Neutral citation no : [2004] NIQB 45

Ref: **WEAC4500**

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

Delivered: **09/07/2004**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY BERNADETTE TODD FOR JUDICIAL REVIEW

WEATHERUP J

The application

[1] This is an application for judicial review of a decision of the Resident Magistrate sitting at Omagh Magistrates' Court on 28 January 2003 by which it is alleged that the Resident Magistrate refused to hear an emergency ex parte application for a non-molestation Order under the Family Homes and Domestic Violence (NI) Order 1998.

[2] It is the applicant's case that she was present with her solicitor at Omagh Magistrates' Court on Tuesday 28 January 2003 awaiting the hearing of the ex parte application for a non-molestation Order against her partner. The Resident Magistrate was conducting the usual list of business when at 12.45 pm the Resident Magistrate informed the applicant's solicitor that she would not be hearing the applicant's application on that day as she was expecting to leave the court at 1.00 pm.

[3] It is the respondent's case that the Resident Magistrate did not refuse to hear the applicant's case and that when the Resident Magistrate completed her list at about 1.15 pm neither the applicant nor her solicitor was present in Court to make any application. It is accepted by the respondent that a refusal by a Resident Magistrate to hear an ex parte application for a Non-molestation Order in the circumstances outlined by the applicant would have been improper.

Academic applications

[4] The applicant obtained a non-molestation Order before a different Resident Magistrate on 29 January 2003. The respondent raises the preliminary issue that the application for Judicial Review is academic. The approach to academic disputes was stated by Lord Slynn in R v The Home Secretary ex parte Salem (1999) 1 A C456 at 457 -

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[5] Carswell LCJ in the Court of Appeal's decision in Re McConnell's Application [2000] NIJB 116 at 120 quoted Lord Slynn and added –

> "It is not the function of the courts to give advisory opinions to public bodies, but if it is apparent that the same situation is likely to recur frequently and the body concerned had acted incorrectly they might be prepared to make a declaration to give guidance which would prevent the body from acting unlawfully and avoid the need for further litigation in the future. The (Parades) Commission is likely in the ordinary course of events to have to rule on other processions proposing to pass through areas whose residents will object to their presence. If it appeared from the evidence before us that there was a substantial possibility that it would then act in a way that was clearly outside its powers or contrary to its prescribed procedures we might be disposed to make a declaration to that effect."

[6] In Re Nicholson's Application (2003) NIQB 30 Kerr J dealt with a challenge to the award of cellular confinement on an adjudication by the applicant prisoner. The applicant had been released on licence before

completing the cellular confinement. The dispute was academic between the parties and Kerr J refused to treat the case as an exception to the general rule. He found that the case would have required a detailed examination of disputed facts, and further that the case was highly fact specific and the circumstances were unlikely to be reproduced. Accordingly the resolution of the issues that arose in that case was unlikely to provide guidance to the Prison Service in future cases.

[7] In *Re E's Application* (2003) NIQB 39 the applicant was the mother of one of the children affected by what is known as "the Holy Cross dispute" and sought Judicial Review in the form of a declaration that the Chief Constable and the Secretary of State failed to secure the effective implementation of the criminal law and ensure safe passage for the applicant's daughter to attend Holy Cross Primary School. The protest at the school had ended and while the respondents contended that the application for Judicial Review had become academic Kerr J allowed the application to proceed on the basis that it was an exception to the general rule. Kerr J concluded at paragraph 12 that on the evidence the possibility of a further flare up of the protest was by no means remote and in that event the debate about the manner in which a full blooded protest was policed would once again become pertinent. Accordingly he did not consider that the respondents had established that the litigation of the issues that arose in the Judicial Review was bereft of practical benefit. Kerr J took the opportunity to state that it was not determinative of an issue as to whether a case should proceed to show that a detailed examination of facts was required or that a large number of cases did not depend on the outcome of the application. These were matters to be taken into account in deciding whether the application should be allowed to proceed. Ultimately it will be a matter for the Court to decide from case to case whether an application that has become academic between the parties has a good reason in the public interest for proceeding.

[8] The present case is academic between the parties and the issue is whether, exceptionally, there is good reason in the public interest that the application should proceed. The respondent contends that as it is conceded that, on the applicant's disputed version of events, the Resident Magistrate had acted improperly, there is no purpose served by the case proceeding. The case concerns an ex parte application for a non-molestation Order by a person alleged to be the victim of domestic violence. There is statutory provision for such applications to be dealt with in Magistrates' Courts with some expedition. In view of the emergency character of such applications the public has a right to expect that issues will not arise as to the effective administration of court business in relation to the grant of such orders. There is a public interest in examining the factual conflict that has developed to determine whether the character of the problem arising in the administration of court business can be identified. Further there is a public interest in these

applications being administered in the Magistrates' Courts in a manner that the public and the legal profession present in Court can understand. Accordingly there is good reason in the public interest for this application to proceed.

