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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY ASHLEIGH McDADE FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF BELFAST DOMESTIC PROCEEDINGS COURT

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Sarah Ramsey KC and Rachel McMillan (instructed by Kristina Murray, Solicitors) for the applicant
Neasa Murnaghan KC and Nessa Fee (instructed by the Departmental Solicitor's Office) for the respondent District Judge and the Department of Justice

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SCOFFIELD J

Introduction

[1] This application raises a short but important point of practice: can an unsuccessful applicant for an ex parte non-molestation order in the domestic proceedings court (DPC) appeal that refusal to the county court without having to give the respondent to the application notice of the appeal?

[2] The issue arises because the applicant in the present case, having been refused a non-molestation order (NMO) on an application which was made ex parte to the DPC in Belfast, brought an application for judicial review in relation to the decision of the district judge. She did so because she was aggrieved at the decision to refuse her application but also because her legal representatives took the view that it was not possible within the terms of the relevant rules for her to appeal that decision to the county court without giving notice of that appeal to her ex-partner, the respondent to the NMO application. That would in turn, she feared, defeat the purpose of the application and appeal. The district judge, the proposed respondent in the application for leave to apply for judicial review, relied on the fact that the applicant had an effective alternative remedy by means of an appeal to the county

court against his decision. On his case, the applicant was perfectly able to mount such an appeal and to ask the county court judge, as the district judge had done, to determine the application in the first instance in the absence of notice having been given to the applicant's ex-partner.

[3] Ms Ramsey KC appeared with Ms McMillan for the applicant. Ms Murnaghan KC appeared with Ms Fee for the respondent district judge ("the first respondent") and for the Department of Justice ("the Department") which was also made a respondent to the proceedings ("the second respondent"). I am grateful to all counsel for their helpful written and oral submissions.

Factual background

[4] In light of the manner in which the central legal issue in these proceedings has crystallised, it is unnecessary to set out in any great detail the factual background to the application. Both sides were agreed that, in light of the developments briefly described below, these proceedings were academic as between the parties. They proceeded solely in order for the court to determine and give guidance on the issue of practice identified at para [1] above.

[5] The applicant initially challenged a decision on the part of District Judge (Magistrates' Court) Meehan, made on 2 March 2022, to refuse to grant a NMO in her favour on an ex parte basis. Her application for this order arose out of an incident on 27 February 2022. The applicant was concerned that, should her ex-partner be served with notice of the application, he would become enraged and unpredictable, so that it was just and convenient for the DPC to make an order without giving him notice of the application. This was on the basis of her view as to the risk of significant harm to her, or the likelihood of her being deterred or prevented from pursuing the application, if the order was not made immediately: see Article 23 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 ("the 1998 Order").

[6] The applicant submitted an application for the NMO in Form F1, ticking the box to indicate that she wished the court to hear her application without notice being given to the respondent. She also lodged a statement in support of her application. This described an alleged incident of a previous assault upon her some years ago, before going on to describe the incident on 27 February 2022 in some detail. This included allegations that her ex-partner had grabbed her by the neck; pushed her onto the stairs with his hand around her throat; bit her nose; pulled a knife from his pocket, with which he threatened her; and that, after assaulting his father, he then punched the applicant on the face and over her body, before confining her in a small cupboard in her home. This is only a brief summary of the facts and matters alleged by the applicant in respect of the incident on 27 February 2022.

[7] The applicant's statement also confirmed that the police had attended and arrested her ex-partner, although not without first having to seek further support in order to do so. The applicant's ex-partner was later released on police bail subject to

conditions; but the police nonetheless advised her to seek a NMO. The applicant's statement said that she was absolutely terrified of her ex-partner and that, when he was attacking her, this was in full view of others and that he laughed when the police arrived. For this reason she did not believe that he would abide by the police bail conditions. She expressly sought the NMO on an ex parte basis "due to the completely erratic and violent behaviour the respondent displayed" and on the basis that she genuinely believed that the respondent would be "entirely enraged and unpredictable should he be served with the summons without me having the protection of an Order."

