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Judgment: approved by the Court for handing down | *Delivered:* **25.06.2003**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

A WALLACE

(Complainant) Appellant;

-and-

COLIN ROBERT KENNEDY

(Defendant) Respondent.

Before Carswell LCJ, Nicholson LJ and Campbell LJ

CARSWELL LCJ

[1] This is an appeal by way of case stated against an order made by Mr WA McNally, sitting as a deputy resident magistrate in North Antrim Magistrates' Court on 16 August 2002, whereby he dismissed a summons brought against the respondent by the appellant, a chief inspector in the Police Service of Northern Ireland, alleging a contravention on 11 June 2001 of a non-molestation order made on 24 January 2001, contrary to Article 25(a) of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 ("the 1998 Order").

[2] The order made on 24 January 2001, on the application of Natasha Mildred Penny McClelland, was a non-molestation order under Article 20 of the 1998 Order, whereby the respondent was forbidden, *inter alia,* to intimidate, harass or pester the applicant. It was made by the resident magistrate sitting in North Antrim Magistrates' Court on an *ex parte* application, pursuant to Article 23 of the 1998 Order, paragraphs (1) to (3) of which provide as follows:

> **"23.**-(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 –
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> (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,
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> (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
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> (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
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> (ii) in any other case, in effecting substituted service.
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> (3) If the court makes an order by virtue of paragraph (1), it shall afford the respondent an opportunity to make representations relating to the order as soon as just and convenient at a full hearing."

A full hearing is defined by Article 23(5) as a hearing of which notice has been given to all parties in accordance with rules of court.

[3] The order of 24 January 2001 specified that it was to take effect forthwith and remain in effect until 24 January 2002. The resident magistrate

did not provide either in the order or by any other means for the holding of a full hearing. The order simply stated:

> "You have a right to ask the court to change or cancel the order but you must obey it unless the court does change or cancel it."

This appears to have been a reference to Article 24 of the 1998 Order, which provides:

> **"24.**-(1) An occupation order or non-molestation order may be varied or discharged by the court on an application by –
>
> (a) the respondent, or
>
> (b) the person on whose application the order was made.
>
> (2) In the case of a non-molestation order made by virtue of Article 20(2)(b), the order may be varied or discharged by the court even though no such application has been made."

[4] A complaint was on 8 January 2002 brought by the appellant by way of summons against **t**he respondent under Article 25 of the 1998 Order, alleging that he had contravened the order of 24 January 2001 by pestering the applicant on 11 June 2001. Following submissions made on behalf of the respondent the magistrate at the hearing on 16 August 2002 held that the order of 24 January 2001 was void *ab initio* by reason of the failure of the magistrates' court to specify a return date for a full hearing or to issue a summons directed to the respondent to attend on a specified date. He accordingly dismissed the summons.

[5] By a requisition dated 23 August 2002 the appellant applied to the magistrate to state a case for the opinion of this court, and the magistrate stated and signed a case dated 20 November 2002. The question posed in the case was:

> "Was I correct in law in holding that the failure of North Antrim Magistrates' Court, in making the order on 24 January 2002, to (a) specify a return date or (b) arrange for the issue and service of a summons for an inter-partes hearing rendered the order void ab initio".

Clearly the magistrate misstated the date of the order and meant to refer to 24 January 2001.

[6] Before we deal with the effect in law of the order we must refer to our feeling of concern that the magistrates' court made an *ex parte* order which was expressed to endure for so long a period, the more so when no arrangements were then made for a full hearing to be held. We have no information about the circumstances of the case which influenced the court to make an *ex parte* order rather than direct a hearing on notice, and cannot express an opinion on the correctness of its decision to do so. We would only observe that Article 23(2) spells out a number of circumstances to which the court should have regard in determining whether to make an order *ex parte,* in terms which appear to envisage that the court should be satisfied that there is an urgent need for an order to be made without notice to the respondent.

