Neutral Citation No: [2026] NIFam 13	*Ref:* **HUM13046**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **13/05/2026**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION
OFFICE OF CARE AND PROTECTION

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Between:

KM

Appellant

and

JF

Respondent

and

DEPARTMENT OF JUSTICE

Notice Party

[Non-molestation orders; incompatibility]

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Ronan Lavery KC & Cathy Downey (instructed by McIvor Farrell) for the Appellant
Greg McGuigan KC & Nick Jones (instructed by Breen Lenzi Maguire) for the Official Solicitor on behalf of the Respondent
Aidan Sands KC (instructed by the Departmental Solicitor's Office) for the Notice Party

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HUMPHREYS J

Introduction

[1] This is an appeal from an order of Master Bell whereby he refused an application for a non-molestation order ("NMO") pursuant to Article 20 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 ("the 1998 Order").

[2] At the hearing before the Master, reliance was placed on a report from Dr Curran, Consultant Psychiatrist, in relation to JF, the respondent, which stated that he did not have a full appreciation or understanding of an NMO and its consequences.

[3] Having considered the relevant authorities, including *Wookey v Wookey* [1991] 2 FLR 319, the Master determined that the application must be refused.

[4] The appellant appealed against the Master's decision and subsequently served a notice, pursuant to Order 120 rule 2(1)(d) of the Rules of the Court of Judicature ("the Rules"), raising a devolution issue and a notice of incompatibility pursuant to Order 121 rule 3A of the Rules, asserting as follows:

> "In so far as the Mental Health (Northern Ireland) Order precludes the applicant from pursuing the claims pursuant to Family Homes and Domestic Violence (Northern Ireland) Order 1998 as set out in these proceedings, the said statutory provisions are unlawful and in breach of the applicant's rights pursuant to articles 2, 3, 6, 8, 13 and 14 of the European Convention on Human Rights. Accordingly, it is a breach of section 24 of the Northern Ireland Act 1998 for the Minister to continue to confirm/approve and act in accordance with these provisions."

The factual background

[5] The appellant sought an NMO under Article 20 of the 1998 Order against the father of her child on the grounds that he had been sending a series of abusive and threatening messages to her and other family members and behaving in an intimidating manner.

[6] Master Wells granted an ex parte NMO on 30 May 2024 prohibiting the respondent from molesting, intimidating, harassing or pestering the appellant and the child and from attempting to contact them, save by way of an arrangement and safety plan put in place by the relevant Trust. The respondent was also excluded from a 50 metre curtilage of the appellant's address and a five metre curtilage from the appellant and the child. This order was further renewed until the hearing before Master Bell.

The medical evidence

[7] The report of Dr Curran stated as follows:

> "[JF] failed to reassure me that he fully appreciates that a non-molestation order is issued to prohibit an abuser from using or threatening physical violence, intimidating, harassing, pestering or communicating with an individual."

[8] Dr Curran also expressed the opinion that JF did not know right from wrong and was prone to deviate and provide excuses for any wrongdoing on his part. It was further stated that he had some superficial understanding of the consequences of

breach of an order but that he failed to understand components of an order and how its restrictions affected certain behaviours.

The statutory framework

[9] Article 20 of the 1998 Order empowers the court to make an NMO prohibiting a respondent from molesting an associated person and/or a relevant child. It specifically states, at Article 20(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."

[10] In *Wookey* the Court of Appeal in England & Wales considered whether a prohibitive order, in the form of an NMO, should issue against a person lacking capacity. Butler-Sloss LJ stated:

> "In my judgment, an injunction ought not to be granted against a person found to be in that condition since he would not be capable of complying with it. Such an order cannot have the desired deterrent effect nor operate on his mind so as to regulate his conduct. If the order can have no effect upon Mr Wookey, any breach by him cannot be the subject of effective enforcement proceedings since he would have a clear defence to an application for committal to prison for contempt."

[11] The *Wookey* principle can be simply stated – an injunction or other coercive order should not be granted against a person incapable of understanding the order. In that event, it may be that action can be taken under the mental health legislation or pursuant to the criminal law.

