

*Anti-social behaviour orders – interim order – whether can be made ex parte without notice to the defendant – rules of court – vires to make rules – form of order – test of anti-social behaviour – Anti-Social Behaviour (NI) Order 2004, Arts 3,4 and 7.*

**Neutral Citation No. [2005] NIQB 71**

**Ref: GIRC5416**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)*

**Delivered: 23/11/2005**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN’S BENCH DIVISION (JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY NORTHERN IRELAND  
HOUSING EXECUTIVE FOR JUDICIAL REVIEW OF THE DECISION OF  
MRS KELLY, RESIDENT MAGISTRATE,  
DATED 28 APRIL 2005**

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**GIRVAN J**

**Introduction**

[1] The Northern Ireland Housing Executive (“the Executive”) brings this application to quash the decision of Mrs Kelly, Resident Magistrate, who refused to entertain an application for an Interim Anti-social Behaviour Order (“ASBO”) brought by the Executive under Article 4 of the Anti-social Behaviour (Northern Ireland) Order 2004 (“the 2004 Order”) against David O’Neill. The application raises the important issue whether a Magistrates’ Court has power to grant an interim ASBO on the ex-parte application of an application without the respondent to the application being given notice of the application.

[2] O’Neill resides in Annadale Flats, Belfast, which are mainly in the ownership of the Executive. He is a secure tenant in the premises. The Executive received numerous complaints about severe noise nuisance emanating from O’Neill’s premises within the flat. The noise was happening in the small hours of the morning. In April 2005 the Executive gave instructions to its legal department to commence proceedings against him by complaint which was duly laid before a magistrate on 27 April 2005 and a summons was issued against O’Neill requiring him to appear as a defendant at Belfast Magistrates’ Court on 10 May 2005.

[3] According to the affidavit of Eadaoin Ward, a solicitor in the legal department of the Executive, the Executive considered that it was important to obtain an interim ASBO urgently because there were continuing complaints against the defendant about the problem of his noise nuisance. Mr Ward discussed the matter with the Deputy Clerk of Petty Sessions and in consequence the matter was allocated to Mrs Kelly on 28 April for consideration.

[4] The precise sequence of events before the Resident Magistrate is in dispute. The Resident Magistrate in her affidavit deposed to the fact that she concluded that there was no legislative provision for an applicant to make an ex-parte application for an interim order. The Northern Ireland Rules do not contain any provision such as is to be found in the English Magistrates' Court (Anti-Social Behaviour Orders) Rules 2002 which contain specific provisions relating to ex-parte applications for interim orders. She accepted that she had a jurisdiction to make an interim ASBO. The applicant asserts that the Magistrate expressed herself so as to give the impression that she considered she could not make any interim ASBO in the absence of properly drawn rules to deal with the making of an interim order.

[5] Having considered the affidavit material and reading it as a whole, the conclusion I have reached is that the Magistrate's true concern was in relation to her power to make an interim order in the absence of notice being given to the defendant to the application. That is the issue which is central to the present application.

### **The Legislative Context**

[6] Under the 2004 Order Article 3 provides:

“(1) An application for an order under this Article may be made by a relevant authority if it appears to the authority that the following conditions are fulfilled with respect to any person aged 10 or over, namely -

(a) that the person has acted since the commencement date in an anti-social manner, that is to say in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself;

(b) that such an order is necessary to protect relevant persons from further anti-social acts by him;

(2) Such an application shall be made by complaint to a Magistrates' Court for the County Court division in which it is alleged that the harassment, alarm or distress was caused or was likely to be caused."

If the conditions mentioned in para (1) are fulfilled the magistrates' court may make an order prohibiting the defendant from doing anything described in the order. For the purpose of determining whether the condition mentioned in para (1)(a) is fulfilled with respect to any person the court shall disregard any act of that person which he shows was reasonable in the circumstances. The prohibitions that may be imposed by an order under this Article are those necessary for the purpose of protecting persons, whether relevant persons or not from further anti-social acts by the defendant. The relevant authorities are defined as district councils, the Chief Constable or the Executive. Before making an application under Article 3 the Executive must consult with the relevant district council and the Chief Constable.

