Neutral citation No: [2014] NIQB 81 | *Ref:* **HOR9190**

Judgment: approved by the Court for handing down | *Delivered:* **13/06/14**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Swann's (Richard) Application [2014] NIQB 81

IN THE MATTER OF AN APPLICATION BY RICHARD SWANN FOR JUDICIAL REVIEW

and

IN THE MATTER OF THE SERVICE ON HIM ON 6 AUGUST 2012 OF A HARBOURER'S WARNING NOTICE

and

IN THE MATTER OF THE SERVICE ON HIM ON 4 DECEMBER 2012 OF A HARBOURER'S WARNING NOTICE

HORNER J

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Summary

[1] The applicant, a man in his middle age, seeks to set aside two Harbourer's Warning Notices ("HWNs") which were issued by the Police Service of Northern Ireland ("the Police") and are dated 6 August 2012 and 4 December 2012 respectively.

[2] The first HWN relates to B and the second HWN to MC, both of whom are girls who were then under the age of 16 years. The HWNs label the applicant a harbourer and a suspect and confirm that the parents/guardians of both these girls have banned their children's contact with the applicant. The HWNs claim that non-compliance by the applicant with them should lead to his arrest for child abduction. The facts relating to the service of the Notices are logged onto the Police Information Service where they will remain and can have serious consequences for anyone, especially if he is in an occupation or hoping to have an occupation caring for children or vulnerable adults. At the time, the applicant, now retired, worked with adults with learning difficulties. These Notices were served without any reasonable investigation, without the applicant being given the opportunity to put his side of what happened, are not subject to review, there is no appeal from them and they remain on the Police "files" for an unspecified period of time .

[3] The Court finds as a matter of law that the Police are legally entitled to issue and serve HWNs pursuant to section 32(1) of the Police Act (NI) 2000. On the facts of this case the Police acted unfairly by failing to carry out any investigation, save one that appears to have been superficial and incomplete, before they served the HWNs, and in particular by failing to give the applicant an opportunity to put his version of events. The service of the HWNs was not a breach of Article 6 of the European Convention on Human Rights ("ECHR") because the HWNs did not determine any civil rights or obligations of the applicant. However, the Police were in breach of the applicant's Article 8(1) rights and what they did was not in accordance with the law and/or was not proportionate.

Introduction

[4] The applicant challenges the service upon him of two HWNs dated 6 August 2012 and 4 December 2012. He seeks an Order of Certiorari quashing both HWNs and declarations as to their unlawfulness.

[5] These HWNs, also known in some areas of the United Kingdom as Child Abduction Warning Notices, are used by police forces throughout the United Kingdom. Detective Superintendent Skelton, who swore an affidavit on behalf of the Police, said:

> "Essentially the purpose of the Harbourer's Warning Notice is an administrative process to act as a formalised record of a warning to the subject that a person enjoying

> parental responsibility for a child has forbidden the child from contact with the subject and that for the subject to knowingly and without lawful authority or reasonable excuse take or keep the child away from its parents or to induce, assist or incite the child to run or stay away from the parent may render the subject liable to arrest for child abduction."

[6] The mental element of child abduction involves satisfying the Court that the abductor knew that he or she had no lawful authority or reasonable excuse for the child to be in his or her company. The HWNs can play a part in establishing the necessary intent before a jury. Mr Coll BL, for the Police, claimed that an HWN was akin to "a quiet word in the ear" and did nothing more than "put a wrapper around a warning". Ms Fiona Doherty BL, for the applicant, complained that these HWNs had potentially disastrous consequences for any persons who received them both in respect of their work and their private lives. I should at this stage record my thanks to both Ms Doherty BL and Mr Coll BL for their comprehensive and challenging oral and written arguments. Both counsel submitted a number of detailed and cogent skeleton arguments and these were fleshed out in court by their effective oral submissions. Both counsel displayed industry and insight in the arguments they advanced on behalf of both of their clients. I have taken into account all the points so carefully and thoroughly made by them before reaching my conclusions on the key issues before the Court, even though I may not, for reasons of brevity, have referred to them in this judgment.

The Facts

[7] The applicant was the learning disability deputy manager with Belfast Health and Social Care Trust. His work involved him managing the support workers who go into the homes of adults with learning difficulties. Before this he had been a police officer in England but had returned to Northern Ireland for medical reasons. From 1996 he had worked in various positions for the Trust. He has now retired because of ill health.

[8] When he had moved to Northern Ireland he did so with his former partner, K. They had three children. When the relationship broke down, K returned to England with the two younger children, L and M. Their eldest son R, had started school in Northern Ireland and did not want to leave. He remained under the care of the applicant in Northern Ireland.

