Neutral Citation No: [2020] NIQB 54 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **OHA11291** *ICOS No:* **2020/40683** *Delivered:* **20/07/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR118
FOR JUDICIAL REVIEW

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Ronan Lavery QC with Sean Mullan (instructed by Brentnall Legal Ltd Solicitors)
for the Applicant
Ms Laura McMahon of Counsel (instructed by the Departmental Solicitor)
for the Respondent
Ms Mel Rice of Counsel (instructed by McKeown & Co Solicitors)
for the Notice Party

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O'HARA J

Introduction

[1] The issue in this application for judicial review is whether a court can extend the date to which a non-molestation order (NMO) takes effect. District Judge Meehan declined to extend such an order on 27 May 2020 on the ground that he had no power to do so. The applicant contends that he had such a power by virtue of Article 24 of the Family Homes and Domestic Violence (NI) Order 1998 ("the 1998 Order") which allows for orders to be "varied." The District Judge's interpretation of "varied" in this context is that any part of the order can be varied except by extending its duration.

[2] In this case I have anonymised the lady who sought the NMO and who has brought this application for judicial review and given her the name "AS." On the evidence before me she is an especially vulnerable person. It is also necessary to anonymise the man, P, against whom the NMO was made initially. He is a notice party in the current proceedings and faces a police investigation into very serious allegations of extreme abuse, including rape. A further reason, if one is needed, to anonymise the adults is that they have a child whose identity should not be disclosed.

Background

[3] District Judge Bagnall made an ex parte NMO on 30 April 2020 in favour of AS and against P. The application was made to her on the basis of a particularly disturbing history between the parties. According to the papers there is an age gap of more than 20 years between them. AS says she first met P when she was 12 and was living on the streets. P is said to have looked after her and given her money and, on one occasion, cannabis. A sexual relationship started when she "was close to" her 16th birthday and continued for approximately 10 years until March 2020. Their child is 3 years old. AS described P as very controlling in terms of his sexual demands and money. In effect she accused him of multiple rapes. She also accused him of recording videos of her having sex and sending "hard core images" to her mother after they separated. She moved to another part of Belfast but contended that he had been at her flat and had been seen in the area by neighbours. AS suggested that P is mentally unstable, that she is terrified of him and believes he would stop at nothing to get to her. She further referenced having provided the police with a video recording of a sexual assault on her which took place on 1 February 2020, said that he had been arrested on 24 April and had then been released on police bail. The terms of bail preclude him from approaching or making contact with her.

[4] The ex parte NMO made on 30 April was served on P by the police. It provided that he was not to use or threaten violence against her and that he must not instruct, encourage or in any way suggest that any other person should do so. Further, he was forbidden to intimidate, harass or pester her and was not to instruct, encourage or in any way suggest that any other person should do so. Finally, it was ordered that he was to be excluded from entering the area where she lived, that area being defined in the order. The order remained in force until 27 May and included the following lines:

> "This order shall take effect upon service of this order and shall remain in force until 27 May 2020.
>
> The respondent shall be given an opportunity to make any representation to the court with regard to the making of this or any further order at Belfast Domestic Proceedings Court … on 27 May 2020 at 10am."

[5] In accordance with the Covid-19 guidance issued for Family Proceedings, the solicitors for AS submitted Form FCI1 to the Domestic Proceedings Court on 26 May. In that form it was stated that AS wanted to proceed with her application for an NMO and that the police had served the ex parte order on P on 30 April. The form then continued as follows:

> "Our offices have not had any contact from the respondent or a solicitor on his behalf. We understand, however, that it may be difficult to obtain legal advice in the current climate. We therefore respectfully request that the order is extended on a without prejudice basis and adjourned for four weeks for review to allow for the respondent to obtain legal advice and indicate whether he intends on defending the order."

[6] On 27 May an official at Belfast Domestic Proceedings Court sent an email to the solicitors for AS which read as follows:

> "With regard to this case, although the order was served by the police the summons server did not collect the papers in this case and the summons never issued. We will re-issue the summons with no fee for a new date. The Judge has indicated that if there are any further incidents a fresh ex parte application can be made at any time with a new grounding statement."

[7] AS's solicitors responded by email asking for the judge "to provide his reasoning as to why the order has not been extended." The response provided by the court official early on 28 May was as follows:

> "It is the Judge's direction that there is no provision in the legislation that allows the extension of an ex parte order and hence the reason he directs that if further incidents occur then a fresh ex parte application can be lodged."