The decision of Master Bell

[12] In applying *Wookey* and the principles set out by Cobb J in *Redcar and Cleveland Borough Council v PR* [2019] EWHC 2305 (Fam), the Master concluded that the making of an NMO could not have the desired deterrent effect on JF, nor operate on his mind so as to regulate his conduct. The making of such an order would therefore be ineffectual and the application was refused.

The Convention rights

[13] On the appellant's analysis, cases involving domestic violence can engage the right to life preserved by article 2 of the Convention, the article 3 prohibition on torture and inhuman or degrading treatment, the right to private and family life under article 8 and the article 6 right to a fair trial.

[14] Article 2 imports a positive obligation upon the state to take preventive measures to prevent a risk to life - see *Osman v UK* [1998] 29 EHRR 245. This duty is triggered in clearly defined circumstances. As the Grand Chamber said in *Osman*:

> "… it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk." (para [116])

[15] The appellant has filed an affidavit in this case outlining the alleged behaviour of the respondent. In no sense could it be said that this conduct gives rise to the type of risk which would trigger any *Osman* duty. There is no identified real and immediate risk to life. Equally, there is no suggestion in this case of any torture or inhuman or degrading treatment. Article 3 is also not engaged.

[16] Article 8 may require the provision of an adequate legal framework to afford protection against acts of violence by private individuals. In *Soderman v Sweden* (Case no. 5786/08) the applicant complained that the state had failed to comply with its obligation under article 8 to provide her with remedies against her stepfather's violation of her personal integrity when he had attempted secretly to film her naked when she was 14 years old. The Grand Chamber held that article 8 may require the state to adopt measures to secure the right to respect for private and family life, including effective criminal law provisions and civil remedies affording protection. The finding in that case was of a violation of article 8 by reason of a lack of a remedy in either criminal or civil law.

[17] In Northern Ireland, the law in relation to harassment permits both criminal and civil sanction under the Protection from Harassment (Northern Ireland) Order 1997 and the Malicious Communications (Northern Ireland) Order 1988, as well as the remedy of NMO under the 1998 Order, other criminal offences and the general civil law on injunctions. There is no lack of any relevant statutory or legal framework. The only complaint which the appellant can have is that the NMO in this case was refused on the basis of the *Wookey* principle. However, she can still avail of the criminal law and there remains the potential for intervention under the Mental Health (Northern Ireland) Order 1986 ("the 1986 Order"). It cannot be said therefore that

there is no remedy available in such circumstances and I am not satisfied that there has been any disproportionate interference with the appellant's article 8 rights.

[18] Reliance is also placed on the right of access to the courts and an effective judicial remedy enshrined in article 6. It is evident that the appellant has had the right of access to the courts. The right to a fair trial must apply to both parties. It would not be fair to hold a person in contempt of court when they do not have the requisite understanding of the order which has been made against them. From that perspective, *Wookey* upholds rather than infringes article 6 rights.

[19] It is not the case that the appellant has been left without any legal remedy. The *Wookey* principle ensures that punitive sanctions for contempt are not used as a proxy for the control of mentally incapable individuals.

[20] The appellant states that there is no provision in the 1998 Order which should be declared incompatible because, it is contended, a broad interpretation should be given to the statutory provisions in order to protect vulnerable individuals.

[21] Rather, the appellant's complaint is one of outcome in that NMOs ought to be made, even in cases where capacity and understanding of the respondent are issues, since they still have utility and would serve to protect applicants' Convention rights. I am entirely satisfied that the principle in *Wookey* represents the legal position in this jurisdiction and that its continued application does not represent a breach of any of the claimed Convention rights. To imprison children or incapacitous adults for breaches of court orders would, in itself, likely entail a breach of Convention rights.

The devolution notice

[22] Section 24(1) of the Northern Ireland Act 1998 ("the NIA") provides:

> "(1) A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act—
>
> (a) is incompatible with any of the Convention rights;"

[23] Under schedule 10, paragraph 1, to the Northern Ireland Act 1998, a "devolution issue" means:

> "(a) a question whether any provision of an Act of the Assembly is within the legislative competence of the Assembly;
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> (b) a question whether a purported or proposed exercise of a function by a Minister or Northern

> Ireland department is, or would be, invalid by reason of section 24;
>
> (c) a question whether a Minister or Northern Ireland department has failed to comply with any of the Convention rights; or
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> (d) any question arising under this Act about excepted or reserved matters."