[9] During her time in Northern Ireland K had become good friends with a woman called DC. K and DC became pregnant at the same time. DC's daughter, A, was born in September 1997 and K gave birth to R in November 1997. K and DC would often go out socially and the applicant would look after all their children, including A. There is no doubt that A developed very close ties with the applicant and his offspring. She often stayed overnight in the applicant's house. When K

returned to England in 2005 following the breakup of the relationship with the applicant, DC looked after the applicant's eldest son, R, who remained in Northern Ireland to complete his studies, when the applicant was working at weekends for the Trust at hostels for people with learning disabilities. For a period of 7 months DC, her partner and A had to move out of their house. All three went to stay with the applicant. DC suffers from colitis. Two years ago she became very unwell. A had not settled at school and the applicant helped look after her at his home, he helped to ensure that she attended school and applied herself to her studies. A's father had gone to the applicant's house, checked out the arrangements and had confirmed that everything was to his satisfaction. The Court was lead to understand that A's father has no complaints about the role the applicant has played in her life and the help he has given to A in what have been very trying times.

[10] In the early summer of 2012 the applicant had agreed to collect A and her friend, B, from DC's house. The applicant had given B a lift home on other occasions but always when A was in the car with them. The applicant called and collected A and B but it was obvious that B had been drinking. A told the applicant that B had been drinking with her relatives in East Belfast while watching a band parade. A had not been drinking and no alcohol was consumed at DC's house. The applicant did not consider that B was drunk. He left her home in his car. A was present with them at all times. The door of B's house was open and she went in. The applicant did not stay. On other occasions the applicant claims that he left B home and had often seen B's mother, her boyfriend and their son. He remembers speaking to B's mother on one occasion when she personally thanked him for giving B lifts on other occasions.

[11] On 17 July 2012 the applicant was asked by his line manager to attend at her office. He was told he was being suspended from his job pending an investigation into allegations that had been made against him. A day or two later he received a letter confirming his suspension because of an allegation that had been made against him. On 6 August 2012 he was served with an HWN by Constable Parker who the applicant claims also confirmed to him that the Police had not investigated the circumstances that had led to service of the HWN upon him. This allegation is denied.

[12] The HWN stated that:

(i) The parents of B had "absolutely banned outright with no exceptions" B from having any contact with the applicant.

(ii) Under the heading it stated: "Article 4 of the Child Abduction (NI) Order 1985"

(iii) It stated, "if you knowingly and without lawful authority or reasonable excuse, take or keep B away from their parent (sic), or if you induce,

assist or incite B to run away or stay away from their parent (sic) you may be arrested for child abduction".

(iv) Finally, it stated that the HWN remained in force until 10 May 2014 when B turned 16 years.

[13] On 20 September 2012 the applicant attended a meeting with his employer accompanied by a friend of his choice. It was explained there had been a complaint that he had been driving minors home without the permission of their parents late at night when they were intoxicated. The only possible occasion when this could have happened was the one previously described. The applicant set out what had happened. He explained that he had never driven a minor unaccompanied and always had the parents' knowledge and permission. He was told that the HWN was a matter between him and the Police. He made it clear that he intended to challenge the HWN. He was asked to explain why he had not told his line manager about these serious allegations. He said that he had no idea about any allegations being made against him until he was told of them on 17 July 2012.

[14] The applicant was concerned about the implication for his career as he had contact with vulnerable adults and in-depth checks were carried out on his background from time to time. He received a letter from the Independent Safeguarding Authority ("ISA") indicating that they were considering whether or not to include him in the Children's Barred List and/or the Adults' Barred List on 17 August 2012. There does not appear to have been any action taken pursuant to this letter on the evidence before the Court. On 4 December 2012 the applicant was served with another HWN in respect of a second child, MC. Again this is the subject of challenge by the applicant. He claims that he has done nothing wrong and nothing to warrant the service of such a HWN.

[15] Detective Sergeant Angela McKerrin, who is detailed to the Child Abuse Team, has sworn an affidavit in response to the applicant's original affidavit, which includes the following information:

(a) A social worker had received a number of complaints about the applicant being in the company of young girls and that he was providing them with alcohol and permitting them to be intoxicated.

(b) The applicant had been warned about his behaviour by the social services and his manager but his behaviour continued.

(c) On 3 July 2012 one of her officers, Constable Parker, met the relevant social worker who informed her of the following:

(i) The social services received an anonymous call on 23 November 2011 that the applicant was holding parties, he was looking after A and that

A was in a sexual relationship with the applicant's son, R. Following investigation by the social services, the case was closed.