[7] Article 4 contains the provisions relating to interim ASBO on applications under Article 3. Article 4(i) provides that:

"If, before determining an application for an order under Article 3, the court considers that it is just to make an order under this Article pending the determination of that application ('the main application') it may make such an order."

The order is an order which prohibits the defendant from doing anything described in the order and the order is for a fixed period. It may be discharged, varied or renewed and shall cease to have effect on the determination of the main application if it does not previously cease to have effect.

[8] Article 7 sets out the consequences of a breach of an ASBO. For the purposes of Article 7 an ASBO includes an interim order made under Article 4 (see the definition of ASBO in Article 2(2)). Thus in Article 7(1) it is provided that if without reasonable excuse a person does anything which he is prohibited from doing by an ASBO he shall be guilty of an offence and liable on summary conviction to imprisonment for up to six months or a fine not exceeding the statutory maximum or on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both. Article 7(4) expressly provides where a person is convicted under Article 7(1)

it shall not be open to the court before whom he is convicted to make an order in the form of a conditional discharge in respect of the offence.

[9] It is stated for the purposes of Article 7 that a breach of an ASBO including an interim order is a criminal offence. Even if at the substantive hearing of the summons the Article 3 complaint the application for the ASBO is dismissed, between the making of the interim order and the conclusion of the substantive hearing the defendant would be subject to an order having criminal law consequences.

[10] The Magistrates' Court (Anti-social Behaviour Order) Rules (Northern Ireland) 2004 contain prescribed forms for a summons on complaint under Article 3, an ASBO under Article 3, an interim order under Article 4 and an ASBO made under Article 6 (which is not material in the present context). It also prescribed forms of a summons to vary or discharge ASBOs and interim orders. Rule 4 requires service of any summons either by personal service or by postal service. An order made under Article 3(iv) or 6 is to be served by the Clerk of Petty Sessions on the defendant if present in person if practicable or by post. The Rules do not contain any provision relating to the form of application for an interim order and contains no provisions relating to conditions to be satisfied in the event of the applicant wishing to have an ex-parte hearing.

[11] The Northern Ireland Rules are to be contrasted with the English Magistrates' Court (Anti-social Behaviour Orders) Rules 2002 which contain prescribed forms for interim orders Rule 4(5). Rule 5 provides that an application for an interim order may with leave of the Justices' Clerk be made without notice being given to the defendant. The Justices' Clerk shall only grant leave if he is satisfied that it is necessary for the application to be made without notice being given to the defendant. If an application made under para. (2) is granted then the interim order and the application for an ASBO under section 1 together with a summons giving a date for the defendant to attend court should be served on the defendant in person as soon as practicable after the making of the interim order. An interim order which is made at the hearing of an application without notice shall not take effect until it has been served on the defendant. If an interim order without notice is not served then it lapses after seven days. It ceases to have effect if the application for the ASBO is withdrawn. Where the court refuses to make an interim order without notice being given the defendant may direct that the application be made on notice. If an interim order is made without notice being given to the defendant then the defendant subsequently applies to the court for an order to be discharged or varied his application shall not be dismissed without the opportunity for him to make oral representations to the court.

[12] According to para 21 of Mr Ward's affidavit when the Magistrates' Court Rules Committee in this jurisdiction was considering making Rules under the 2004 Order it decided not to make Rules corresponding to Rule 4(5) or Rule 5 of the English Rules because the Committee was of the view that the provisions went beyond "regulating practice and procedure" particularly as regards the provision in Rule 5 of the English Rules for the making of orders without prior notice having been given to the defendant.

### **The Arguments**

[13] Mr McCloskey QC who appeared with Mr Elliott on behalf of the applicant reminded the court of the underlying purpose and intent of the ASBO legislation which was explained by the House of Lords in McCann v Crown Court of Manchester [2002] 4 All ER 593 which considered the corresponding English legislation. He submitted that the combined effect of Articles 3 and 4 were as follows:

"A duly commenced but as yet undetermined application for an Article 3 order is a pre-requisite to the making of an interim order. The interim order is designed to operate pending the determination of the main application and the over-arching criterion is whether the court considers it just to make an interim order. An interim order is clearly designed to operate as a temporary 'quick-fix'".