[24] Order 120 rule 2 of the Rules requires a party raising a devolution issue to specify:

> "the facts and circumstances and points of law on the basis of which it is alleged that the devolution issue arises in sufficient detail to enable the Court to determine whether a devolution issue arises in the proceedings."

[25] The issue raised in the instant case seems to fall within para 1(a) in that the appellant contends that the 1986 Order and the 1998 Order are unlawful and the Minister is in breach of section 24 of the NIA by continuing to "confirm/approve" their provisions.

[26] The 1986 Order is an Order in Council laid before Parliament many years before devolution. The 1998 Order is also an Order in Council, made on 22 April 1998, prior to devolution occurring in 1999. They are not Acts of the Assembly.

[27] No devolution issue can therefore arise in respect of either piece of legislation and the devolution notice ought not to have been served.

The incompatibility issue

[28] Section 4 of the Human Rights Act 1998 ("HRA") provides:

> "(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
>
> (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
>
> (3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

> (4) If the court is satisfied—
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> (a) that the provision is incompatible with a Convention right, and
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> (b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,
>
> it may make a declaration of that incompatibility."

[29] Order 121 rule 5(2)(d) of the Rules requires the following to be specified:

> "where the relief sought includes a declaration of incompatibility, details of the legislative provision (or provisions) alleged to be incompatible and the grounds on which it is (or they are) alleged to be incompatible."

[30] It can be seen therefore that the making of such a declaration is firmly anchored to the provisions of primary legislation. However, in this case, the appellant states that there is no legislative provision which is said to be incompatible. This rather begs the question as to how any section 4 declaration could conceivably be made.

[31] Section 3 of the HRA requires a court to read and give effect to legislation in such a way as is compatible with Convention rights, so far as it is possible to do so. The limits of this interpretative obligation were recognised by the Supreme Court in *Secretary of State for Business and Trade v Mercer* [2024] UKSC 12. At paras [102] to [105] Lady Simler draws the distinction between the section 3 interpretation and impermissible judicial legislation.

[32] In any event, in this case, there is no legislative provision identified which calls for a particular section 3 compliant interpretation.

[33] If the complaint of the appellant is properly characterised as asserting there is a lacuna in the law which calls for legislative intervention, it is clear that a failure to make legislation cannot be the subject of a section 4 declaration – it is no part of the court's function to compel Parliament to create a new statutory scheme.

[34] In *Re S (Children)* [2002] UKHL 10 the House of Lords considered the article 8 rights of children in the context of care orders and the safeguards provided by the Children Act 1989. One of the issues concerned the inability of a child to initiate judicial review proceedings to challenge decisions about his welfare, and the potential for breach of his or her article 6 and article 8 rights. However, while it was the legislative scheme that entrusted the responsibility for the child's care to a local authority, it was the local authority's failure to comply with its statutory obligations

that was the source of the infringement. The principal contention, then, was that the incompatibility lay in the absence from the Children Act of an adequate remedy if a local authority fails to discharge parental responsibilities properly. Lord Nicholls held:

> "The United Kingdom may be in breach of its treaty obligations regarding this article. But the absence of such provision from a particular statute does not, in itself, mean that the statute is incompatible with article 6(1). Rather, this signifies at most the existence of a lacuna in the statute." (para [85])

[35] Equally, it is not open to the appellant to argue that the failure to legislate constituted an unlawful act pursuant to section 6(1) of the HRA since, by section 6(6), an "act" does not include a failure to:

> "(a) introduce in, or lay before, Parliament a proposal for legislation; or
>
> (b) make any primary legislation or remedial order."

[36] The appellant's claim of incompatibility cannot therefore succeed.

Conclusion

[37] Properly analysed, the appellant's appeal is against the merits of the Master's decision, challenging as it does his interpretation of the evidence and application of the law.

[38] There was never any basis to raise a devolution issue or to seek a declaration of incompatibility in this case.

[39] The court will proceed to hear and determine the appeal on its merits.