

Mag 26

Enforcement (a.k.a. Contempt) Summons under Art. 112 of The Magistrates' Court (NI) Order 1981; application to amend in order to state the complaint more properly; Art 6 ECHR; whether a declaratory residence order is capable of being the subject of enforcement under Art. 112 without more; Art. 14 of The Children (NI) Order 1995; enforcement proceedings are a remedy of last resort.

I G Complainant	Family Proceedings Court of East Tyrone at OMAGH
W G Defendant	County Court Division of FERMANAGH & TYRONE

Ruling upon the lawfulness of the Complainant's Enforcement Summons

I have prepared this judgment in an anonymised form. Nothing must be published which might lead, either directly or indirectly, to the identification of the children or the parties involved in this case.

The Background

This case arises within a regrettably attenuated dispute between these parties with reference to residence and contact. There are two children of the family, DG and ZG. On 23rd January 2003 a Final Order of the Court was made in respect of an earlier cycle of litigation, stating as follows;

Full Residence Order in favour of the applicant Mrs. G... with reasonable contact in favour of the Respondent, Mr. G...
No Order as to costs.

These are the terms of a residence or contact order as they are usually made in a Family Proceedings Court, whether or not by consent of the parties. Not uncommonly, however, more details as to just when the absent parent may have contact are also included.

Unfortunately, these parents found it necessary to return to the Court within a matter of months, having failed to reach agreement about a proposed trip for ZG, their daughter, with her father to England to attend a football fixture. This led to a further Order dated 1st May 2003, which provided as follows;

Application granted to allow the Applicant to take the child, Z... G... on the arranged trip to England.

The Respondent's costs to be paid by the Applicant.

Contact to take place on Tuesdays and Thursdays from 3.00pm – 6.30pm and alternate Sundays from 1.00pm – 7.00pm. No significant extension of such contact periods without the written consent of the Respondent.

Here we have a specimen “defined contact order”, so far as the details for Tuesdays, Thursdays and Sundays be concerned. Again, it is fairly typical that a general, or declaratory, contact order was made in the first instance, tightened into what is usually termed a defined contact order when difficulties later emerged.

It is also to be regretted that these two parents, encountering further difficulties, were either unable or unwilling to resolve matters without another approach to the Court. It seems that their son, DG, did not return to the Complainant after a contact visit to his father, the Defendant, on Tuesday, 15th July 2003.

On Thursday, 17th July, just two days later, each party sought leave to make application *ex-parte*. Mrs. G sought a Specific Issue Order dealing with the breach of the existing residence order. Mr. G sought a residence order in his favour, to reflect the circumstance whereby DG, aged 11, was now staying with him. It is such a great pity that in a case like this two parents could not have co-operated to the extent of sitting down with this 11-year-old boy, and discussing with him, in a calm, supportive and constructive manner, where he would like to live and what the comparative advantages are, as between the two options. So often, after months of damaging and costly litigation, these cases close when it is established independently that the child has and maintains a clear preference on that issue and that the preferred arrangement is consistent with his best interests. The real cost is that the child has been forced, by his parents, to make his choice to strangers, often with the knowledge that he has been made the object of court proceedings, with a consequential degree of guilt and confusion.

In any event, faced with these arm's-length cross-application, the visiting Resident Magistrate, quite understandably, refused each applicant leave to proceed *ex-parte* and directed an *inter-partes* Hearing on 24th July, one week later, with the relevant Social Worker to attend on that date to give evidence about the boy's wishes and feelings.

On 24th July, the Court was nonetheless informed of a written Agreement entered into between the parties in the course of that day and on foot of which, by consent, I directed that the cross-Applications be each adjourned for further review on 18th September. I directed the vacate of the subsisting residence order pending a full Hearing of the cross-Applications, as also agreed. The parties had undertaken *inter se* to co-operate with the Social Worker and had further agreed

that each would use best endeavours to facilitate whatever arrangements she would recommend. There was also a clause in the written Agreement which sought simultaneously to provide not only that the contact and residence arrangements would be determined by the Social Worker, but also, conversely, that this would follow agreement being reached between the parties. The document was unsigned. However, counsel for each party informed the Court that the parties had agreed that the boy would stay with his father for the time being, while his parents worked with the Social Worker. The case would come before the Court again on 18th September, to see if a resolution had been achieved.