[8] The applicant's solicitors were dissatisfied with that response and took three steps. They applied to the District Judge to state a case on the legal issue for the opinion of the Court of Appeal, they appealed the decision to the Family Care Centre and they applied for judicial review. Given that the legal issue needs to be addressed urgently I agreed to hear the judicial review rather than require the applicant to take either of the alternative courses though in other cases an appeal to the FCC might well be the more appropriate route.

The Family Homes and Domestic Violence (NI) Order 1998

[9] In light of the submissions of the parties it is necessary to set out in some detail the main provisions of the 1998 Order. Articles 4-10 concern rights to occupy a home where the couple are married or in a civil partnership. In broad terms they provide that one spouse or partner, B, may acquire "home rights" as against the other spouse or partner, A, even if A is entitled by virtue of a beneficial estate, contract or statutory provision to remain in occupation and B has no such entitlement. Those home rights may include the right to occupy the property.

[10] Articles 11-18 provide for occupation orders to be made where the person applying for such an order is entitled to occupy a dwelling house by virtue of a beneficial estate or a contract or by virtue of any statutory provision giving him/her the right to remain in occupation or has home rights. An occupation order may, inter alia, enforce the applicant's entitlement to remain as against the respondent, regulate the occupation of the home by either or both parties, suspend or restrict the exercise of the respondent's rights to occupy the home or require the respondent to leave.

[11] Article 11(6) provides for some of the circumstances which a court is to consider when deciding whether to make an occupation order. They include the housing needs and housing resources of each of the parties and any relevant child, financial resources and the conduct of the parties.

[12] Article 11(7) then provides:

> "(7) If it appears to the court that the applicant or any relevant child is likely to suffer significant harm attributable to conduct of the respondent if an order under this Article containing one or more of the provisions mentioned in paragraph (3) is not made, the court shall make the order unless it appears to it that—
>
> (a) the respondent or any relevant child is likely to suffer significant harm if the order is made; and
>
> (b) the harm likely to be suffered by the respondent or child in that event is as great as, or greater than, the harm attributable to conduct of the respondent which is likely to be suffered by the applicant or child if the order is not made."

[13] Article 11(10) provides as follows in terms of the duration of the court order:

> "(10) An order under this Article may, in so far as it has continuing effect, be made for a specified period, until the occurrence of a specified event or until further order."

[14] Occupation orders made under the 1998 Order can operate to restrict or suspend the legal rights and entitlements of respondents in those proceedings. They are therefore not intended to last indefinitely. Instead, they are typically made on the following basis:

> "An order under this Article must be limited so as to have effect for a specified period not exceeding 12 months but

> may be extended on one or more occasions for a further specified period not exceeding 12 months."

Such clauses are found in Articles 13(10), 14(10), 15(6) and 16(6).

[15] Article 20 then provides for the making of NMOs. In Article 20(1) NMOs are defined as follows:

> "20.—(1) In this Order a "non-molestation order" means an order containing either or both of the following provisions—
>
> (a) provision prohibiting a person ("the respondent") from molesting another person who is associated with the respondent;
>
> (b) provision prohibiting the respondent from molesting a relevant child."

[16] In this context it is to be noted that molestation is an umbrella term covering a wide range of behaviour. Obviously, it includes violence and threats of violence but it extends to serious pestering or harassment – see Stephens J in *Re Alwyn* [2010] NIJB 170. NMOs may be expressed to refer to molestation in general or to particular acts of molestation or both – Article 20(6). By way of example the order made by District Judge Bagnall would have had the effect of requiring P not to send any further hard core images to AS's mother. They may also exclude the respondent from any defined area or premises as happened in this case – Article 20(6A).

[17] Article 20(7) provides as follows in terms of the duration of the order:

> "(7) A non-molestation order may be made for a specified period or until further order."

[18] Article 23(1) allows the court to make an occupation order or an NMO even though the respondent has not been given notice of proceedings. Not surprisingly the circumstances in which ex parte orders can be granted are restricted by the terms of Article 23(2) which provides as follows:

> "(2) In determining whether to exercise its powers under paragraph (1), the court shall have regard to all the circumstances including—
>
> (a) any risk of significant harm to the applicant or a relevant child, attributable to conduct of the respondent, if the order is not made immediately,

(b) whether it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately, and

(c) whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and that the applicant or a relevant child will be seriously prejudiced by the delay involved—

(i) where the court is a court of summary jurisdiction, in effecting service of proceedings, or

(ii) in any other case, in effecting substituted service."

[19] Article 23(3) provides that if a court makes an ex parte order "it shall specify a date for a full hearing." This provision prevents ex parte orders extending indefinitely to the detriment of the respondent without giving the respondent the opportunity to challenge the making of an order. It also requires continuing judicial scrutiny.