(ii) On 23 February 2012 social services were informed about underage drinking at the applicant's house and the involvement of two other named female children. This matter was investigated but due to lack of evidence the investigation was concluded in late March 2012.

(iii) On 8 June 2012 the mother of B made a complaint through B's teacher. Her complaint was that on 19 May 2012 the applicant had left B home with A in his car and that B had been intoxicated. It was claimed that B's parents had endeavoured to speak with the applicant on a number of occasions but that he had driven off. When this complaint was investigated the Police were satisfied that no offence had been committed. The Police were able to satisfy themselves of this without the need to interview the applicant. The Police interviewed B, another girl, MC, and a third girl, X. Each of the girls involved denied consuming alcohol in the applicant's house or being supplied with alcohol by the applicant. However, during the course of the interviews, X had disclosed that she had stayed overnight at the applicant's house on one occasion when A was not there. There was no suggestion of any misbehaviour on the part of the applicant during her stay. The applicant does not believe she did stay because he would have known if she had stayed over in his house.

[16] At no stage has the applicant ever been interviewed by the Police about any complaint or allegation made to the social services or the Police about his behaviour with A, B, MC, X or any other child. MC's parents made a statement of complaint. It included the comment:

> "I would give the Police permission to tell this man to have no contact with my daughter as he is too old to be hanging about with young girls."

[17] It is far from clear that MC's parents or B's parents knew about A's relationship with the applicant and the support the applicant had provided to both A and her mother, DC. Indeed, it is still not clear to the Court, despite all the affidavit evidence which has been filed, whether this is information that the Police had within their possession when they decided to issue these HWNs. The Court cannot but conclude that there is a real prospect that the Police (and the parents of both B and MC) did not know of the applicant's family circumstances.

[18] A letter was subsequently sent by the applicant's solicitors to the Trust on 20 August 2012 which stated:

> "Our client requires an immediate clarification as to the status of the investigation into the allegation. It is now four weeks since our client was suspended. We would expect that your investigation should be at an advanced stage or concluded."

[19] By letter dated 7 September 2012 the Trust replied that they would be investigating the matters, that the applicant could be represented by a Trade Union Representative or a work colleague and that the Trust offered a confidential counselling service which he could take advantage of.

[20] On 13 September 2012 the applicant's solicitors wrote a detailed letter to the Chief Constable of the PSNI making it clear that they were challenging the service of the HWN of 6 August 2012 and making the point clearly that the Notice was unlawful.

[21] On 30 October 2012 the applicant moved for a judicial review of the HWN of 6 August 2012. On 4 December 2012 a further HWN in respect of MC was served on the applicant. This Notice emanated from a different police district and this is the explanation provided for its delay in being issued.

ORDER 53 STATEMENT

[22] The applicant advances his claim on a number of different fronts:

(i) The procedure for issuing HWNs in general is unlawful being *ultra vires* the powers of the Police and having no legal basis either in statute or under the common law.

(ii) The issue and service of the HWNs was procedurally unfair and/or did not comply with the procedures set out in the Police's Service Procedure SP27/2010 ("SP27/2010").

(iii) The issue and service of the two HWNs on the applicant offended his Article 6(1) rights under the ECHR.

(iv) The issue and service of the HWNs on the applicant infringed his Article 8 rights under the ECHR.

Harbourer's Warning Notice

[23] In Northern Ireland the procedure for issuing and serving HWNs is set out in SP27/2010. It is sufficient at this stage that this procedure is set out in abbreviated form:

(i) Its purpose is to assist the application and enforcement of Police powers under the Child Abduction (NI) Order 1985 ("the 1985 Order") and the Children (NI) Order 1995 ("the 1995 Order").

(ii) The primary purpose is to sever contact between a child or young person and the potential abductor. The Notices can provide evidence in Court to demonstrate that the defendant had been warned not to offer shelter to the child and to prove that the abductor knew that he had no permission to allow the child/young person to stay with him.

(iii) Under paragraph 8(2)(a) it is stated "while the intention of either party may be entirely innocent, **an investigation must be undertaken to establish the nature of the contact** and appropriate action taken according to the risks as presented". (Emphasis added).

(iv) An HWN remains in force until the child reaches 16 years, or if the child is in care 18 years. (It depends on whether the 1985 Order or the 1995 Order applies).

(v) Breach of an HWN is not a criminal offence.

