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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JAMES DAVID BIGGERSTAFF FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

GILLEN J

Application

[1] This is an application by James David Biggerstaff ("the applicant") to judicially review a decision of a Resident Magistrate not to recuse himself from the hearing of an application for an order for financial provision under the Domestic Proceedings (Northern Ireland) Order 1980 ("the 1980 Order").

Background

[2] On 20 August 2007 Mr Bates RM ("the RM"), presiding at Downpatrick Domestic Proceeding Court, granted a Non Molestation Order and an Occupation Order pursuant to the Family Homes and Domestic Violence (Northern Ireland) Order 1998 ("the 1998 legislation") in favour of Marlene Biggerstaff against the applicant James David Biggerstaff ("the original order"). The terms of the original order were that:

> "The respondent is forbidden to use or threaten violence against the applicant, and must not instruct, encourage or in any way suggest that any other person should do so.
>
> The respondent is forbidden to intimidate, harass of pester the applicant, and must not instruct, encourage or in any way suggest that any other person should do so."

[3] This original order was made after a full hearing during the course of which the applicant and his wife had given evidence. The applicant denied the allegations of domestic abuse made against him by his wife and asserted that he had been the victim of bullying by her.

[4] The applicant then appealed the decision of the RM and the appeal was listed for hearing at Newtownards County Court on 3 September 2007.

[5] Mr Biggerstaff asserts in the grounding affidavit to his application that the appeal was "settled out of court between me and my wife by way of undertaking". He has exhibited to his affidavit in this matter a handwritten copy of the agreement ("the agreement") which contains, inter alia, the following terms:

> "(1) The appellant, James Biggerstaff, will immediately vacate the property at 56 Ballykine Road, Ballynahinch and allow Marlene Biggerstaff and the children of the family free and sole enjoyment of these premises save for the yard at 56 Ballykine Road, Ballynahinch which the appellant, James Biggerstaff, shall have sole use of for the purposes of his business.
>
> (2) Neither James Biggerstaff nor Marlene Biggerstaff shall approach one another for any reason save with the consent of the other.
>
> (3) The appellant James Biggerstaff makes no admission of liability as to the allegations made against him by Marlene Biggerstaff.
>
> (4) The appellant James Biggerstaff agrees to give these undertakings before the court.
>
> (5) Marlene Biggerstaff accepts that she does not require the Orders sought at the Domestic Proceedings Court sitting at Downpatrick on 20 August 2007.
>
> (5)(a) Each party shall meet their own costs."

[6] I was informed by Mr McCann, who appeared on behalf of the applicant, (having confirmed the terms with the relevant County Court Office in the absence of the Order), that the County Court Judge made an Order to the effect that the Order of 20 August 2007 be "revoked". No reference was made therein to any undertaking given or agreement made.

[7] The wife of the applicant thereafter proceeded to make an application under Article 4 of the 1980 Order that the applicant make her periodical payments ("the financial provision proceedings") on the grounds that the applicant:

> "(a) Had failed to provide reasonable maintenance for (the wife).
> (b) Had behaved in such a way that the (wife) cannot reasonably be expected to live with him."

[8] By way of letter of 12 November 2007 to the Domestic Proceedings Court Office, the applicant requested that the financial provision proceedings be determined by a magistrate other than Mr Bates. Mr Bates indicated that he would consider the application on 17 December 2007.

[9] At the hearing before the RM counsel on behalf of the applicant produced a skeleton argument in relation to the recusal application. Inter alia the applicant, in the skeleton, sought the recusal of Mr Bates on the grounds that:

> "One of the grounds of Mrs Biggerstaff's application for an Order for Financial Provision is that she claims that Mr Biggerstaff has behaved in such a way that she cannot reasonably be expected to live with him. It is Mr Biggerstaff's contention that a finding that he was guilty of molestation would amount to a finding that he had behaved in such a way that his wife could not reasonably be expected to live him. Therefore, it is Mr Biggerstaff's contention that, in effect, the Orders made by the Resident Magistrate amount to a finding that he has behaved in such a way that his wife cannot reasonably be expected to live with him. Mr Biggerstaff appealed against the Orders of 20 August 2007 and the Orders were subsequently dismissed.
>
> 3. On the face of it, the hearing of the application for an Order for Financial Provision comes before the court with the parties on an equal footing. The position, however, it is submitted, is that the Resident Magistrate has already formed a view (on 20 August 2007) as to his conduct; he concluded that it amounted to molestation of his wife. In effect therefore it is submitted that a crucial aspect of the

> application for an Order for Financial Provision has already been decided. It is in this context that Mr Biggerstaff makes his recusal application on the grounds that it is necessary that the Resident Magistrate recuses himself to ensure that his "Article 6" human rights is protected."

[10] In the course of that skeleton argument it is further asserted that –

> "Mr Biggerstaff instructs that he remains acutely conscious of comments of the Resident Magistrate made on 20 August 2007 to the effect that the Resident Magistrate was convinced that molestation had occurred beyond any doubt and that he was surprised that Mrs Biggerstaff had stuck him so long and that his evidence was classic of an abusive person."

[11] The RM determined that he would not recuse himself from the hearing of the financial provision proceedings and delivered a written judgment to this effect. I consider this to have been a carefully considered and thoroughly researched judgment which sets out all of the issues to be determined.

The applicant's case

[12] In a well marshalled argument before me Mr McCann relied upon the skeleton argument which had been put before the RM and in addition submitted:

(1) The well known principles set out in *Porter v. Magill* (2002) 1 AER 465 ("Porter's case") on bias apply in this instance.

(2) The undertakings set out in the agreement made clear that there had been no admission of misconduct by the applicant. Consequently counsel asserted that the agreement should be considered as having the same force as a court order reversing the original decision. He pointed out that the undertakings were mutual and Mrs Biggerstaff had agreed that she did not require the protection of the original court order. Mr McCann argued that this was not a typical agreement in so far as the wife was categorically stating that she did not require such protection.

(3) The RM had concluded that he would not consider the terms of the agreement. The RM was therefore proceeding to hear the financial provisions proceedings as if the agreement had not taken place and without allowing the issue of the earlier finding to be reopened. This amounted to a closed mind on the primary issue to be determined.

(4) The court should take particular note of that portion of the RM's written judgment where he said:

> "The court has an overriding responsibility to put the children's interest in a paramount position when dealing with family cases: the Domestic Proceedings Order clearly required the court to consider the welfare of children under Article 10 thereof. To allow this case to be effectively heard on the issue of domestic abuse (in as much as that is a potential ground in the applicant's financial provision application, rather than failure to provide reasonable maintenance which is also claimed in the papers) would be a disservice to the children of this family as it will protract litigation and has the capability of causing delay. It will also require the applicant to repeat the stressful task of giving evidence again. I am exercising my discretion, and therefore I believe having due regard to the principles set out in the Liverpool Justices case. I believe to exercise my discretion to allow the financial case to be heard before another magistrate would be wrong. Prejudice is to draw conclusions without evidence or experience, but my conclusions about domestic abuse in this case are based on evidence. I have no previous knowledge of Mr Biggerstaff outside these proceedings and thus I am not biased against him."

Mr McCann asserted that this extract amounted to a blanket refusal to take account of the outcome of the appeal and the agreement entered into. Counsel argued that the purport of the agreement was to cause the situation to be reverted to the status quo before the original order was made and hence the financial proviso proceedings should be determined by someone who approached the issue of domestic abuse de novo.

The Legal Principles

[13] At the leave stage in Judicial Review proceedings, a judge needs to be satisfied that there is a proper basis for the relief sought. The court must not grant leave without identifying an appropriate issue on which the case can properly proceed. Leave will not be granted on a speculative basis and it is not sufficient for the papers to disclose what might on further consideration turn out to be an arguable case (see *R v. IRC ex parte National Federation* (1982) AC 617 at 644a per Lord Diplock). Whether there is an arguable ground for judicial review includes whether there is some properly arguable vitiating flaw such as

unlawfulness, unfairness or unreasonableness. Accordingly it is well settled, that in order to be permitted to present a judicial review application, the applicant must raise an arguable case on each of grounds on which he seeks to challenge the impugned decision (*R v. Secretary of State for the Home Department ex parte Cheblank* (1991) 1 WLR 1890).