The truce was short-lived. On 13th August 2003 a C2 Application was filed on behalf of Mrs. G, requesting a Direction that the matters be listed for timetabling on 21st August and thereafter listed for Hearing as a matter of urgency. This was grounded upon an allegation - as yet untested - that Mr. G had refused to co-operate with the Social Worker and had "refused to allow contact between the applicant and her son." The date of 18th September has now been re-set as one for Final Hearing, the Court having been informed that, in any event, the Social Worker was now refusing to deal further with these parents, which I take to mean that she saw no merit in further efforts at mediation.

All of this is by way of background. On the evening of 20th August as I studied the papers it was another thread in all this litigation which engaged a fair part of my attention. As well as issuing her C1 Application on 17th July 2003, Mrs. G had also caused to be issued what is commonly referred to as a Contempt Summons against her husband - what I prefer call an Enforcement Summons and which had been adjourned from time to time since then, evidently in deference to the substantive cross-Applications.

While much of my efforts were actually taken up in trying to understand the document, I also became concerned with the issue as to whether the previous Orders of the Family Proceedings Court, whether on 23rd January 2003 or 1st May 2003, were actually capable of lawfully being the cause for fining, let alone imprisoning, either party, upon an allegation of a breach of its terms.

In these circumstances, on 21st August, I took the opportunity to make counsel on each side aware of my concerns and to adjourn that Enforcement Summons to 4th September 2003 for legal submissions.

The Enforcement Summons

A: Whether to permit Amendment.

The text of the Summons before me ran as follows;

MAGISTRATES COURT (NORTHERN IRELAND) ORDER 1981
Article 20(1) & (3) Rule 8 – Form 2
SUMMONS TO DEFENDANT TO ANSWER COMPLAINT

(Title)

A complaint has been made to me that on the 16 July 2003 in the said Petty Sessions District and County Court Division, you the said Defendant refused to comply with a Contact Order made in favour of the Complainant by the Court of Summary Jurisdiction sitting at Omagh on the 23 January 2003 and on the 1 May 2003 whereby the Complainant was granted Residence and the Defendant was granted contact with the child, D... G..., date of birth 16th February 1992.

This is to command you to appear as a Defendant on the hearing of the said complaint at the Petty Sessions Courthouse, Omagh on the 24th day of July 2003 at 10.30 a.m. before a Magistrates' Court for the above mentioned Petty Sessions District.

It was dated 17th July 2003 and signed by the Clerk of Petty Sessions.

Ms. Cunningham, BL, appearing for Mrs. G, conceded at the outset that the text of the Summons needed to be amended, with leave of the Court, so as to describe the specific offence with which the Defendant was charged and to provide reasonable information as to the nature of the charge.

I was referred in this regard to Rule 6 of The Magistrates' Courts (Northern Ireland) Rules 1984;

Wording, etc., of documents

6-(1) Every complaint, summons, warrant or other document made or issued for the purposes of, or in connection with, any proceedings before a magistrates' court for an offence shall be sufficient if it describes the specific offence with which the accused is charged, or of which he is convicted, in ordinary language avoiding as far as possible the use of technical terms, and gives such particulars as may be necessary for giving reasonable information as to the nature of the charge.

(2) Every complaint, summons, warrant or other document in proceedings upon complaint in a civil matter shall be sufficient if it describes the cause of complaint in ordinary language without necessarily stating all the facts upon which the complaint is founded and gives such particulars as may be necessary for giving reasonable information as to the nature of the complaint.

(3) If the offence charged or cause of complaint is one created by or under any statutory provision, the description of the [offence] or cause of complaint shall contain a reference to the section of the Act, or, as the case may be, the rule, order, regulation, bye-law or other instrument giving rise to the offence or the cause of

complaint unless such reference appears elsewhere on the face of any summons or warrant issued in respect thereof.