[24] The Association of Chief Police Officers ("ACPO") subsequently published its guidance after SP27/2010 came into effect. This differs in important respects from SP27/2010. The following differences are worthy of note:

(a) Under paragraph 6.1 of ACPO guidance a warning notice can be issued when a suspect has given "significant cause for concern". Paragraph 6.9 refers to "clear concerns". The Northern Ireland document proceeds on the basis of Police being "concerned" about a child.

(b) There is no requirement in the PSNI guidance, unlike the ACPO guidance, that the young person/child should have been warned by the parents not to associate with the alleged harbourer.

(c) The HWN is time limited under the ACPO guidance. There is no doubt that under ACPO there is a reference to six months. It is not altogether clear whether this is the period during which the investigation is to be carried out or the period during which the Notice will remain in force. I consider that a fair reading of paragraph 6.10 is that the six month period refers to the period after service of the Notice during which the Police are required to continue to monitor intelligence and assess risk. Any subsequent action will be informed by this intelligence operation. After 6 months the HWN has to be reviewed. No such process is recommended under the Northern Ireland guidance. So it would appear in Northern Ireland that an HWN is served and it remains in force until the child/young person

reaches 16 or 18 depending on whether the 1985 Order or the 1995 Order applies.

Relevant Statutory Provisions

[25] The Court's attention was drawn to a number of different statutory provisions which it was claimed were relevant to the issues before the Court.

(A) Section 32(1) of the Police (Northern Ireland)Act 2000 provides that:

> "It shall be the general duty of police officers –
>
> (a) To protect life and property;
> (b) To preserve order;
> (c) To prevent the commission of offences;
> (d) Where an offence has been committed, to take measures to bring the offender to justice."

(B) Article 4 of the Child Abduction (Northern Ireland) Order 1985 states as follows:

> "Offences of abduction of a child by other persons.
>
> 4.-(1) Subject to paragraph (2), a person, not falling within Article 3(2)(a) or (b), commits an offence if, or without lawful authority or reasonable excuse, he takes or detains a child under the age of 16 –
>
> (a) So as to remove him from the lawful control of any person having lawful control of the child; or
>
> (b) So as to keep him out of the lawful control of any person entitled to lawful control of the child."

(C) Article 68 of the Children (NI) Order 1995 states that it is an offence if a person knowingly and without lawful authority or reasonable excuse takes a child to whom this article applies away from a responsible person; keeps such a child away from the responsible person; or induces, assists or incites such a child to run away or stay away from the responsible person. The child referred to in this Article is any child under 18 years.

(D) Section 17(3) of the Interpretation Act (NI) 1954 states:-

> "Where an enactment empowers any person or authority to do any act or thing, all such powers shall be deemed to be also given as are reasonably necessary to enable that

> person or authority to do that act or thing as are incidental to the doing thereof."

GROUNDS OF THE CHALLENGE

Illegality

[26] The parties joined issue on whether the Police were legally able to issue HWNs. The applicant asserts that the service procedure SP27/2010 implemented in September 2010 is ultra vires the powers of the Police. He claims that there is no legal basis under section 32 of the Police Act, Article 4 of the 1985 Order or Article 68 of the 1995 Order and that they cannot call in aid section 17(3) of the Interpretation Act (NI) 1954, all of which are set out above.

[27] The Police disagree and say that the fundamental purpose of HWNs is the protection of children. The service of an HWN on a third party effectively brings to the attention of the recipient the elements of the offence created under Article 4 of the 1985 Order and Article 68 of the 1995 Order. It therefore serves to protect all those involved, including the recipient of the Notice. In R v Mortimore [2013] EWCA Crim 1639 the Court of Appeal in England accepted that the service of a Notice was "…relevant evidence, since it made clear to the appellant that the person who had lawful control of the child, SR's mother, did not consent to the child being or remaining in the appellant's company. The appellant could not therefore advance as a defence that he had lawful authority or a reasonable excuse to be in the company of the child."

[28] Section 32 of the Police Act is framed in very broad terms. In Breslin & Ors v Seamus McKenna & Ors [2008] NIQB 98 Morgan J (as he then was) was asked to consider the ambit of section 32 of the Police Act on the basis that it did not give the Police power to furnish information to the plaintiffs and that no such power should be implied. This arose out of the civil claim brought by the victims of the Omagh Bombing against those whom they believed were responsible for carrying it out. Morgan J said:

> "I do not consider that section 32 supports such a construction. The section merely sets out the general functions of police officers but does not purport to say anything about the basis on which police officers should deal with the ancillary issue of the retention and distribution of information. There is no basis for contending that this section provides a prescriptive list of matters which thereby prevent the police distributing information in appropriate circumstances."