[8] The district judge considered the application but was not prepared to grant a NMO on an ex parte basis. It appears that he was heavily influenced in this decision by the fact that the respondent to the NMO application was subject to police bail, including a condition precluding contact with the applicant. This is an issue which I addressed in *Re JR131's Application* [2021] NIQB 74, at paras [41]-[44] and [47](e). A considerable focus of the applicant's pre-action correspondence, sent on 2 March 2022, was on the guidance provided in that judgment. As I said there, there is not direct equivalence between the protection afforded by a NMO granted in favour of an applicant against a respondent and the protection which may be afforded by a bail condition precluding the latter from contacting the former. I would not expect the fact that such a bail condition was in place to be taken, as a matter of course, as a reason not to grant an NMO, either with or without notice to the respondent. However, it goes without saying that every case must be addressed on its own merits and that this is a matter for assessment by the district judge considering the application.

[9] A response to the applicant's pre-action correspondence was received on 3 March 2022 from the Departmental Solicitor's Office on behalf of the district judge. It did not concede any aspect of the proposed application and, in addition, made the case that the applicant had a readily available, effective alternative remedy in the form of an appeal to the county court against the impugned decision, so that recourse to judicial review was inappropriate. (For a recent discussion of the relevant principles in relation to alternative remedy in judicial review, see *Re Alpha Resource Management Ltd's Application* [2022] NICA 27, especially at para [20].) The applicant was not persuaded that this was a realistic option open to her, for reasons which appear below. She therefore proceeded to issue an application for leave to apply for judicial review of the district judge's decision.

[10] When the leave application was made, the applicant also applied for interim relief in the form of an ex parte NMO to be granted in her favour until such time as the judicial review proceedings were determined or the matter was further considered by the DPC. The leave application was considered by Colton J on 8 March 2022, at which stage he granted the applicant leave to apply for judicial review and also granted interim relief in the form of an ex parte NMO which would remain in force until 30 March 2022, at which point the matter was further listed before the DPC. As it happens, the order was extended on that date and the matter

was substantively considered by the DPC on 11 May 2022, at which point the applicant's ex-partner consented to the grant of an order for a further three months to 11 August 2022. After that order expired, the applicant made a further NMO application on 8 September 2022, relying on an allegation that her partner had breached the previous NMO on 24 June 2022 and, more importantly, that on 6 September 2022 he had further intimidated her.

[11] A further NMO was granted on 8 September 2022 and remains in force so that, as noted above, this application has proceeded solely in order to clarify the issue of principle in relation to whether an appeal on an ex parte basis is permissible. Indeed, this same issue has been raised in another judicial review application in which leave to apply for judicial review has recently been granted by Humphreys J, with an ex parte NMO also being made by this court by way of interim relief. That case awaits the determination of the issue in the present proceedings.

Summary of the parties' positions

[12] The applicant accepts that, in principle, she has a right of appeal to the county court against the decision of the district judge to decline to grant a NMO on her application without notice to her ex-partner. Her concern is that notice to her ex-partner would be required to be given in respect of the appeal pursuant to Article 144 of the Magistrates Courts' (Northern Ireland) Order 1981 ("the 1981 Order"). Given that she contended that it was appropriate for the DPC to grant a NMO *without* such notice being given, she argues that the availability only of an on-notice appeal would not be an effective alternative remedy. It would require her to make her ex-partner aware of the renewed application being made to the county court for a NMO in circumstances where, on her case, this would defeat the ends of the application where she was seeking to challenge (inter alia) the district judge's decision that it was not appropriate to grant such an order without notice.

[13] The first respondent maintains his position that, rather than pursuing an application for judicial review, the applicant could and should have appealed to the county court; and that there was nothing to stop her from doing so *without* having to put her ex-partner on notice. The Department was joined as a respondent to these proceedings after leave was granted in order to address the procedural issue in relation to interpretation of the relevant legislation and court rules for which it is now responsible. The Department supports the position taken by the district judge.