[14] The test to be applied in cases where bias is alleged, is that set out Porter's case which refined the test formulated by the House of Lords in *R v. Gough* (1993) 2 AER 724. In Porter's case, Lord Hope said at p 707 para 103:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

[15] Thus the test of ostensible bias is not contentious. It is whether a fair-minded observer informed of all the relevant circumstances would have concluded that there was a real possibility that the judge was biased. "Biased" in the present context has to mean the premature formation of a concluded view adverse to one party.

[16] In *Gillies v. Secretary of State for Work and Pensions* (2006) UK HL 2 Lord Hope said at paragraph 17:

> "The fair-minded and informed observer can be assumed to have had access to all the facts that were capable of being known by members of the public generally, bearing in mind that it is the appearance that these give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny. It is to be assumed, as Kirby J put in *Johnson* (2000) 2001 CLR 488, 509, para 53, that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant."

[17] A further significant authority in the context of this RM's decision not to recuse himself is *Her Majesty's Attorney General v. Pelling* (2006) 1 FLR 93 ("Pelling's case") where Laws LJ said:

> "There is no doubt, as we are acutely aware, that for any judge to have to decide whether he or she is

> actually or apparently biased in proceedings before him or her is an uncomfortable and unsatisfactory state of affairs. But to adjourn the case for another judge to decide the question is likely to be much more injurious to the doing of justice and, so far as we know, has never been the practice. If it were the practice, it would mean that proceedings would be liable to adjournment, and thus delay, in every case where an application for a judge's recusal was made, save no doubt where the judge indicated that he would indeed recuse himself. In particular, the court's process would be open to manipulation and contrived delay at the hands of disaffected litigants. It is, of course, elementary where an application for a judge's recusal is refused but should have been allowed, the party complaining, if ultimately he loses the case, may appeal or seek permission to appeal on the ground of bias by the judge."

[18] In determining such applications, it is important that judicial officers discharge their duty to do so and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour. (See *Re JRL, ex parte CJL* (1986) 161 CLR 342 at 352).

Conclusions

[19] I have come to the conclusion in this case that the applicant has not satisfied me that there is an arguable case for the relief that he seeks.

[20] The RM was correct to determine this matter himself and to resist any temptation to accede too readily to what I consider to be an unfounded suggestion of the appearance of bias.

[21] I consider that the RM acted appropriately by taking into account the nature of these proceedings as a factor when determining whether or not he would allow the evidence of domestic abuse outlined in the original hearing to be revisited in the financial provision proceedings. I share the concerns expressed by Mr Bates about cases of this kind and which I have outlined in paragraph 12(4) of this judgment.

[22] One of the primary purposes of the 1998 legislation is to provide fair and expeditious protection for those who have been subject to abuse. Domestic proceedings are almost invariably invested with elements of raw emotion and frightening anxiety not found in most other areas of the law. The giving of

evidence and the process of cross examination are emotionally draining on all the parties. It cannot be in the interests of justice to return to these issues once they have been determined absent a material change of circumstances or a reversal by another judicial body of the RM's decision. Courts should be cautious in the family context about permitting allegations, once proven, to be revisited. I am satisfied that there is nothing in the written judgment of the RM which would detract from this applicant having a fair trial when the proceedings are heard under the 1980 legislation. Any fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that this RM was biased in the circumstances of this case where he had already heard and determined a contested hearing on the issue of domestic abuse comparatively recently .