Article 4 imports by implication considerations of speed and urgency. It does not preclude the making of an interim order in the absence of the defendant. It does not prescribe any procedure for interim order applications omitting any familiar phrases such as 'in accordance with the Rules of Court'. It is not expressed to be either subject to or to be applied in conjunction with Article 81 of the Magistrates' Court (Northern Ireland) Order 1981. Article 4(1) makes clear that the Magistrates' Court may make an interim order. The real question was whether it had power to do so in the absence of notice to the defendant. He contended the magistrate was in error in concluding that she had no power to act in the absence of some subordinate Rules of court expressly empowering her to do so. The absence of a purely administrative regulatory framework which Rules of court would typically create cannot operate to emasculate or frustrate the power to make an order under Article 4. He contended that any possible imbalance flowing from the conclusion that an interim order under Article 4 to be made in the defendant's absence is adequately counter-balanced by the defendant's entitlement to seek variation or discharge of the order without delay and its ultimately expiry in any event when the main application is determined.

[14] Mr Scoffield on behalf of the respondent accepted without reservation the power of a court to make an interim order. The question however was whether the magistrate was permitted to do this when notice had not been given to the defendant. There was no empowering provision expressly permitting the magistrate to do so in either the 2004 order or any Rules made under it. A magistrates' court is a creature of statute and has only such powers as are conferred upon it by statute. There was no statutory empowerment to make an ex-parte notice. He compared this with the position under Article 23 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 which confers an express power to make an ex-parte order. No such express power was contained in the 2004 Order. It is a constitutional imperative that the withdrawal of a defendant's rights at common law and under the Convention to be given notice before an order is made against him should only be effected by clear legislative revision. A pre-requisite for the making of an application for an interim order is that there be an application for a full order. In turn it is a pre-requisite for the making of an application for a full order that there is a complaint. An application for an interim order is and must be within the framework of the proceedings on the complaint. Such an application is caught within the procedural scheme set out in Article 81 of the 1981 Order. Article 81(2) provides:

"The court shall not begin to hear the complaint or proceed in the absence of the defendant, unless either it is provided to the satisfaction of the court, upon oath or by affidavit or in such other manner as may be proscribed, that the summons was served on him within what appears to be a reasonable time before hearing an adjourned hearing or the defendant has appeared on a previous occasion to answer to the complaint."

The hearing of a application for an interim ASBO constitutes "beginning to hear the complaint" or "proceeding" for the purposes of Article 81(2). The effect of Article 81(2) is that the magistrate is precluded from hearing an interim application unless satisfied the summons has been served on the defendant or he has appeared previously.

### **Conclusions**

[15] Article 4 of the Order clearly empowers a court to make an interim order. The central question for determination is whether it can make an order in the absence of notice to the defendant giving him an opportunity to be heard before the order is made. If the court has the power to make an ex-parte order the court would have to go on to determine whether in all the circumstances it should make such an order in the absence of the defendant. The magistrate in the present instance did not move to the second stage

having concluded that she had no power to do so. She concluded that in the absence of express rules dealing with an ex-parte application (such as those adopted in England) the court could not make such an order and she did not have power to re-write the statute or incorporate the equivalent of the English Rules. The question whether the court has any power to make an ex-parte order in the absence of statutory powers to do so raises the questions whether the power to make such an order must be spelt out in the Order itself or whether it could be dealt with in rules of court. If the statute does not provide the power to do so the rules of court could not do so the rules of court could not create a power not given to the court by the primary legislation. The Rules Committee would not have the vires to make Rules conferring a jurisdiction to make an order which the statute does not permit.

[16] In R(M) v Secretary of State for Constitutional Affairs [2004] 2 All ER 531 the Court of Appeal held that there was nothing intrinsically objectionable about the power to grant an ASBO without notice. In that case the applicant mounted a challenge to the validity of Rule 5 on an argument similar to that raised in the present instance. The trial judge in the Court of Appeal rejected the argument. At p. 547 Kennedy LJ stated:

“(1) Although it is unusual for a court in this country to make an order against a person who has not been given notice of the proceedings that course is adopted when it is necessary to do and subject to safeguards which enable the person effected at an early stage to have the order reviewed or discharged.