[14] Without commenting on the specific position in *this* case, the Department accepted that there would be circumstances where an unsuccessful applicant for an ex parte NMO may wish to pursue an appeal which would also be considered (at least in the first instance) on an ex parte basis and where it would be important that they should be able to do so. As noted above, the Department's case is that this is possible under the current statutory regime.

What is required by the statutory provisions?

[15] The starting point for the applicant's concerns about a respondent having to be put on notice in an appeal against a refusal to grant an ex parte NMO is Article 144 of the 1981 Order. Article 144(1) provides as follows:

> "Where an appeal is made to the county court under this Part, the appellant shall, in addition to complying with the provisions of this Part as to recognizances, within fourteen days commencing on the day on which the decision of the magistrates' court was made, give to the other party notice in writing of his appeal and shall within the said period lodge a copy of such notice so given with the clerk of petty sessions."

[16] An appeal against the decision of a district judge not to grant a NMO is said by the applicant to be an appeal under Part XII of the 1981 Order, to which Article 144 applies. That is because it is said to be an appeal under Article 143, entitled 'Appeals in other cases.' Article 143 provides, in material part, as follows:

> "(1) Subject to paragraph (2) and to Articles 29 and 31(1) of the Domestic Proceedings (Northern Ireland) Order 1980, an appeal shall lie to the county court from any order of a magistrates' court in proceedings to which this Article applies, by any party to the proceedings.
>
> …
>
> (3) This Article applies to the following proceedings—
>
> …
>
> (d) proceedings upon a complaint to which Part VIII applies."

[17] The applicant points out that, in Article 88 of the 1981 Order, "domestic proceedings" is defined as including "proceedings… under the Family Homes and Domestic Violence (Northern Ireland) Order 1998"; that domestic proceedings are provided for under Part VIII of the 1981 Order; and, in particular, that for the purposes of Part VIII "civil matters" are matters in which proceedings may be brought before a court of summary jurisdiction, pursuant to Article 77(1) of the 1981 Order. Article 77(2) provides that: "Proceedings in a civil matter shall be upon complaint and in accordance with this Part." Reading these provisions together, an application under the 1998 Order is a civil matter, domestic proceedings in respect of which "shall be upon complaint" under Part VIII of the 1981 Order. Accordingly, at

first blush, Article 144(1) applies because the relevant appeal right in respect of such proceedings is conferred by Article 143(1) and 143(3)(d).

[18] However, the respondents place particular reliance upon rule 10A of the Magistrates' Courts (Domestic Proceedings) Rules (Northern Ireland) 1996 ("the 1996 Rules"). These rules generally make procedural provision for domestic proceedings in the magistrates' court. They were amended, after the coming into force of the 1998 Order, by the Magistrates Courts' (Domestic Proceedings) (Amendment) Rules (Northern Ireland) 1999 ("the 1999 Rules"). The 1999 Rules amended the 1996 Rules, including by inserting a new rule 10 and 10A, in order to cater for the new remedies and procedures introduced by the 1998 Order.

[19] The new rule 10 – which replaced the previous rule 10 which related to applications for personal protection orders and exclusion orders under the Domestic Proceedings (Northern Ireland) Order 1980 – related to applications for non-molestation and occupation orders under the 1998 Order. It deals with on-notice applications. It provides that "an application by way of complaint… for… a non-molestation order… shall be made in writing in Form F1" and shall be supported by a statement which is signed and declared to be true or, with the leave of the court, by oral evidence. Any summons issued in consequence of such an application shall be prepared in triplicate in Form F2 and a copy shall be served, with a copy of the written application and supporting statement, on the respondent not less than two days prior to the date fixed for hearing (although the court may abridge that period).