[20] Referring to occupation orders only, Article 23(4) provides that if at a full hearing a court makes an occupation order then for the purposes of calculating the maximum period for which the full order should have effect time starts to run from the date on which the ex parte order had effect. This is important because of the time limits which occupation orders are subject to – see paragraph [14] above.

[21] Article 24, which is at the heart of this application for judicial review, is headed "Variation and discharge of orders". It provides as follows:

"24.—(1) An occupation order or non-molestation order may be varied or discharged by the court on an application by—

(a) the respondent, or

(b) the person on whose application the order was made."

Other relevant materials

[22] Proceedings before the Domestic Proceedings Court are governed by the Magistrates' Court (Domestic Proceedings) Rules (NI) 1996. Rule 13 is headed "Applications to vary etc orders made under the Order of 1998." It states:

> "An application by way of complaint to a Justice of the Peace or Clerk of Petty Sessions for the extension, variation or discharge of an occupation order or non-molestation order made under the Order of 1998 shall be made in writing on Form F8."

[23] Form F8 then invites applicants to tick one or more of 3 boxes marked "Vary", "Extend" or "Discharge." They are invited to give details of the orders which they want the court to make and to give their reasons for applying. No distinction is made between occupation orders and NMOs in Rule 13 or Form F8.

[24] The applicant's solicitor provided affidavit evidence of ex parte orders being renewed (i.e. extended) in a number of cases. This evidence was not challenged by the respondent who did however draw a distinction, which I acknowledge, between what does happen and what should happen. In effect the District Judge's case is that these extensions were made improperly because the courts which granted them didn't have the power to do so.

[25] The parties confirmed that there is no material difference between the law in Northern Ireland and that in England & Wales where the relevant provisions are found in the Family Law Act 1996, at sections 42-49 in particular. The Family Procedure Rules 2010 which apply in that jurisdiction are also cast in similar terms to those in Northern Ireland. Against that background the applicant emphasised the significance of Practice Guidance issued on 18 January 2017 by the then President of the Family Division, Sir James Munby. That guidance addressed specifically at paragraph 6 and provided for circumstances in which ex parte NMOs could be varied "by extending the ambit or duration of the order."

Submissions

[26] For the applicant, AS, it was submitted by Mr Lavery that the whole purpose of NMOs is to protect vulnerable people. This is evident from the statutory provisions themselves and from judgments such as those of Higgins LJ in *Re Sloan* [2001] NIQB 23 at page 11 and Stephens LJ in the Court of Appeal in *Murphy v Murphy* [2018] NICA 15 at paragraph 13. That being so there is no justification for restricting the meaning of "varied" in Article 24(1) as suggested by the District Judge. It makes no sense, Mr Lavery submitted, to allow every part of the order to be varied except the date to which it extends. Furthermore, the relevant rules and forms confirm the obvious meaning of "varied" to include "extend."

[27] The proposition advanced by the District Judge is that in a situation such as the one which presented itself on 27 May the proper course was to submit a new application for an ex parte NMO almost inevitably with the aid of a new grant of legal aid. Such a course would be unwieldy, unnecessary and unjustified especially

in a case such as the present where the allegations are so grave and the need for protection all the more obvious.

[28] Mr Lavery suggested that there might be many good reasons to extend the operation of an ex parte order. The most obvious is where a violent respondent seeks to evade or avoid service and tries to thwart the legitimate efforts of the vulnerable applicant to secure the court's protection. But there might also be mundane reasons for extending the order such as illness or the unavailability of a legal representative. Whatever the reason might be, the court must be regarded as having the power to extend the ex parte order. Whether it chooses to do so is another matter – the fact is that it can do so on the basis of the clear and obvious meaning of Article 24.

[29] For the respondent Ms MacMahon submitted that on close scrutiny there is a clear difference drawn in the legislation between occupation orders and NMOs. She highlighted the repeated references in the provisions about occupation orders to the length of time for which they can be made and then extended for – see paragraph [14] above. She then contended that there is no equivalent reference to the duration of NMOs, submitting that this leads to a conclusion that NMOs cannot be extended. On this analysis Article 24 is to be interpreted to mean that an occupation order can be varied by being extended but an NMO cannot be. Alternatively, the power to extend an occupation order is not derived from Article 24 at all but instead from the specific provisions referred to at paragraph [14] above.

[30] Support for this proposition was said to come from the earlier Domestic Proceedings (NI) Order 1980 ("the 1980 Order"). This forerunner of the 1998 Order provided for personal protection orders and exclusion orders rather than NMOs and occupation orders. Exclusion orders, once made, could be extended for up to 6 months – Article 18(9). However, interim exclusion orders or personal protection orders made ex parte could be followed "by the making of a further such order" – Article 21(6). It was submitted that this provision contemplated a new interim order being made rather than an existing one being extended.