[29] It is important to remember that what is being considered under section 32 are duties which Parliament has imposed upon the Police. While a power implies

some measure of discretion, a duty necessarily implies an obligation to use it. At 12.2.8 *Craies on Legislation* (10th Edition) states:

> "The imposition of a duty necessarily implies a power to do whatever is required in order to comply with the duty."

[30] In Jones v Cleanthi [2006] EWCA Civ 1712 Jonathan Parker LJ at paragraph 75 said:

> "Where Parliament requires that an act be done … it necessarily empowers that person to do the act."

If the function is conferred in very broad terms, the powers available for its performance will be implied in very broad terms (subject to those rebuttable presumptions of construction). However in cases where Parliament "has made detailed provisions as to how certain statutory functions are to be carried out there is no scope for implying the existence of additional powers which lie wholly outside the statutory code": see R (Khan) v Secretary of State for Health [2003] 4 All ER 1239, at 1261.

[31] There can be no reasonable doubt that HWNs:

(a) Can be important evidence in cases allowing the prosecution to establish all the elements of the offences created under Article 4 of the 1985 Order and Article 68 of the 1995 Order.

(b) Can serve to warn parties of the risks that they are running by associating with children and thereby prevent crime.

Accordingly I have no hesitation in concluding that such Notices assist the Police in performing all four general duties imposed by section 32 of the Police Act. Therefore the police are entitled in certain circumstances to serve HWNs to assist them in performing their duties under section 32(1) of the Act. If necessary, and I do not consider this to be the case as the law is clear, I am of the opinion that the Police can call in aid section 17(3) of the Interpretation Act (NI) 1954 and that the power to issue HWNs is incidental to the performance of the duties set out at section 32(1) of the Police Act. It follows, therefore, that I am wholly satisfied that as a general proposition, the Police have the power in carrying out their duties under the Police Act to serve HWNs. They are neither *ultra vires* nor illegal.

Unfairness

[32] "There is a general presumption that the legislature does not intend to achieve a result that is manifestly unfair, unreasonable or arbitrary": see 19.1.5 of *Craies on Legislation*. Lord Diplock made clear the presumption extends to the nature

of the powers and duties conferred by statute. In Hillingdon London Borough Council v Commission for Racial Equality [1982] AC 779, at 787 he said:

> "Where an Act of Parliament confers upon an administrative body functions which involve its making decisions which affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that Parliament intended that the administrative body should act fairly towards those persons who will be affected by their decisions".

[33] Accordingly, I find that the Police in issuing and serving HWNs must act fairly. But, of course, fairness is an elastic concept. The demands of fairness are not immutable and depend upon the specifics of any given set of circumstances: see Doody v Secretary of State for the Home Department and Other Appeals [1993] 3 All ER 92, at page 106 per Lord Mustill.

[34] Unfairness is contextual and it must have some practical effect. *Wade on Administrative Law* (10th Edition) at page 419 states:

> "There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice".

In R v Devon County Council ex p Baker [1995] 1 All ER 83, at 85 (c)-(d) Dillon LJ stated:

> "Obviously it could be said to be best practice, in modern thinking, that before an administrative decision is made there should be consultation in some form, for those who will clearly be adversely affected by the decision. But judicial review is not granted for a mere failure to follow best practice. It has to be shown that a failure to consult amounts to a failure by the local authority to discharge its admitted duty to act fairly".

[35] However as Lord Steyn said in R v Home Secretary ex p Amin [2003] UKHR 51, at paragraph 52:

> "… It is vital that procedure and the merits should be kept strictly apart otherwise the merits may be judged unfairly".

Even the most open and shut case on one side's version, turns out to be nothing of the sort when the other side's is examined: see the application of Graeme Drummond [2006] NIQB 81, per Deeny J at paragraph 18.

[36] On the facts of this case it is impossible to know whether the Police were fully aware of the background circumstances of the applicant and his relationship with DC and her daughter, A. Indeed there are good grounds for concluding that neither the Police nor the parents of B or MC were aware of the circumstances of why A was often in the company of the applicant. At the very least there could have been grounds for confusion. It is also unclear as to the circumstances in which MC's parents came to learn of MC's contact with the applicant. The Statement of Complaint of the parents is consistent with the Police asking for permission to serve an HWN because the applicant had been hanging about with young girls, who included A, and having no possible reason other than a nefarious one for so doing. It would have been extraordinary in those circumstances if MC's parents had not insisted on MC having no further contact with the applicant, especially if, for example, they were told that an earlier one had been issued and served.

