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Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **20/09/11**

IN THE MATTER OF TM AND WD

IN THE CROWN COURT AT LAGANSIDE

His Honour Judge Burgess

[1] These applications relate to a series of omissions to make orders under Article 23 of the Protection of Children and Vulnerable Adults Order (Northern Ireland) 2003. While these particular applications relate to defendants in two Crown Court trials, there are in fact a number of such defendants who are potentially affected by the ruling which I am about to make. I record that all of those parties have been given notice of the hearing at which legal argument was put forward to the effect that the court at this stage had no power to make any order under Article 23. In the event either no application was made to be heard or alternatively the legal representatives of other defendants adopted the arguments put forward on behalf of the legal representatives of the above-named applicants. This ruling will therefore be binding on all defendants before the court in relation to the making or otherwise of orders in respect of their individual cases.

[2] The matter has been the subject of an application for judicial review to the Divisional Court which delivered its judgment on 10 August 2011. For the reasons stated in paragraphs [8] and [9] of the judgment of the Divisional Court, the court determined that it was within the jurisdiction of the Crown Court that the issues in relation to Article 23 should be decided. The court did go on to consider the merits of the applications based on the legal arguments placed before it much of which, indeed in my opinion all of which, reflect the arguments placed before this court in the extremely helpful skeleton arguments filed by Mr Sean Devine BL and Mr M D Barlow BL. I am grateful to both of them for the arguments and for their further submissions made orally at the hearing of this matter. At this stage I confirm that I have carefully considered all of the matters raised by them, including the authorities filed by them in advance of the hearing.

[3] The Divisional Court in considering the merits held that they would have refused the applications that the Crown Court has no jurisdiction at this stage to

consider or to make such orders and I have the benefit of considering the legal argument placed before the Divisional Court which led to that conclusion – albeit given their earlier decision that such comment is obiter dicta. Suffice to say that I found nothing new in the arguments placed before this court that were not before the Divisional Court, and whilst in oral argument counsel argued that the view of the writer of a letter dated 7 July 2011 from the Office of the Lord Chief Justice in respect of the ruling of Hart J in R v H [2006] NICC was wrong, nevertheless the reasoning in that case again was before the Divisional Court before they came to their conclusion.

[4] Article 23 applies where the conditions set out below are satisfied in the case of an individual:

(a) That the individual is convicted on indictment of an offence against a child committed when he was 18 or over; and

(b) The qualifying sentences is imposed by the court in respect of conviction.

[5] The salient part of the Article for the purpose of these applications are sub-paragraphs (4), (5) and (6) which state:

> "(4) Subject to sub-paragraph (5) the court must order the individual to be disqualified from working with children:
>
> (5) An order shall not be made if the court is satisfied having regard to all the circumstances that it is unlikely that the individual will commit any further offence against a child: and
>
> (6) If the court does not make an order under this Article it must state its reasons for not doing so and cause those reasons to be included in the record of the proceedings."

[6] At the outset I believe there has been a misunderstanding in the approach of the defendants in relation to these provisions. The starting point is that the provisions are mandatory, in terms that where the conditions are met then an order "must" be made. Sub-paragraph (5) would allow the court on any submission to it to consider whether the circumstances of an individual case would make it unlikely that the individual would commit any further offence against a child. It is clear that in each of these cases no such application was made and therefore no consideration was given to disapplying what would otherwise be a mandatory obligation to

impose the orders. It is obvious in those circumstances that the provisions of (6) do not come into play in relation to any of these applications since no consideration was given to disapplying the statutory provisions. The terms of sub-article (6) have significance in that, as with other orders made by the court, it would leave the decision not to apply the restriction amenable to appeal.

[7] Mr Devine in his argument at paragraph 4.4. states:

> "All that has occurred is that the authorities (whether the prosecution or the Probation Service) failed to invite the Court's attention to a further Order that it could consider making. The time for rectifying this has now past by many months."

[8] That paragraph in my opinion exhibits the misunderstanding to which I have referred. It imports that the court has a discretion as opposed a mandatory obligation to impose the order. It refers to ' a further order that [the court] could consider applying', and an obligation of the prosecution or Probation Service to draw the matter to the attention of the court as to whether it should exercise what Mr Devine refers to as a discretion not to impose the order. I believe the situation is different. The restriction in Article 23 applies unless it is drawn to the attention of the court by the defence that circumstances are such that the court should consider exercising its power not to apply the provisions of the Article. Without any such submission, and as a result the consideration of such an application in the context of the criteria set out in sub-paragraph (5), the restriction applies. The court has not exercised a discretion. The court is not at liberty to act at its own pleasure (see Chambers definition of "discretion"), but must act in a particular way unless it is asked to act in a different way - which did not occur in any of the applications with which I am dealing.

[9] I am therefore more than satisfied that the starting point in this particular series of applications is that the provisions of Article 23(1) apply in relation to each of the applications/defendant, and the argument at present is whether or not the court should engage in considering whether to exercise its power under (5) notwithstanding the passage of time. I were to adopt the argument of the defendants the court would have no such right to re-open these matters, and the provisions of Article 23, and its restrictions, would apply in every case.

[10] I will return to that point in a moment, but in the meantime confirm that for the reasons set out in the judgment of the Divisional Court as to the merits of the argument before them, whist obiter, I would arrive at the same conclusion.

[11] Having decided as I have, I have considered the matter from the view of a defendant not having addressed the issue at the date of sentencing, and potentially making an application under Article 23 (5). Apart from the argument that the Court has continuing jurisdiction, I intend to proceed on the basis that since the impact of the breach of such a restriction could place defendants at the risk of losing their liberty, the court should revisit each case if requested by an applicant in order to consider the exercise of its power under Article 23(5). I arrive at that decision based on the fact that this court is a "public authority" for the purposes of the Human Rights Act and is charged to apply the principles of the European Convention and in particular Article 6. Given my conclusions and my acceptance of the reasoning on the merits of the Divisional Court, I am satisfied that in the interests of justice it is right that I should allow any party to now place before the court his or her argument that the court should disapply the restriction. I will afford each defendant 21 days in which to make that application, but confirm that the present position is that the restriction under Article 23 applies to each defendant. In addition the Independent Safeguarding Authority will include each defendant on the 'Barring List' relating to children.