[20] The new rule 10A dealt specifically with ex parte applications under the 1998 Order. Article 23 of the 1998 Order makes provision for a NMO to be granted without notice to the respondent. Rule 10A(1) provides as follows:

> "An application for an occupation order or a non-molestation order under the Order of 1998 may, with the leave of the court, be made ex parte and in which case –
>
> (a) Article 77(2) of the Magistrates Courts' (Northern Ireland) Order 1981 (civil proceedings to be on complaint) and rule 10 shall not apply; and
>
> (b) The evidence in support of the application shall state the reasons why the application is made ex parte."

[21] I accept the respondents' submission that the purpose of this rule is clearly to dis-apply the usual procedures by which a respondent to an application for a NMO, including on appeal, must be put on notice of the proceedings at the time when the application is made. Where the application is made ex parte with the leave of the

court, Article 77(2) of the 1981 Order does not apply, so the proceedings need not be "upon complaint"; and rule 10 does not apply, so the Form F1 does not stand as a complaint and need not, at that stage, result in the issue of a summons which is required to be served on the respondent.

[22] Although the district judge in this case did not *grant* a NMO on an ex parte basis, he clearly considered the application on an ex parte basis; that is to say, he entertained the application and considered whether it was appropriate to make an order in the absence of notice having been given to the applicant's ex-partner. In such circumstances, a district judge should be taken to have given leave for the application to be made ex parte. I imagine it would only be in a very rare case where it would be appropriate for a district judge to refuse to even consider the application ex parte where he or she is being asked to grant an order on an ex parte basis. That might arise if there was some fundamental issue with the application which meant it could not proceed; or, for instance, where it was clear that the respondent was in fact already on notice of the application by some means and attended before the district judge seeking to make submissions. Where an ex parte order is sought, however, and the district judge considers it without notice to the respondent having been given, in the absence of any express indication to the contrary from the district judge, that should be taken to represent leave of the court being given for the application to be made ex parte in accordance with rule 10A(1), even if the judge is not prepared to grant the application for an order in those circumstances.

[23] The result of this analysis is that the applicant's application to the district judge on 2 March 2022 was not upon a complaint. Article 143(3)(d) of the 1981 Order does not apply to it; Article 143(1) does not therefore provide her a right of appeal; and Article 144, requiring the provision of notice, is also not relevant.

[24] How then can the first respondent contend that the applicant *does* have a right of appeal against his refusal to make a NMO on an ex parte basis? That arises because a specific right of appeal is conferred upon her by virtue of Article 39(3)(b) of the 1998 Order itself, which is in the following terms:

> "Subject to any express provisions to the contrary made by or under this Order, an appeal shall lie to the county court against—
>
> (a) the making by a court of summary jurisdiction of any order under this Order; or
>
> (b) any refusal by a court of summary jurisdiction to make such an order."

[25] Instead of having to be brought in reliance on the general right of appeal conferred in relation to a variety of types of civil proceedings in the magistrates'

court under Article 143 of the 1981 Order, the relevant right of appeal is simply that established by Article 39(3) of the 1998 Order.

[26] I raised with the second respondent the question of whether it would be permissible for the 1999 Rules, a species of delegated legislation which is subordinate to the 1981 Order, to carve out an exception to the general requirement to provide notice of an appeal to the respondent to the proceedings. In fact, this issue may not be relevant for two reasons. First, as explained above, the relevant right of appeal does not engage the provisions of the 1981 Order at all, on one view. Second, I have also formed the view that the 1998 Order itself contemplates the county court considering an application on an ex parte basis. That is because Article 23 provides that "the court" may make a NMO without notice having been given to the respondent; and Article 34(1) defines the "the court" as not merely meaning a court of summary jurisdiction but also including a county court and the High Court. In short, the 1998 Order itself contemplates any level of court properly dealing with an application for a NMO doing so on an ex parte basis if the conditions in Article 23 are met.