[7] We agree with the opinion expressed in *Emergency Remedies in the Family Courts,* 3rd ed, para 15.93 that orders without notice should be the exception rather than the rule. The reasons given by the editors are in our view valid:

> "An order granted without notice inherently carries a risk of inflaming the situation, whereas at a hearing on notice the respondent frequently accepts that the applicant needs protection and is willing to submit to an injunction or give a binding undertaking. Most respondents do not know that an order without notice is only provisional and subject to early review as if nothing had been proved. Upon receiving service of an order without notice, it is likely that it will appear to most respondents that the court has assumed that the allegations made against him were accepted as true by the court without question.
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> A hearing on notice is an opportunity to address outstanding issues. For example, allegations of molestation are often answered by a respondent claiming that the applicant has frustrated contact with a child: if the first hearing is held urgently and on notice, mutually acceptable arrangements for contact with a child may be achieved and the problem defused. Orders which interfere with civil liberties ought not to be made without notice unless they are clearly warranted; audi alteram partem is a fundamental legal principle of great importance."

Hoffmann LJ in a non-molestation case in *Loseby v Newman* [1995] 2 FLR 754 at 758 described the proper practice in generalised terms:

> "An *ex parte* order should be made only when either there is no time to give the defendant notice to appear, or when there is reason to believe that the defendant, if given notice, would take action which would defeat the purpose of the order."

In the context of family cases, that will generally be limited to emergency cases when the interests of justice or the protection of the applicant or a child clearly demand immediate intervention by the court: *Ansah v Ansah* [1977] F 138 at 143, per Ormrod LJ.

[8] When it is appropriate to make an *ex parte* order, it is clear from the authorities that it should be made to subsist only for a very limited duration. In *Ansah v Ansah* Ormrod LJ went on to say:

> "If an order is to be made ex parte, it must be strictly limited in time if the risk of causing injustice is to be avoided. The time is to be measured in days, ie the shortest period which must elapse before a preliminary hearing inter partes can be arranged, and the order must specify the date on which it expires."

This principle has been regularly followed, and in *G v G (Ouster)* [1990] 1 FLR 395 Lord Donaldson of Lymington MR expressed the view that a period of seven weeks was "completely unjustifiable".

[9] In reaching his conclusion the magistrate reasoned from the judgment of Higgins J in *Re Sloan's Application* [2001] NIJB 321. In that case the applicant sought to set aside a non-molestation order granted *ex parte,* where, as in the present case, the magistrate did not take any step to arrange a full hearing. By the time that the application for judicial review came on for hearing the issues between the parties had been resolved, but the judge proceeded to hear the matter and expressed an opinion on the practice which magistrates should follow, in order to provide guidance for them. At pages 327-8 of his judgment he stated:

> "Article 23(3) requires the court to afford the respondent an opportunity to make representations. Article 23(3) is mandatory in its requirement that the court give the respondent the opportunity to make representations. It is not simply the opportunity to make representations

> but to do so at a full hearing the timing of which must be just and convenient. To inform the respondent that he has the right to apply to vary or discharge the order is insufficient to comply with the mandatory words of art 23(3). The burden of doing so falls on the court.
> ….
>
> The fact that it is an unrestricted non-molestation order underlines the necessity to comply with the statutory duty of giving the respondent the opportunity to make representations at a full hearing. The court is under a duty to do so and to devise a means to fulfil that duty. While it is an order it is one made without notice. There is the potential for such an order to work an injustice on the respondent. Hence the necessity for an inter partes or full hearing after which a further order would be made or no order made at all."

[10] The magistrate reasoned from this opinion that the *ex parte* order was void *ab initio,* though Higgins J did not make any definite pronouncement on that issue. He considered the decision of the English Court of Appeal in *Johnson v Walton* [1990] 1 FLR 350, in which Lord Donaldson of Lymington MR said at page 352 that an injunctive order operates until it is revoked on appeal or by the court itself, and has to be obeyed whether or not it should have been granted in the first place. The magistrate distinguished this on the ground that a judge of the High Court or county court has a discretion to grant injunctions and can grant them for an indefinite period. The magistrates' court's jurisdiction to make a non-molestation order is, on the other hand, purely statutory and is defined by the terms of the 1998 Order.

[11] On appeal before us Mr McCloskey QC for the appellant relied again on *Johnson v Walton* and upon other authorities in which the courts have stated that orders of a court of competent jurisdiction must be obeyed unless and until they have been set aside: see, eg, *Isaacs v Robertson* [1985] 1 AC 97 at 101, per Lord Diplock and *Hadkinson v Hadkinson* [1952] P 285 at 288, per Romer LJ. He also relied on the presumption contained in the maxim *omnia praesumuntur rite et sollemniter esse acta,* citing Bennion, *Statutory Interpretation,* 4th ed, pp 982-3.