[37] In circumstances where the applicant was served with HWNs in respect of which he never had the opportunity to put his own version of events, he had every right to feel that he had been unfairly dealt with by the Police. I do not accept that it is an answer to the charge of unfairness that the applicant could have given his version of events when he was served with each HWN. Never mind the numbing effect the service of such Notices would have on the mind of any recipient, the central fact is that the applicant could not know the full circumstances which had led to the service of the Notices without being told by the Police and therefore would have been unable to shape the nature of his response. In R (Osborn) v Parole Board [2013] UKSC 61 the Supreme Court looked at the use of procedural unfairness in the common law. Lord Reed giving the judgment of the Supreme Court said at paragraph 67:

> "There is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested."

He also pointed out that two other important values were engaged. The first was the avoidance of the sense of injustice which the person who is the subject of the decision might otherwise feel. The second is the Rule of Law.

Lord Reed said at paragraph 71:

> "Procedural requirements that decision- makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions: see eg Fuller, The Morality of Law, revised ed(1969), 81 and Bingham, The Rule of Law, (2010), ch 6."

[38] However, in this case paragraph 8(2)(a) of the Service Procedure required an investigation before any HWN was served. The applicant says that Constable Parker, who served the first HWN, told him that no investigation had been carried out by the Police. Detective Sergeant McKernin on behalf of Constable Parker in an affidavit denies that Constable Parker said any such thing, although Constable Parker has not sworn an affidavit. Judicial reviews are particularly ill suited to determining disputes such as this. However, the court is satisfied that any investigation by the Police was cursory and superficial. There are two reasons for reaching this conclusion:

(i) Neither A nor DC were interviewed. Of all the girls, A was in the applicant's company the most and had the most to say about his behaviour.

(ii) The applicant was not interviewed.

It seems that the Police may, instead of proceeding on the basis of hard fact, have proceeded on the basis of unmerited assumptions. Of course, not every investigation will require an interview. In some cases there may be exceptional reasons why the Police must serve an HWN immediately and there may be insufficient time to investigate fully. The Police may be unable because of pressure of time to obtain the subject's explanation for what had happened. As I have made clear, unfairness is contextual. In this case the Police had ample time and opportunity to obtain the applicant's version of events and the versions of others with critical information before serving either of the HWNs. They chose not to listen to the applicant or to A and her family for reasons which are still not clear to the Court. If the Police decided only to carry out a superficial investigation and/or not to interview the subject because they believed they were administering the "written equivalent of an informal word in the applicant's ear", they were seriously mistaken. Service of an HWN provides the Police imprimatur that the subject is a harbourer or a suspect following a request or direction from the parents of a child under 16 years of age. Investigation in the context of SP27/2010 can only mean such investigation as is reasonable in all the circumstances. This did not take place on the evidence before this Court. There is no system of review or appeal to allow the applicant to challenge the decision to serve HWNs. This can only be done by way of judicial review. In R (Catt and T) [2013] 1 WLR 3305 a Harassment Notice in England setting out an allegation of harassment under the Protection from Harassment Act 1997 and warning that a further act of harassment could give rise to a prosecution, could be retained by the Police for at least 7 years and could be used as evidence in future proceedings. Moore-Bick LJ said *obiter*:

> "Nor is there any need to discuss the submission that by failing to take reasonable steps to obtain Ms T's side of the story before serving the letter on her the Police failed to observe common law requirements of fairness and so acted unlawfully. It might be thought however, that in

> common fairness a person against whom an allegation of this kind is made should be invited to give his or her side of the story **before** the Police decide whether action of any kind is appropriate." (See paragraph [62]). (Emphasis added). I agree.

[39] While parents have the right and authority to decide who can see their children before they reach the age of 16, there may on occasions be all sorts of disreputable reasons as to why parents would not want their offspring to see a particular adult. They can include spite, bigotry and racism. There is no reason why the Police should copper-fasten such base motives. By reinforcing spite and prejudice, the Police would most assuredly not be acting in accordance with section 32 of the Police Act. I do not suggest that these motives were present here, just that at the very least they may have been. Certainly the Police could not know because they failed to make the reasonable enquiries required by the circumstances.

Article 6

[40] Article 6 of the ECHR states:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[41] The applicant complains that the service of the HWNs upon him have obviously interfered with his right to enjoy a good reputation. In Werner v Poland [2003] 36 EHRR 28 the Court said:

> "The Court sees no reason to disagree with the conclusion reached by the Commission which, moreover coincides with the Court's own findings in the case of Tolstoy Miloslavsky v United Kingdom and in the case of Kurzac v Poland that the right to enjoy a good reputation and the right to have determined before a tribunal the justification of attacks upon such reputation must be considered civil rights within the meaning of Article 6(1) of the Convention." (See paragraph 33).