[27] Nonetheless, insofar as it is material, I am also persuaded that the rule-making power under which the 1999 Rules were made permits them to make exceptional procedural provision of this type. The 1999 Rules are made under Article 13 of the 1981 Order and Article 34(11) of the 1998 Order. The latter provision states that Article 165 of the Children (Northern Ireland) Order 1995, dealing with provision which may be made by rules of court, shall apply for the purpose of giving effect to the 1998 Order as it applies for the purpose of giving effect to the Children Order. In turn, Article 165(2) of the Children Order, which is in extremely wide terms, provides that:

> "The rules may, in particular, make provision –
>
> (a) with respect to the procedure to be followed in any relevant proceedings (including the manner in which any application is to be made or other proceedings commenced);
>
> (b) as to the persons entitled to participate in any relevant proceedings, whether as parties to the proceedings or by being given the opportunity to make representations to the court;
>
> (c) with respect to the documents and information to be furnished, and notices to be given, in connection with any relevant proceedings;
>
> (d) applying (with or without modification) statutory provisions which govern proceedings brought on a

> complaint made to a court of summary jurisdiction to relevant proceedings in such a court brought otherwise than on a complaint or disapplying or modifying such statutory provisions in relation to relevant proceedings in a court of summary jurisdiction which would otherwise be brought on a complaint;
>
> …
>
> (h) enabling the court, in such circumstances as may be prescribed, to proceed on any application even though the respondent has not been given notice of the proceedings; …"

[28] In light of the terms of this enabling power, particularly Article 165(2)(d) and (h), I am satisfied that it was intra vires the 1999 Rules to make provision, in respect of an ex parte application for a NMO, dis-applying the usual approach whereby a respondent to an appeal from the DPC would be entitled to notice of the appeal.

[29] Since Article 144 of the 1981 Order is not engaged by such an appeal, and where the application for the NMO was made ex parte and was therefore not on complaint, the applicant could have appealed the first respondent's refusal to make a NMO to the county court and would *not* have been required to provide her ex-partner with notice of such an application (unless so directed by the county court judge).

[30] In passing, I note that the respondent relied upon *Re Harper's application* [2015] NIQB 49. That was a case in which a county court judge refused to grant an order on an ex parte basis under the Protection from Harassment (Northern Ireland) Order 1997. This refusal was the subject of an application for judicial review. Stephens J refused leave on the basis that the applicant could have appealed to the High Court against the refusal; but went on to consider the matter himself by way of appeal from the county court judge. He did so on an ex parte basis, although he found that there was not a proper foundation for granting an order without notice to the respondents. I agree with the applicant's submission that this authority does not really assist: partly because it is dealing with a different statutory regime and entirely separate procedural provisions to those at issue in the present case; and partly because there is no recorded argument or reasoning on the point, which is perhaps unsurprising since it is clear that the ruling was given ex tempore after an emergency application. Nonetheless, it was clearly Stephens J's instinctive view that an appeal could be dealt with on an ex parte basis (at least in the first instance) where the aggrieved litigant was seeking to challenge a refusal to make an ex parte order in circumstances analogous to those in the present case.

How should an appeal be brought ex parte?

[31] An affidavit has been sworn by Ms Laurene McAlpine, the Deputy Director (Civil Justice and Judicial Policy Division) on behalf of the Department. Ms McAlpine, on behalf of the Department, accepted that there would be circumstances where an unsuccessful applicant for an ex parte NMO may wish to pursue an appeal which would also be considered, at least in the first instance, on an ex parte basis and where it would be important that they should be able to do so. The Department agreed with the analysis presented on behalf of the district judge that an appeal lay under Article 39 of the 1998 Order and that notice of the appeal did not automatically have to be served.

[32] Ms McAlpine's affidavit also explained that, in practice, applicants for non-molestation orders which were refused on an ex parte basis and who wished to appeal such a decision without giving notice to the respondent had been able to do so, in at least some cases. She conducted what was described as "a dip sample" of recent appeals where an application for an ex parte NMO had been refused. Her research indicated that, at least in Belfast, such appeals were made by the appellant's solicitor lodging Form 97, with no notice being given to the respondent about the appeal.