[23] This RM is highly experienced and has been specifically designated to deal with family cases. By reason of his training and experience and in light of the oath of office that he has taken he is well versed in the discipline of disabusing his mind of irrelevant material. He will confine his decisions to the statutory requirements and the fair administration of justice. I have no doubt that he will readily recognise that one of the tests to be applied under the 1980 proceedings i.e. whether the applicant has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent, may be conceptually different from that which he has determined in the proceedings under the 1998 legislation . The terms of the agreement entered into at Newtownards County Court may conceivably speak to his decision as to whether the applicant can reasonably be expected to live with the applicant without the necessity of revisiting the allegations which he has found to be proven under the 1998 Order. I find nothing in the determination made by the RM on this matter that will prevent him taking all necessary matters into account, including his findings of domestic abuse in the original hearing, before making an appropriate determination under the 1980 legislation.

[24] I consider that the RM is also unarguably correct in concluding that there is no obligation on him to revisit the factual findings he has made at the original hearing notwithstanding the agreement. Neither the agreement entered into between the applicant and his wife at Newtownards County Court nor the Order to revoke-made without a hearing - constitutes a reversal of his findings of fact. Mr Dunlop, who appeared on behalf of the proposed respondent RM, properly in my view submitted that the status of this matter was no more than a contractual agreement entered into between the parties to exchange mutual undertakings but which at the same time allowed the wife of the applicant to remain in the matrimonial home and not to be approached thereafter. It does not impact on the factual findings made by the RM and certainly does not purport to reverse them. The Order makes no reference to any undertaking given under oath or to any enforceable or penal consequence of a breach. The 1998 Order provides no prescribed form for such undertakings.

[25] It is instructive to observe the distinction between the law with reference to such undertakings in Northern Ireland and that in England and Wales. In England and Wales many applications for domestic violence injunctions will be satisfactorily resolved by one or both parties giving undertakings to the court. In that jurisdiction, an undertaking has the same effect as an injunction. Breach of the undertaking places the defaulting party in jeopardy of committal proceedings. In any case where the court has power to make an Occupation Order or a Non Molestation Order, it may accept an undertaking from any party to the proceedings, including the applicant (see Family Law Act 1996, S 46(1)). This power is now subject to the provision that the court may not accept an undertaking instead of making a Non Molestation Order where it appears to the court that the respondent has used or threatened violence against the applicant or a relevant child and for the protection of the applicant or child it is necessary to make a Non Molestation Order so that any breach may be punishable under S 42A (i.e. is a criminal offence) of the Family Law Act 1996. An undertaking given to a court is enforceable as if it were a court order (see s 46(4) of the Family Law Act 1996). The major difference between the making of an order and the receiving of an undertaking is that no power of arrest may be attached to an undertaking and the court must not accept an undertaking when, if an order were made, a power of arrest would be attached. Even in England and Wales however the making of an undertaking will not normally involve a finding of fact by the court. In a County Court in England and Wales, an undertaking given by a person present in court must be recorded in the prescribed form. The court must provide the giver of the undertaking with a copy of the record of his undertaking. It will therefore be immediately obvious that nothing of this nature exists under the Northern Ireland legislation. Hence it did not come as a surprise to me that the order of the County Court did not make any reference to the undertakings other than to record that the original order had been revoked. Undertakings do not normally carry the force of those made in England and Wales. I consider that this adds further strength to the view of the RM that the agreement did not serve to overturn the factual findings he had made. It is entirely appropriate that he should refuse to reopen them subject to what I have said about the statutory duty on him under the 1980 legislation to be satisfied that the applicant has behaved in such a way that the applicant cannot reasonably be expected to live with the respondent.

[26] I have come to the conclusion therefore that there is no evidence before me that could be the basis for an argument that the RM was guilty of bias either ostensible or actual in this case. Moreover I find no evidence to ground an argument that he has acted unlawfully in any way or transgressed Section 6 of the Human Rights Act 1998 by acting in a way that is incompatible with any Convention right and in particular Article 6 of the European Convention on Human Rights and Fundamental Freedoms. In my view no arguable case has been produced to the effect that this RM ought to have recused himself.

[27] I therefore dismiss the applicant's case.