(4) Subject to the foregoing paragraphs, the forms set out in Schedule 1 or forms to the like effect shall, where appropriate, be used in connection with proceedings to which the Rules relate.

It is only fair to add that Ms. Cunningham was not its original author. With regard to an application to amend, in order to rectify the deficiencies apparent on the face of the document served upon the Defendant, it seems to me that certain issues arise within the context of human rights.

Before I proceed to address Article 6 of the European Convention, I ought to make clear that I treat these enforcement proceedings as criminal in their nature for the purposes of the Convention rights. The court is empowered to fine or imprison the Defendant, upon finding him in breach of an order. The facts grounding a complaint under Article 112(3) of the 1981 Order must be proved to the criminal standard (*Dean v Dean* [1987] 1 FLR 517). In this regard, the following passage is found in Emmerson and Dixon's treatment of Article 6, contained in *Human Rights Law and Practice*, edited by Lester and Pannick;

In considering whether the proceedings are "criminal" for the purposes of art 6, the Convention organs adopt an autonomous approach to interpretation. Three criteria are to be applied, namely: (a) the classification of the proceedings in domestic law; (b) the nature of the offence itself; and (c) the severity of the penalty which may be imposed. If the applicable domestic law defines the offence as criminal, this will be decisive. But where domestic law classifies the proceedings as civil, the domestic classification will be "no more than a starting point". The E Ct HR will conduct an independent assessment of the true nature of the proceedings, taking into account the particular severity of the penalty which may be imposed. If a domestic court has the power to impose imprisonment, this will generally be sufficient to define the proceedings as "criminal", unless the "nature, duration or manner of execution of the imprisonment" is not "appreciably detrimental". Thus, prison disciplinary proceedings, proceedings for tax evasion leading to large financial penalties, commitment to prison for non-payment of the community charge and contempt proceedings have all been held to be criminal proceedings for the purposes of art. 6.¹

The rights set out in Article 6 are as follows;

Article 6

Right to a fair trial

1 In the determination of his civil rights and obligations or on any criminal charge against him, everyone is entitled to a fair and public hearing within a

¹ *Human Rights Law and Practice*, Lester and Pannick, ed. (London) 1999, p. 138

reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:

- a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- b. to have adequate time and facilities for the preparation of his defence;
- c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

I return at this juncture to Ms. Cunningham's application for leave to amend the Summons, in order to rectify the circumstance whereby the recital therein patently failed to inform the Defendant plainly of the nature and cause of the accusation against him. It appeared to reflect a complaint that he was in breach of both a residence order and a contact order in respect of the same child, at one and the same time. It intimated that he was in breach of the order of 1st May 2003 as well as that of 23rd January and, further, it disclosed no particulars of any statutory provision giving rise to the offence or cause of complaint.

The principle whereby Article 6 is to be given a broad and purposive interpretation applies to the Article as a whole and not just to Article 6(1).

A court which is asked to exercise its discretion to grant leave to amend in order to address such a level of deficiencies must have regard to the terms of Article 6(3)a of the Convention, whereby one of the Defendant's minimum right is to receive details of the nature and cause of the accusation against him, in comprehensible language, promptly. That is a fundamental right. In the present context, it would not be sufficient that, by resort to amendments, the Defendant were given this kind of information merely in good time for his scheduled trial. This Convention right is aimed at the information required to be given at the time of the commencement of proceedings, rather than the disclosure of evidence necessary to enable the accused to prepare for trial. A person is treated as being subject to a criminal charge when he is substantially affected by the proceedings.

In this case, that was when the Defendant was served with the Summons. The obligation to provide him promptly with adequate details of the charge is an obligation to do so in the text of the Summons as served.

