might contain a more tailored or different exclusion zone from any which is imposed in a bail order.

[42] Bail conditions can, of course, be varied upon application. The respondent could also be released unconditionally and no longer subject to bail for a variety of reasons, not all of which would adversely impact the applicant's prospects of securing a NMO based (wholly or partly) on the behaviour which was the subject of the criminal charge. Where this happens, the protection afforded to the applicant by the bail conditions would fall away. Provided the NMO proceedings had not been finally disposed of, an opportunity would exist for the matter to be brought back before the DPC at that stage (provided also that the applicant was aware that the relevant bail condition was no longer extant). However, the respondent points out that there is no default procedure for alerting a NMO applicant that bail conditions have been amended or removed, or that the respondent to the application has been discharged from bail. Nor is there any means, at least ordinarily, by which the complainant participates in a bail hearing; nor can they themselves bring an admitted or alleged breach of bail back to court for further action. As Ms McMahon pointed out, the 1998 Order is designed to put such matters into the hands of the individual who complains that they need legal protection.

[43] A respondent who without reasonable excuse contravenes a NMO is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a term not exceeding 6 months or both (see article 25 of the 1998 Order). In addition, however, the court has a range of further civil enforcement powers exercisable upon complaint, including committal for non-compliance and a fine: see article 27(1) of the 1998 Order and article 112(3)-(8) of the Magistrates' Courts (Northern Ireland) Order 1981. A breach of a bail condition may result in a revocation of bail, if the matter is brought back to court by the relevant authorities, but it may not. The judge could not revoke bail merely on a punitive basis; and breach of a bail condition (as opposed to failure to surrender to custody without reasonable excuse) is not, of itself, a criminal offence.

[44] In summary, both in terms of purpose and effect, there are differences between the protection provided by non-molestation orders and bail conditions prohibiting contact with a complainant. In some cases, an appropriately worded bail condition may provide reassurance to a district judge that a NMO is unnecessary, or at least unnecessary for some period of time. However, a judge is perfectly entitled to reach the view that protection by means of a bail condition is second best to the protection afforded by a non-molestation order, enforceable at the instance of the beneficiary of that order.

[45] As to the outcome of the challenge on the particular facts of this case, I would hold as follows:

(i) As a matter of law, the applicant was not impeded in his defence of his wife's application for a non-molestation order at the time the district judge listed it for hearing. It was open to him to defend that application and to do so on whatever grounds he wished, including by giving evidence on his own behalf. If the hearing had proceeded, it would not have been an unfair hearing. The issue, rather, is that the applicant would have had some tactical judgments to make as to what, if any, case he wished to make at the hearing; as to whether he would give evidence; and, if so, as to what precisely he would say. The mere fact that the applicant would prefer not to have been the subject of questioning at that point does not mean that he would have been deprived of a fair opportunity to defend the application brought by his wife.

(ii) The key issue is whether this would prejudice the later criminal proceedings to an extent which violates his Article 6 rights, which I take to be protected by the common law as it has developed in the authorities discussed above. Assuming the applicant's Article 6 rights were engaged at the relevant time (when he had been subject only to pre-charge questioning), the applicant has not advanced any Strasbourg authority suggesting that his Convention rights go further than his rights at common law in this area. In my judgment, the applicant has failed to establish that the relevant threshold has been reached. I do not consider that there would be a real risk of serious prejudice to him leading to injustice in his later criminal trial if the NMO application had proceeded. Any prejudice to him is speculative and not such as to meet the test where it would be wrong to allow the civil proceedings to proceed.

(iii) The issue therefore resolves to a rationality challenge. I am also not persuaded that the course the judge took was an exercise of his discretion which was so plainly wrong as to be unsustainable in law. Although another judge might have taken a different course and have been justified in doing so, that is not the test. The judge appears to have been influenced by the fact that the applicant had been interviewed by the police and had answered all questions put to him in respect of the allegations; that is to say, he had already chosen to put on record his version of events. He was aware that the

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applicant was on bail at that time and took that into account. He also took into account the detailed submissions made on behalf of the applicant as to the listing of the *inter partes* NMO hearing but considered that the feared prejudicial effect on the possible later criminal proceedings was speculative and unparticularised. In short, like me, he appears to have been unconvinced that the applicant had established a real risk of serious prejudice leading to injustice.

[46] The application for judicial review of the district judge's decision will therefore be dismissed.

Guidance for future cases

[47] Since this issue has been brought into focus by these proceedings, I venture to suggest some guidance as to how it might be addressed in future cases, which I hope may be of assistance. In doing so I recognise, as Mr Heraghty correctly submitted, that the instances where unfairness may result from a district judge forcing on contested NMO proceedings will be fact sensitive. Any attempt to lay down hard and fast rules would therefore be futile. The observations below should be read in this light:

(a) Ultimately, it seems to me that it should only be in a rare case that an applicant for a NMO who can mount a *prima facie* case that they are deserving of the court's protection should have their right to seek that protection outweighed or restricted by the respondent to the application simply wishing to keep his or her 'powder dry' in relation to the criminal investigation or proceedings. The purpose and intention of the 1998 Order is to provide an effective remedy to those requiring the courts' protection and that there should be an on-notice hearing of an application for a NMO expeditiously. This should be the starting point for consideration of these issues.