[31] For P, the notice party, it was submitted by Ms Rice that the District Judge's interpretation and approach on 27 May was the correct one. It was suggested, though not on affidavit, that P had tried to contact the court office after the NMO had been served on him by the police but had been unable to get through to speak to anyone. For the purposes of this judgment that factual issue does not need to be explored but it does seem curious that a man who was on police bail and was being investigated for the most serious of sex crimes took no other steps e.g. engage a solicitor.

Discussion

[32] In the Order 53 Statement and the pre-action protocol correspondence between the parties there was significant focus on whether the ex parte order made

on 30 April was an "interim" order. In fact, the term "interim", which appeared in the 1980 Order, is not repeated in the 1998 Order. The fact that it is still used on a day to day basis is apparent from a judgment of District Judge Meehan himself, *H v W* [2017] NI Mag 1. However, as Higgins LJ pointed in *Re Sloan*, once an order is made it is binding and the word "interim" adds little or nothing.

[33] The parties accepted during the course of the hearing before me that there is one central issue in this case and that the question to be addressed is:

> "Does Article 24 of the Family Homes and Domestic Violence (NI) Order 1998 empower a court to vary a non-molestation order by extending the date to which it has effect?"

[34] It is necessary to distinguish that question from the next question which would arise which is whether the court should, in fact, extend an NMO in the circumstances of a particular case. From his judgment in *H v W* it is apparent that District Judge Meehan is concerned that applications for NMOs, and particularly ex parte applications, are made too casually and too often. I defer to his experience in that regard and I accept entirely the emphasis which he places on the Article 23 test for an ex parte order which might broadly be described as the risk of significant harm test.

[35] On the central issue however, I cannot see any logic or basis for confining the use of the word "varied" in Article 24 to exclude varying an order by extending the date to which it has effect. The position of the District Judge is that "varied" cannot encompass extending any order because there are specific provisions for extending occupation orders elsewhere in the 1998 Order and none for extending NMOs. With respect to this very experienced Judge I disagree. The 1998 Order specifically allows for the extension of occupation orders but only up to a final point in time because those orders interfere (or may interfere) with various forms of legal entitlement to property. In those circumstances it needs to be made clear that such interference can be extended but not beyond a certain point in time. That consideration does not apply equally to NMOs which do not interfere in any equivalent way with the rights of an individual. Simply put, we do not have a right to molest others. In my judgment this helps to explain why the statutory provisions about occupation orders have to be more precise and defined in terms of duration than NMOs.

[36] Furthermore, the interpretation contended for by the District Judge simply does not sit with either the wording of either of Rule 13 or Form F8 or the guidance issued in England and Wales. This confirms my view that his interpretation is wrong. If he is right, all of them are wrong or need to be read other than in the way which is most apparent.

[37] The present case illustrates precisely why there may be a need to extend the duration of an NMO. A man against whom serious allegations have been made and

in respect of whom there is a police investigation did not contact solicitors despite being exhorted to do so on the face of the order which was served on him. Nor did he succeed (for whatever reason) in making contact with the court office. On the face of the papers before the District Judge on 27 May AS is a woman who needs protection. The law should be interpreted, as it can be, to allow the court to consider what if anything needs to be done to protect her rather than to say that the court cannot do anything unless a fresh application is presented to it.

[38] If the NMO which an applicant seeks to extend was made ex parte then the Article 23 risk of significant harm test may apply (though if papers have been served on the respondent so that he has notice of the hearing date that may not be the case). If it was made inter partes or if notice of the hearing has been given then the test under Article 20(5) is less demanding. In either event the court should consider whether the order should be extended, and if it is to be extended, how long for. The court will ask itself two questions. The first is what has happened in the period since the NMO was made. The second is what the overall context of the application is. In a case such as the present the fact that there is alleged to have been a pattern of coercive criminal conduct for a decade might itself be enough to persuade the court to extend the order for a further short period. This will allow the respondent to present his answer to the allegations, if he has such an answer, while at the same time ensuring the applicant continues to have the degree of protection which the NMO provides.

[39] On 27 May District Judge Meehan did not reach the stage of considering whether he should extend the order because he interpreted the legislation to mean that he could not do so even if he wanted to. In my judgment his interpretation of his powers was wrong and I answer the question posed at paragraph [33] above by declaring that Article 24 of the 1998 Order empowers a court to vary a non-molestation order by extending the date to which it has effect. I will make no other order save that the case is remitted to a different District Judge for consideration and I make an order for costs against the Respondent to be taxed in default of agreement. I also order legal aid taxation of the costs of any assisted party.