[42] In Karakasis v Greece [2003] 36 EHRR 507 the European Court of Human Rights held:

> "A procedure whereby civil rights were determined without ever hearing the parties' submissions could not be considered to be compatible with Article 6(1) of the Convention." (See paragraph 26).

[43] Further, it is asserted that these proceedings for judicial review do not cure these failings. In Tsfayo v United Kingdom [2009] 48 EHRR 18 at paragraph 48 the Court said:

> "The applicant had her claim refused because the HBRB did not find her a credible witness. Whilst the High Court had the power to quash the decision if it considered, inter alia, that there was no evidence to support the HBRB's factual findings, or that its findings were plainly untenable, or that HBRB had misunderstood or been ignorant of an established and relevant fact, it did not have jurisdiction to rehear the evidence or substitute its own views as to the applicant's credibility. Thus, in this case, there was never the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute."

[44] However, I do not consider that the applicant's civil rights or obligations have been determined. The parents made a complaint ; whether it was in response to information provided by the Social Services or the Police or of their own initiative remains unclear. I note that the Court of Appeal in England in R (Catt and T), albeit when considering a breach of Article 8, found that the service of the warning letter was insufficient of itself to amount to an interference with her right to respect for her private life. It held at paragraph 55:

> "Although the receipt of the letter no doubt caused her a degree of annoyance and distress, its effect was not of a serious nature and in any event it was, and could have remained, essentially a private matter between her and the police. However, although the applicant was not given a copy of the letter, he was told by police that they were going to visit Ms T later that week to give her a harassment warning letter. To that limited extent, therefore, it entered the public domain."

In that case no attempt was made before the Court to allege a breach of the applicant's Article 6 rights, and if such an attempt were made, it was almost certainly doomed to failure.

[45] In the present case I find:

(a) The HWNs did not involve any determination of any issue adverse to the applicant.

(b) There is no evidence that the HWNs which were served on the applicant have affected his reputation.

(c) His employer had been informed of the circumstances leading to the issue of the HWNs by the social services.

[46] So on the facts of this particular case, I am not satisfied that there has been any determination of the applicant's civil rights or obligations. The position would be different if a recipient of an HWN was able to prove that its service had, for example, interfered with his ability to continue in his work. In (R on the Application of Wright) v Secretary of State for Health [2009] UKHL 3 Lady Hale said at paragraph 36:

> "For my part, I am inclined to take the same view of whether Article 8 is engaged as to whether Article 6 is engaged. There will be some people for whom the impact upon personal relationships is so great as to constitute an interference with the right to respect for private life andothers for whom it may not."

Article 8

[47] Article 8 of the ECHR provides:

> "(1) Everyone has a right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[48] Article 8 "is the least defined and the most unruly of rights enshrined in the Convention" per Stanley Brunton J in R (On the application of Wright And Others) v Secretary of State for Health [2007] HRLR 5 at paragraph [60].

[49] In R (Catt and T) Eady J held at first instance that the issue of a warning letter of this kind was a matter in relation to which there was a reasonable expectation of privacy. He also held that the risk of disclosure gave it the necessary degree of seriousness and in those circumstances the mere retention of information of that kind had to be justified because it involved an interference with Ms T's rights under

Article 8.1: see paragraph 51 of [2013] 1 WLR 3303. The Court of Appeal was sceptical that the mere issuing of the letter could engage the applicant's rights. It all depended on the circumstances, and the effect of the letter being sent. At paragraph 55 it said, "… the letter cannot be viewed in isolation from the CRIS report and the retention on Police files of both a copy of the letter itself and the information described in the allegation and the steps taken in response to it". The Court of Appeal went on to say at paragraph 56:

> "This has certain adverse consequences for Ms T. One is that a person reading the letter and the CRIS report would naturally conclude that the Police thought there was some truth in the allegation, since, if they did not, they would simply have recorded the facts of the allegation without taking any further action … we think that the letter and the CRIS report contained information of a personal kind, the systematic processing and retention of which will involve an unlawful interference with the right to respect for private life unless it can be justified."

[50] In this case the service of a HWN had potential consequences which include:

(i) Labelling the applicant as a harbourer or suspect.

(ii) The communication that these Notices had been served on the parents of the children concerned.

(iii) The effect of the HWNs, which remain in force until each of the children reach 16 years.

(iv) Their retention on various IT and local data bases.

(v) That a Command and Control Serial Offence against the applicant was opened and an Occurrence Management form initiated.

(vi) That the statements from the parents and the HWNs were scanned to Niche for information.