[33] The applicant is correct that, in light of the conclusion that Article 144 of the 1981 Order does not apply to an appeal such as that described in this case, there is somewhat of a lacuna in the procedural provisions governing the initiation of such an appeal. An appeal lies pursuant to Article 39 of the 1998 Order; but the precise procedural means by which such an appeal is commenced before the county court is not fleshed out. Ideally, this should be looked at and addressed by the Department, in conjunction with the Magistrates' Courts Rules Committee, as soon as possible. The rule-making power in Article 13 of the 1981 Order and Article 34(11) of 1998 Order was conferred on the Lord Chancellor but would now be exercisable by the Department: see Article 15(1) of, and paras 37 and 47 of Schedule 17 to, the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (SI 2010/976).

[34] In the meantime, the pragmatic approach which has been adopted of using Form 97 – which is set out in Schedule 1 to the Magistrates' Courts Rules (Northern Ireland) 1984 – seems as good as any. Although that form is provided for use in appeals to the County Court to which Article 144 of the 1981 Order applies, it is entitled 'Notice of Appeal to the County Court' and requires an appellant to insert details of the county court appealed to; details of the magistrates' court appealed from; and the date and nature of the order appealed against. It will obviously require some ad hoc amendment when completed by the applicant or their solicitor in the circumstances described above but, with such amendment, can passably be used to appraise the county court judge of the nature of the appeal. It should obviously be lodged with the appropriate court office accompanied by the initial

application for the ex parte NMO. It should also make clear that the appellant is seeking consideration of their application on an ex parte basis by the county court.

[35] Where an application for an ex parte NMO is refused by a district judge and the applicant wishes to appeal on an ex parte basis, this should ideally be raised with the district judge as soon as possible (and at the conclusion of the ex parte hearing, if one has been held, where practicable). This is so as to ensure that the district judge is in a position to give directions pursuant to rule 10A(2) and/or rule 10A(5) of the 1996 Rules about service of the application upon the respondent and the fixing of an inter partes hearing – or to hold off on giving such directions, as necessary – in a way which does not cut across the applicant's ability to pursue their intended appeal without the respondent being on notice that an application for an NMO has been made. If, in the course of such an appeal, the county court judge takes the view that the application *should* be made on notice to the respondent, he or she may either give directions in order to hear the inter partes application themselves or, perhaps more sensibly, dismiss the appeal and allow the on-notice application (should the applicant wish to pursue it) to be dealt with by the district judge below.

The applicant's Convention rights

[36] Finally, the applicant sought a declaration to the effect that, in the event that she was correct about the construction of the relevant provisions discussed above, nonetheless Article 144 of the 1981 Order should be read down pursuant to her Convention rights such that notice of her appeal would *not* have to be provided to her partner. Perhaps counterintuitively, therefore, the applicant was arguing that the domestic provisions required notice to be given (so that an appeal to the county court was not an effective alternative remedy in the circumstances of the case) but that any such requirement was itself unlawful; whilst the first respondent was arguing that the applicant could mount an appeal without providing notice, notwithstanding his conclusion that in the circumstances of this particular case the grant of a NMO on an ex parte basis, even taking into account the applicant's Convention rights, was not required. In any event, in light of my conclusions on the meaning and effect of the domestic statutory provisions, I need not decide whether in the circumstances of this case (or more generally) Convention rights require the availability of an ex parte appeal. That has been provided for in the relevant Order and Rules.

Conclusion

[37] For the reasons given above, I conclude that it was open to the applicant, rather than initiating these proceedings for judicial review, to appeal the first respondent's decision not to grant a non-molestation order on an ex parte basis. She could have done so pursuant to Article 39 of the 1998 Order and, by virtue of rule 10A(1)(a) of the 1996 Rules, would not have been required to serve notice of this appeal on the respondent to her application. Accordingly, her right of appeal represented an alternative remedy. The application for judicial review will be dismissed; and I will hear the parties on the issue of costs.