Part of my reasons for declining to permit these amendments, then, is that to do so would constitute a breach on my part of the court's duty under S. 6(1) of The Human Rights Act 1998;

6. *Acts of public authorities*

(6) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

On the other hand, it would be open to me to dismiss the present Summons by reason of these incurable deficiencies, without prejudice to the right of the Complainant to issue a fresh Summons within the time allowed.

B: Whether it would make any real difference if an amendment to the Summons were allowed.

Nonetheless, the issues raised in this case go beyond that of a Summons which fails to specify the complaint in a sufficiently clear manner. I therefore considered it useful to enquire into whether the previous orders made by the Family Proceedings Court in their present form actually permit of enforcement by an Article 112 Summons. To that end, I wanted to take a look at a more competently drafted document. Ms. Cunningham had her suggested corrections, while I had some others, but the following may serve as a working text.

MAGISTRATES COURT (NORTHERN IRELAND) ORDER 1981 Article 20(1)

Rule 8 – Form 2

SUMMONS TO DEFENDANT TO ANSWER COMPLAINT

(Title)

A complaint has been made to me that on the 16 July 2003 at (*place*) in the said Petty Sessions District and County Court Division, you the said Defendant refused to comply with a Residence Order made in favour of the Complainant by the Court of Summary Jurisdiction sitting at Omagh on the 23 January 2003, whereby the Complainant was granted Residence of the child, D... G..., date of birth 16th February 1992, contrary to Article 112(3) of The Magistrates' Courts (Northern Ireland) Order 1981.

This is to command you to appear as a Defendant on the hearing of the said complaint at the Petty Sessions Courthouse, Omagh on the 24th day of July 2003 at 10.30 a.m. before a Magistrates' Court for the above mentioned Petty Sessions District.

This version would recite that a Residence Order was made, alleges that the Respondent refused to comply with it, and then asserts that this was contrary to Art. 112(3) of The Magistrates' Courts Order (to which Order I will refer more commonly as "the 1981 Order" in what follows).

Article 112(1) of the 1981 Order provides;

Enforcement of orders other than for the payment of money

112-(1) Where a power is conferred under any enactment upon a magistrates' court to require any person to do or abstain from doing anything other than the payment of money and no mode is provided for the exercise of such power, the court may, subject or the provisions of this Order, exercise such power by order.

This paragraph, then, simply empowers a magistrates' court to exercise a power to compel or forbid action by a person through the vehicle of a court order – except where some other method of enforcement is provided by the enactment which endows the court with that power over the person concerned. Article 112(3) of the 1981 Order, insofar as the provisions illuminate the present enquiry, provides;

Enforcement of residence orders

(3) Where a person fails to comply with an order such as is mentioned in paragraph (2) by either failing to do, within the time specified in the order or (if no time is so specified) forthwith, the thing he is required to do or, as the case may be, doing the thing he is required to abstain from doing and the enactment under which the order was made prescribes no punishment for such failure, a resident magistrate or other justice of the peace may upon complaint made to him at any time –

(a) issue a summons for the appearance of the person by whom that thing is required to be done or not done before a court of summary jurisdiction acting for the same petty sessions district as the court which made the order; or

(b) by warrant cause such a person to be brought before a resident magistrate acting for the same petty sessions district as the court which made the order or for any other petty sessions district in the same county court division.

(4) A warrant shall not be issued under paragraph (3) unless the complaint is in writing and substantiated on oath.

(5) ...

(6) Upon the appearance of a person summoned before a court of summary jurisdiction under paragraph (3) or on proof that the summons was duly served on him the court, or, where a person is brought before a resident magistrate pursuant to a warrant issued under that paragraph, the resident magistrate –

(a) may order that person to pay a sum not exceeding £50 for every day during which he fails to comply with the order or a sum not exceeding £1,000; or

(b) may commit him to prison for a fixed period not exceeding two months or until he either complies with the order or satisfies a court of summary

jurisdiction that he intends to comply with it (and the court may issue a warrant to enforce the order of commitment);

but a person who is ordered to pay a sum for every day during which he fails to comply with the order or who is committed to prison until he complies or satisfactorily indicates his intention to comply with the order shall not by virtue of this Article be ordered to pay more than £1,000 or be committed for more than two months in all for doing or abstaining from doing the same thing contrary to the order (without prejudice to the operation of this Article in relation to any subsequent failure to comply with the order).