[51] In my view Article 8(1) is engaged on the facts of this case. There is an interference with the applicant's private life. "Such an interference is justified by the terms of paragraph 2 of Article 8 only if it is **in accordance with the law**, pursues one or more of the legitimate aims referred to in paragraph 2 and is, **necessary in a democratic society** in order to achieve the aim or aims": see paragraph 65 of Gillan and Quinton v United Kingdom [2010] 50 EHRR 45.

[52] Paragraph 76 of the same case states:

> "The Court recalls that it is well-established case law that the words, **in accordance with the law** require the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct."

I am not satisfied that the HWNs in this case were in accordance with the law. Obviously I have concluded that it is within the power of the Police to issue HWNs. However, I have found on the affidavit evidence filed that there was a failure on the part of the Police to carry out an investigation which was reasonable in the circumstances and which I have found the Police were bound to carry out prior to the issue of HWNs pursuant to paragraph 8(2)(a) of SP27/2010. Furthermore, the quality of law test has been failed. There is no process for review of the HWNs at all, there is no appeal, there is no definition of how the information will be stored and disseminated, how it can be used and by whom, and for how long the information will be held or whether there is a policy for its destruction after a fixed period of time.

[53] It is also necessary to consider whether or not each of the HWNs was proportionate. This involves the Court asking … "whether the decision is the least intrusive in the circumstances and one that has struck a fair and appropriate balance between all affected interests": see *Anthony on Judicial Review in Northern Ireland* (2nd Edition) at 6.12. He also goes on to state that:

> "The proportionality principle is, however, also applied on the understanding that at common law, **context is everything**": see 6.13.

During the course of the hearing, I heard evidence as to how other police forces in other parts of the United Kingdom deal with these types of Notice and the guidance provided by ACPO. There was some dispute as to the weight which should be attached to such advice. I consider that I am entitled to take these into account in considering what is proportionate, although just because one police force does it differently to another Police force does not necessarily mean that one or both of the police forces' approach is unlawful. There is very often more than one right way, or indeed one wrong way, of doing something. However, proportionality does mean that the Court, while giving a margin of appreciation to the decision maker, will be interested in whether the decision is "the least intrusive" and strikes a fair balance. Accordingly, how the procedure for issuing these types of notice operate and how

they operate elsewhere will be of some significance in assessing the nature of the interference and whether it is the least intrusive possible.

[54] SP27/2010 predates the ACPO suggested procedure and differs in a number of important respects:

(i) The Police's service procedure does not require that the Police will be provided with a statement from the parents setting out their concerns. This is important because as discussed if those concerns are based on ill-founded prejudices, then the Police will normally refuse to act by giving them official approval. The Police argue that the police officers concerned will take account of the concerns in the exercise of their policing policy on the issue of the HWN in any particular case. However, it is difficult to see how this could have been achieved in the present case if, as appears to be the case, neither the Police nor the parents were aware of the applicant's particular circumstances which could have led to an outsider jumping to an unfortunate and unjustified conclusion about the applicant's relationship with A.

(ii) The ACPO documents provide for a review within a period of 6 months at which point the "extension or discontinuance" of the Notice will be authorised. There is no such specific review in the Police's policy. Of course, as Mr Coll submitted on behalf of the Police, there was nothing to prevent the applicant from making representations to the Police for the removal of the HWNs. While that is true, the fact is that judicial review proceedings were already underway and that may not necessarily have occurred if there was a review process available under SP27/2010 provided within the procedure.

[55] 6.10 of the ACPO guidance, entitled "Timeline, Declaration and Review", states:

> "From outset officers should expect to be working to a 6 month time limit on the warning notice. This allows for an appropriate amount of time to monitor intelligence and assess risk."
>
> "Review – a clear 6 month review date should be set by the Vulnerable Child Coordinator. At this point, a full review of intelligence and suspect will be conducted. The review should be conducted with the relevant D/Inspector (safeguarding) who will authorise its extension or discontinuance".

As previously stated I consider that a fair reading of the "6 month timeline" relates to the 6 months available to gather intelligence and assess the risk after the Notice is served. In other words, the 6 months' timeline relates to the initial period after the Warning Notice is in force and before the review.

[56] Accordingly, in the light of the above, I conclude that the issue and service of each HWN on the applicant, without any reasonable investigation, with no process for review or appeal, with the HWNs remaining in force until each of the children reach 16 years, and the continued retention of information, apparently untrammelled by time constraints, breached the applicant's Article 8 rights.

Relief

[57] In the light of my findings of common law unfairness and breach of Article 8 in the issue of each of the HWNs, I will hear the parties as to what relief the court should grant to the applicant.