(2) The more intrusive the order the more the court will require proof that it is necessary that it should be made and made in the particular form sought but there is nothing intrinsically objectionable about the power to grant an interim ASBO without notice.”

He went on to conclude that because an application for an interim order without notice can only be made when the justices' clerk is satisfied that it is necessary for the application to be made without notice and because the order can only be made for a limited period, when the court considers that it is just to make it and in the circumstances where it can be reviewed or discharged as indicated above, it seemed to the Court to be impossible to say that it determines civil rights. Certainly for a time it restricts certain freedoms and the restriction can be enforced by sanctions and that is the nature of any interim order so in our judgment provided the interim order follows its normal course Article 6 of the Convention will not be engaged.

[17] Two cases of potential significance were not apparently cited to the court in R(M) v Secretary of State. In Forest v Brighton Justices [1981] 2 All

ER 711 the appellant was sentenced by a Magistrates Court to consecutive terms of imprisonment totalling 12 months. When he was still in prison the same court issued a warrant for his imprisonment for a further 144 days consecutive to the sentences passed on 15 March in respect of its default in paying a large number of fines imposed by various Magistrates Courts. The appellant was given no notice of the proceedings and had no opportunity of making representations to the court before it issued the warrant for its further imprisonment. The appellant applied for a judicial review by way of an order of certiorari to quash the order and the warrant of commitment contending that the magistrates had erred in law in committing the prisoner without any notice of the hearing and that section 44(6) of the Criminal Justice Act 1967 did not empower them to dispense with notice. That provision provided that:

“After the occasion of an offender’s conviction by a magistrates court, the court shall not, unless –

(a) the court has previously fixed the term of imprisonment under Section 65(2) of the Magistrates Courts Act 1952 which is to be served by the offender in the event of a default in paying a sum adjudged to be paid by the conviction or

(b) the offender is serving a term of imprisonment or detention in a detention centre; issue a warrant of commitment for a default in paying the sum ... except at a hearing at which the offender is present.”

The House of Lords held that although the effect of section 44(6) of the 1967 Act was that where an offender was serving a sentence of imprisonment his actual presence at the hearing before a warrant of commitment was issued might be dispensed with, that did not either expressly or impliedly mean that a hearing itself was to be dispensed or that there was no need to give notice of it to the offender. The magistrates in the case had been in breach of the principle of natural justice that a person was entitled to adequate notice and an opportunity to be heard before any judicial order is pronounced against him and the appeals were allowed. Lord Fraser put the position thus:

“One of the principles of natural justice is that a person is entitled to adequate notice and an opportunity to be heard before any judicial order is pronounced against him, so that he or somebody acting on his behalf may make such representations if any as he sees fit. That is the rule of audi alteram partem which applies to all judicial proceedings unless its application to a



particular task of proceedings has been excluded by Parliament expressly or by necessary implication.”

In Wilson v Colchester Justices [1985] 2 All ER 97 that reasoning was applied. The issue of a warrant of commitment was a judicial act involving the liberty of the subject and accordingly a warrant should not be issued without giving the offender an opportunity to be heard. Although Lord Roskill considered Lord Fraser’s comments as establishing the general principle in relation to the judicial act of issuing a warrant for commitment, the principle stated by Lord Fraser in Forest was expressed in wider terms and in line with the general proposition that before any judicial order is pronounced against a party he must be given adequate notice and opportunity to be heard. The making of an interim ASBO, is a judicial order and as has been noted, gives rise to a potentially criminal liability for breach of the order. The ASBO legislation straddles the division between civil and criminal law. At first sight it is tempting to equate an ASBO with a form of civil law injunction breach of which can lead to an application to commit for contempt and the equation may tempt one to see an interim order as something very akin to an interlocutory injunction. The comparison, however, is not a true one. Breach of an injunction is not a criminal act with potentially severe consequences in terms of giving rise to a conviction and possibly leading to imprisonment as a punishment not merely as a means of ensuring compliance with the order but as a penalty. This heightens the argument against the making of an ex parte order in the defendant’s absence. Furthermore, the formulation of an ASBO requires great care. One detects a trend in some courts in England and Wales of using ASBOs as means of exercising a form of social control with the sanction of criminal law consequences going well beyond the mischief to which the legislation is directed. Magistrates may differ widely in their views as to what should be determined to be anti-social behaviour meriting an ASBO. Once an order is made by a magistrate the breach of the order is an offence. A magistrate can thus, by his determination decide what is or is not action or conduct which should be treated as meriting a criminal sanction if it continues. This opens the door to arbitrariness in determining the parameters of criminal activity. This may be a general criticism of the concept of ASBOs but it is of particularly heightened relevance in the context of interim orders where the lack of a full opportunity for the defendant to present arguments heightens the risk of an inappropriate ASBO or an inappropriately worded ASBO being issued.