(b) Accordingly, it will rarely, if ever, be acceptable to deprive an applicant for a NMO of the opportunity to pursue her or his application where this will result in a lack of appropriate protection for them from the actions of the respondent in the meantime. Although there may be some cases where the judge is entitled to form a view that the application for the NMO is misguided or hopeless, for instance where the written application fails to raise even a *prima facie* case that it would be appropriate to grant an order, in the vast majority of cases the starting point will be that the applicant seeking the court's protection is entitled to present their case that they should be granted a NMO and have it determined on the merits at an early stage.

(c) Having said that, it should also be recognised that, where future criminal proceedings dealing with the same subject matter are likely to follow, it may be better for both the complainant and the respondent not to be required to give contested evidence on those same issues in a different forum, where

different rules of evidence may apply. If, therefore, a pragmatic way may be found to avoid that, there will usually be much to commend this.

(d) To this end, a district judge may take a more relaxed view about adjourning or staying the full hearing of a NMO application where satisfied that, assuming the applicant would be successful in their application, there is equivalent or adequate protection for them in the meantime. This will most often arise where the respondent to the NMO application consents to the making of an interim order against them (albeit without prejudice to their right to contest whether that order should continue or be made final at some later point); or is prepared to give a formal undertaking to the court in appropriate terms. Indeed, in such circumstances, a district judge would ordinarily require a good reason to press ahead with the hearing.

(e) Where the interim 'protection' relied upon by the respondent as justification for the court declining to hear the NMO application is something other than consent to an interim order or the giving of an undertaking in appropriate terms, it will be for the district judge to weigh the competing interests. A bail condition prohibiting the respondent from contacting the applicant in terms which would also prohibit any molestation which the DPC would restrain may well suffice. So too might the situation where the respondent is remanded in custody and therefore has their opportunity to molest the applicant severely restricted. However, the judge should be alive to the possible shortcomings of such an approach which are highlighted in paragraphs [42]-[44] above. In taking all relevant considerations into account, the judge will wish to consider the seriousness of the offences; the likely risk to the applicant for the NMO or others (such as children) who might benefit from its terms; the extent of overlap between the matters grounding the NMO and any pending criminal charges; the amount of time between the intended NMO hearing and any pending criminal trial; and the extent of any prejudice on which the respondent relies as likely to arise in their dealing with actual or potential criminal charges.

(f) Where the applicant for the NMO does not enjoy any other form of protection in the interim (for instance, where the respondent is not on bail and will not consent to an interim order or give any undertaking), the judge should require the NMO application to proceed *unless* satisfied (i) that doing so will create a real risk of serious prejudice to the defendant's right to fair trial in related criminal proceedings; and (ii) that that risk cannot be adequately mitigated by the use of appropriate safeguards. In most cases, therefore, the NMO hearing will be likely to proceed.

(g) Those representing respondents to NMO applications in such circumstances should advise their clients in relation to the above and proactively explore whether a pragmatic solution might be achieved which would avoid the need for a contested application to adjourn or stay the NMO application which

may well be likely to fail, resulting in a hearing which may give rise to *some* prejudice to their later defence of criminal proceedings and/or at which they felt inhibited to some degree in the presentation of their case.

(h) Where the judge determines that the NMO hearing should proceed but there are legitimate concerns on the part of the respondent about prejudice to criminal proceedings, he or she should consider what further measures may mitigate this risk, for example by requiring undertakings to be given that none of the evidence in the hearing will be disclosed to any other person, or used in the course of any other proceedings, without the written consent of the other party or the leave of the court.

[48] A central complaint on the part of the applicant was that there are no statutory protections available to render the evidence given in NMO proceedings inadmissible in later criminal proceedings. In this, he drew a comparison with the provision made in article 171(2) of the Children (Northern Ireland) Order 1995, which applies in proceedings under Parts V and VI of the Children Order (*i.e.* public law proceedings concerning the care, supervision and protection of children). Of course, in that case, the protection afforded in article 171(2) is a corollary of the removal of the privilege against self-incrimination in such proceedings which is effected by article 171(1). The legislature has apparently concluded that, in the course of such proceedings, the importance of getting to the truth of what has occurred in the interests of the children concerned outweighs the usual protection afforded by this type of privilege. Once the privilege is removed – unlike the position in NMO proceedings (see paragraph [37] above) – it is right that evidence so obtained cannot then be used against an accused in a criminal trial. It has been obtained on penalty of imprisonment for contempt. The Department of Justice may wish to consider whether similar provision should be made in relation to NMO proceedings but, for my part, I see a ready distinction between Children Order proceedings to which article 171 of the 1995 Order applies and applications for non-molestation orders under the 1998 Order.

Conclusion

[49] For the reasons given above, I reject each of the grounds of judicial review on which the applicant was granted leave and dismiss his application.

[50] Although it is a matter for the district judge and the parties to the NMO proceedings, it seems to me that it would be appropriate for those proceedings to be listed for review before the judge (having been adjourned pending the outcome of this application) in order to determine, in light of the present circumstances and the attitude of each of the parties, whether any further step in those proceedings is necessary or appropriate at this time.