The factual dispute

[9] The applicant's solicitor states that on 28 January 2003 she lodged the forms for the ex parte application at the court office in Omagh at approximately 10.20 am. During the morning the applicant's solicitor intervened on two occasions with the Resident Magistrate in relation to the applicant's case. At 11.45 am the applicant's solicitor asked the Resident Magistrate for an indication of the time when the application might be dealt with and the Resident Magistrate stated that she may not be in a position to hear the application at all. At 12.45 pm the applicant was rebuked by the Resident Magistrate for talking in court and when the applicant's solicitor explained the reason for the presence of the applicant the Resident Magistrate stated that she had already said that she would not be hearing the applicant as she expected to leave the court at 1.00 pm. The applicant and her solicitor left the court. This outline of events is broadly supported by the applicant and by a friend of the applicant who attended court with her on that day. It is also supported by a reporter who was present in court and by another solicitor who was so struck by the exchanges between the Resident Magistrate and the applicant's solicitor that she made an entry in her notebook to the effect that the Resident Magistrate had said that she would not be hearing the applicant's case that day.

[10] The Resident Magistrate refers to the first intervention of the applicant's solicitor at 11.45 am and states that she had said that she was anxious to finish her assigned list but did not state that she would not hear the application or that she may not hear the application. At the intervention at 12.45 pm the Resident Magistrate states that she indicated that she would need to complete her assigned list and was hoping to finish by 1300 hours but she did not say that she would not hear the application. When the assigned list was completed it was about 1315 hours and there was no one left in Court and the clerk advised that there was no outstanding business. The Resident Magistrate confirms that had the applicant and her solicitor waited until the end of the assigned business the Resident Magistrate would have dealt with her application. The Resident Magistrate's statement of events is supported by the court clerk.

[11] It is apparent that there is a complete conflict between the description of events given by and on behalf of the applicant and the description of events given by the Resident Magistrate and the clerk of the court. Judicial Review is not a convenient forum for the resolution of such factual dispute. In *R v The Justices' of the County of Surrey ex parte Curl* (unreported 12 June 1990), on an

application for an order of certiorari to quash a conviction on the grounds of procedural impropriety, the Court faced conflict as to the events that had transpired before the Justices. Farquarson LJ stated that where there is a clear conflict as to what had taken place (subject to other points that were raised by Counsel) the Court had to accept the evidence which stood against the person who had responsibility of show that the certiorari should lie.

[12] In those circumstances counsel contended that the proper course was to call the opponents to Court for cross examination. Farquarson LJ stated that it was not the class of case were such a direction should be given and that:

> "The circumstances and nature of this particular dispute are in my judgment not up for review by this court in the form that has been requested. That is to say, where there has been a dispute as to procedure or indeed any other event in the Magistrate's Court, it is not appropriate generally – one cannot be totally dogmatic about it - for the matter to be examined by the calling of witnesses before this court."

[13] No application was made for cross examination, and rightly so, as the Court would not have engaged in any such examination for the reasons given by Farquarson LJ in *ex parte Curl*. The details of the present case have been examined to determine whether it is possible to resolve the differences in the circumstances but the conflict of evidence cannot be resolved on paper. In the circumstances the factual dispute between the parties remains incapable of resolution and the Court must accept that the applicant has not discharged the burden of making out her version of the facts.

[14] If the facts were as stated by and on behalf of the applicant then the Resident Magistrate behaved improperly. The Resident Magistrate has accepted that if the applicant's account is correct the Resident Magistrate was not acting lawfully in simply refusing to hear the matter without a good reason for refusal. While there was a public interest in examining this dispute it has not proved to be one that is capable of being resolved so it is not possible to make a finding that would identify the problem and prevent a repetition of the administrative difficulties that emerged on the day in question. However it is possible to find that there was at least a failure of communication that prevented some of those present from understanding how the proposed application would be dealt with on that day.

[15] As it has not proved possible to identify a particular problem in the administration of Court business that should be addressed, other than the general requirement to advance the understanding of the public and the professions, it is not appropriate to make any declaration. This application

has proceeded in the public interest because it involves a particular form of emergency procedure and the administration of court business was not such as appeared to facilitate the objective. This is not to admit of unarguable complaints where there is no reasonable prospect of success on the issue of the administration of Magistrates Court business relating to such applications as it is necessary to obtain leave to apply for Judicial Review. The application for Judicial Review is dismissed.