[18] The conclusion I reach is that the absence of an express power contained in the 2004 Order for the hearing of an ex parte interim application there is no power to make an order without the defendant being given notice of the proceedings for the interim order. The Magistrates’ Court has no express or implied power to proceed against the defendant who is not given an opportunity to present his case. Rules of court could not confer such a

power in the absence of an enabling provision in the order itself. Article 81(2) underlines the principle of natural justice that proceedings should not be conducted in the absence of a defendant unless he has been given an opportunity to attend. If it does not apply specifically to an application for an interim order (and I consider that it does) it underlines the general principle to which Lord Fraser was referring.

[19] In many cases the need to make an interim ASBO would be obviated by ensuring early return days on the summons on the complaint under Article 13. There may be administrative and practical difficulties for this or there may be difficulties in presenting a case substantively at the first hearing of the summons in which case the question whether an interim order should be made will arise. In that event the court would require compelling evidence that an ASBO would be likely to be granted in due course. It would be unjust to submit a defendant to an order with criminal law consequences unless there is strong evidence that in due course a full order is very likely to be made.

[20] In this instance a final order was made on 10 May:

“It is ordered by the Magistrates’ Court ... that the defendant is prohibited from

(i) engaging at block 55-60 Annadale Flats or within the Annadale Flats Belfast in conduct which causes or is likely to cause harassment, alarm or distress to others or permit or incite or encourage others to engage in such conduct;

(ii) engaging ... in conduct which is likely to be threatening, abusive or insulting to others or permit or incite or encourage others to engage in such conduct;

(iii) play music at a loud volume at 59 Annadale Flats, Belfast;

(iv) suffer or permit more than three visitors to be in the premises ... between the hours of 12 midnight and 8.00am.”

The order at (i) lacks precision. The concept of causing distress does not define what the defendant could or could not do. What causes distress to some people may constitute activities which in a pluralist and liberal society are not objectionable to others. In the context of injunctions granted by a court of equity “it is the necessary requisite of every injunction and every

mandatory order that it should be certain and definite in its terms and it must or ought to be clear what the person against whom the injunction or order is made is required to do or refrain from doing.” (Attorney v Staffordshire County Council [1905] 1 Ch 336). What is true of injunctions must a fortiori be true of ASBOs since a breach of an ASBO give rise to an offence. While the wording adopted in the order in paragraph (i) replicates the statutory provision, the statutory provision sets the parameters within which an ASBO may be made and does not determine the form of the actual ASBO which must be drawn to deal with the specific conduct or actions of the defendant which give rise to the anti-social behaviour falling within those parameters. Before an order could properly be made against a defendant the court would have to be satisfied that the impugned conduct or activity causes harassment, alarm or distress. The concept of harassment is one that has a reasonably clearly understood definition. The concept of conduct causing distress or alarm requires some definition. It must point to the sort of conduct that falls outside the range of legitimate activity which a citizen is reasonably entitled to pursue in a pluralist, democratic and open society which calls for reasonable give and take on all sides. It must be conduct or activity that causes or would reasonably cause alarm or distress to a person of reasonable fortitude to such a degree that it unreasonably interferes with his or her enjoyment of life or home life and it would be unreasonable to subject him or her to a continuation of such conduct. If such a test were consistently applied then some of the more unreasonable forms of ASBOs mentioned in argument would not have been made.

[21] On the facts of the present case the pre requisites for the making of an ASBO were clearly present. The wide order in paragraph (i) would have to be qualified as referring to the particular actions restrained by paragraph (ii), (iii) and (iv). In the making of orders courts must be careful to ensure that the form of the order has a sufficient degree of precision to represent an enforceable one.