(7) ...

(8) ...

It is to be noted that these penal provisions are predicated, not upon an order made under paragraph (1) of Article 112, but under paragraph (2), which provides;

(2) The court may annex to any order requiring any person to do or abstain from doing anything other than the payment of money any condition as to time or mode of action and may by order on complaint suspend or rescind such order on any undertaking being given or upon the condition being performed.

In other words, the mere making of a court order which requires a person to do or abstain from doing something other than the payment of money does not of itself carry the enforcement provisions contained in Article 112(3). For those to be available, the court which makes an order of the kind defined in Article 112(1) must annex to it some condition as to time or mode of action, pursuant to Article 112(2). This condition may be annexed either at the time of making the order initially or by way of a variation. It is a breach of such a condition under paragraph (2), not of the order itself, which is made actionable upon complaint, under the provisions contained in Article 112(3).

It will be recalled that on 23rd January 2003, the court ordered "*Full Residence Order in favour of the applicant Mrs. G with reasonable contact in favour of the Respondent, Mr G.*" As things stand thus far in this enquiry, the terms of that order do not admit of the enforcement provisions of Article 112(3). There is nothing attaching to the declaratory terms of either the residence order or the contact order which can be construed as a provision as to time or mode of action within the meaning of Article 112(2).

On the other hand, there is nothing standing in the way of the court making either the residence or the contact order just as unequivocal, transparent and exact as it sees fit. Article 11(7) of The Children (Northern Ireland) Order 1995 (to which I will usually refer here as "The Children Order") states:

11 (7) An Article 8 order may-

(a) contain directions about how it is to be carried into effect;

- (b) impose conditions which must be complied with by any person-
 - (i) in whose favour the order is made;
 - (ii) who is a parent of the child concerned;
 - (iii) who is not a parent of his but who has parental responsibility for him;or
 - (iv) with whom the child is living;and to whom the conditions are expressed to apply;
- (c) be made to have effect for a specified period, or contain provisions which are to have effect for a specified period;
- (d) make such incidental, supplemental or consequential provision as the court thinks fit.

Notwithstanding this, Article 14 of The Children Order further provides as follows;

Enforcement of residence orders

14-(1) Where –

- (a) a residence order is in force with respect to a child in favour of any person; and
 - (b) any other person (including one in whose favour the order is also in force) is in breach of the arrangements settled by the order,
- the person mentioned in sub-paragraph (a) may, as soon as a copy of the order has been served on the other person, enforce it under Article 112(3) of the Magistrates' Court (Northern Ireland) Order 1981 as if it were an order requiring the other person to produce the child to him.
- (2) Paragraph (1) is without prejudice to any other remedy open to the person in whose favour the residence order is in force.

The effect of this would seem to be that the court order herein dated 23rd January 2003 must be construed as though it stated something like; "*Full Residence Order in favour of the applicant Mrs. G. Mr. G is to produce the above-named children to Mrs. G. Reasonable contact in favour of the Respondent, Mr G.*" One must also ask, though, whether the terms of Article 14 can actually be invoked in aid of the Complainant in circumstances such as here obtain. Whether the two children were ordinarily resident with Mrs. G already, at the time when the formal residence order was made in January 2003, or whether they were handed over at that time by Mr. G, the fact is that they both resided with their mother after that, for several months – as indeed their daughter continues so to do. My reading of Article 14 of The Children Order is that it intends to provide for the situation where a child is in the care of one parent at the time when the court makes a residence order in favour of the other. Article 14, with its reference to acting "... as soon as a copy of the order has been served on the other person...", together with the insertion of the stipulation that compliance be "forthwith" by virtue of the terms of Article 112(3), seems to me to address only the situation where the

other parent has to hand over – to produce- the child to the newly-endowed care parent, in order to give effect to the residence order. Should the other parent refuse to hand over the child, the effect of Article 14 – at least under our domestic law as it stood before the coming into effect of The Human Rights Act 1998 – is that the parent in whose favour the residence order has been made may seek the issue of an Article 112 Summons under the 1981 Order without having to revert back to the Family Proceedings Court for any more peremptory variation.