[12] We do not find these lines of argument of direct assistance in determining the statutory intention of Article 23(3), which in our view governs the matter and in which the conclusion is to be sought. We agree with Higgins J that there is an obligation upon the court to make some satisfactory arrangement for a full hearing and that it is not to be left to the

respondent against whom the non-molestation order is made to apply for the holding of a full hearing. Still less do we consider that that respondent's interests are sufficiently protected by the right contained in Article 24 to apply to vary or discharge the order, which would put the onus on him to make out his case.

[13] One of the factors material to determining the construction to be adopted of Article 23(3) is the effect of Article 6(1) of the European Convention on Human Rights. If an *ex parte* non-molestation order is made and the court has taken no step to hold a full hearing, then the respondent is subsequently prosecuted for a breach of the order committed several months after it was made, there is in our judgment a degree of procedural unfairness which would be a breach of Article 6(1). We accordingly have an obligation under section 3 of the Human Rights Act 1998 to construe the provisions of Article 23(3), so far as possible, in a way which is compatible with Convention rights.

[14] We do not consider that an *ex parte* non-molestation order is void if the court has omitted at the time of making it to arrange for a full hearing to be held. That omission could in an appropriate case be cured by making the necessary arrangements within a proper time – which will necessarily be short, as we have set out - and it would deprive the statutory provisions of some of their effectiveness if one were to hold the order void *ab initio.* As against that, if a considerable period of time has elapsed before the respondent commits an act prohibited by the order and he is subsequently prosecuted for its breach, we do not consider that the order can be regarded as still valid at the time of commission of that act. We do not find it possible to define in such a way that it can be generally applied to all cases how long an *ex parte* order will remain valid in the absence of a full hearing. The court which hears the prosecution for breach of the order will, however, be in a position to say *ex post facto* when it would have been just and convenient to hold a full hearing in the circumstances of the particular case.

[15] We would therefore offer the following guidance to magistrates' courts which are asked to make *ex parte* non-molestation orders:

(a) The court should consider with some care whether the circumstances of the case justify the making of an order *ex parte* rather than directing that the matter be heard *inter partes* on short notice.

(b) At the time of making the order the court should preferably fix a return date for the full hearing, specify that date in the order and limit the duration of the order to the date of the full hearing. The period of duration should be as short as reasonably possible, in order to comply with Article 23(3) of the 1998 Order.

(c) Alternatively, it could issue a summons directed to the respondent to attend a full hearing and limit the duration of the order to the date of that hearing.

(d) If neither of these steps is taken at the time of making of the order, the court should subsequently proceed to arrange a full hearing, provided it can be done within a time which qualifies as being "as soon as just and convenient."

(e) It would be open to a respondent, if the court has not taken steps to arrange a full hearing, to make a request for one to be held, and in such case the court should make the necessary arrangements.

(f) The respondent may apply under Article 24 for variation or discharge of a non-molestation order, whether it has been made *ex parte* or *inter partes* or confirmed after a full hearing. The onus will be on him on such an application to make out his case for variation or discharge. The court should be careful, however, to ensure that a respondent is not required to undertake that onus if he should really have sought a full hearing under Article 23(3), and in such a case it should treat the application as a full hearing under that provision.

(g) If a respondent commits an act prohibited by the order before a full hearing is held, and is then prosecuted for breach, it will be open to him to rely upon the defence that a full hearing should have been held before the time when he committed the act alleged. It will be for the court hearing the prosecution to determine whether the act was committed before the time at which a full hearing should have been held (whether or not one was ultimately held). If it was, that defence will fail; but if it was not, then the summons should be dismissed.

[16] It follows that although we are not in agreement with the reasons adopted by the magistrate in the present case, the summons was in our view correctly dismissed, for a full hearing should certainly have been held long before 11 June 2001. We would add a second question to that posed in the case stated:

> "2. Was I correct in law in dismissing the summons brought against the respondent for breach on 11 June 2001 of the order of 24 January 2001?"

We answer the first question (substituting the correct date) No and the second Yes and dismiss the appeal.