On my reading of the statutory provisions, it is my finding that the terms of Article 14 of the 1995 Order do not assist the Complainant and that one cannot read into the residence order of 23rd January 2003 some provision which requires the Defendant, by order of the court, to return his son to the Complainant after a contact visit. There would have had to have been a variation of that initial order to insert such a requirement and the amended order would then have had to have been served upon the Defendant before he could be deemed to be in breach of its terms.

If one cares to label this a narrow construction of Article 14 of the 1995 Order, my other reason for preferring it to any more liberal, or permissive, interpretation goes to the issue as to whether Article 14 is compatible with, among others, Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (No punishment without law). Article 14 would appear to create a situation whereby an order can be served upon the citizen which is merely declaratory in its terms, but treated as though he can or ought to read into it that there is a specific thing which he has to do or else commit what may be deemed to be a criminal offence under European jurisprudence, with imprisonment as a possible consequence.

I hasten to add that I make no ruling on this issue. For one thing, this court has no power to do so, within the terms of Section 4 of The Human Rights Act 1998. All I do say is that I am content to construe Article 14 in the instant case in a manner which does not require me to go further than I have done here, having regard to the terms of Section 3 of the Human Rights Act.

So far as contact orders may be concerned, Article 8 of the 1995 Order provides a statutory definition which is of some significance in the present context.

“contact order” means an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other.

It will be readily appreciated, then, that a contact order which more accurately reflects this definition would be one couched in terms of a positive obligation on

the part of the person with whom the child lives. Instead of the contact order of 1st May 2003 simply declaring; Contact to take place on Tuesdays and Thursdays from 3.00pm – 6.30pm and alternate Sundays from 1.00pm – 7.00pm, it would have stipulated; The Applicant, Mrs. G. shall allow the children to visit the Respondent on Tuesdays and Thursdays from 3.00pm – 6.30pm and alternate Sundays from 1.00pm – 7.00pm.

Conclusions

(a) The terms of this particular Article 112 Summons constitute a breach of the Defendant's fundamental rights under Article 6(3) of the Convention and it must be dismissed.

(b) Even if the Article 112 Summons had been more clearly drawn, the residence order concerned is merely declaratory in its terms and the Defendant therefore cannot be in breach of Article 112(3) of The Magistrates' Court (Northern Ireland) Order 1981, so that the Enforcement Summons would fall to be dismissed on this ground in any event.

I will hear submissions on the question of the Defendant's costs.

General Observations

Whatever else may be claimed for Enforcement Summonses, the enhancement of relations between the two parents concerned is not one of them. The worse relations get between the parents, the less likely it is that the children concerned will be afforded their right to a fulfilling and loving relationship with both father and mother and the less those parents will be able to co-operate in prioritizing the interests of their children in all this.

I take the opportunity, in closing, to make the following observations.

- 1) Specific arrangements in amplification of a declaratory residence or contact order may be inserted either at the time of the making of such an order or later.
- 2) Pursuant to the No Order principle, such additions ought only to be included where the court anticipates a breach of the order.
- 3) The court has to exercise its powers in a manner consistent with Article 8 of the Convention (the right to respect for private and family life).
- 4) Resort to such additions on the face of an order are likely to be inappropriate when making the order by consent of the parties.
- 5) The issue of a process whereby the complainant seeks to invoke the court's power to fine or imprison a parent is always to be regarded as a remedy of last resort.

6) An Enforcement Summons ought not to be issued amidst more orthodox applications for adjudication, upon the real question in dispute, under the provisions of The Children (Northern Ireland) Order 1995 itself.

18th September 2003 at Omagh Family Proceedings Court

John I. Meehan, RM