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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 APPLICATIONS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY 'JR131' AND WILLIAM CLIFFORD (LEAVE STAGE)

AND IN THE MATTER OF DECISIONS OF THE DOMESTIC PROCEEDINGS COURT

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David Heraghty BL (instructed by Higgins Hollywood Deazley, Solicitors) for the First Applicant; and also (instructed by Sara Edge, Solicitors) for the Second Applicant
Laura McMahon BL (instructed by the Departmental Solicitor's Office) for the Respondent in each case
Niamh Horscroft BL (instructed by MD Loughrey, Solicitors) for the Interested Party in the Clifford case

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SCOFFIELD J

Introduction

[1] There are two applications for leave to apply for judicial review before the Court. These applications were heard together, given that they raise similar issues. Each case concerns the powers of the Domestic Proceedings Court to manage and determine applications for a non-molestation order ('NMO') under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 ('the 1998 Order').

[2] In particular, there are two issues of principle raised by each case. The first issue is whether, in circumstances where an *ex parte* or *interim* NMO has expired or been discharged, the district judge still retains jurisdiction to hold an *inter partes* hearing; or whether, as the applicants contend, the judge's jurisdiction has at that point fallen away with the expiry of the *interim* order. The second issue is whether, and in what circumstances, it is open to a district judge to hold an *inter partes* hearing

in relation to an application for a NMO in cases where the factual circumstances giving rise to the application are also the subject of an ongoing criminal investigation or of extant or anticipated criminal proceedings.

[3] In the first case, in which I have anonymised the applicant using the cipher 'JR131' for reasons explained below, the applicant challenges a decision of District Judge Meehan whereby he listed the application of JR131's wife for a NMO for an *inter partes* hearing. In the second case, that of Mr Clifford, the applicant challenges a decision of the same district judge to both list and then hear such an application, after which a NMO was granted, albeit that Mr Clifford declined to give evidence at the hearing.

The facts in JR131's case

[4] The background to JR131's case lies in a number of offences alleged to have been committed against his wife, including a number of allegations of rape, one of sexual assault and an allegation of administering a poison in April 2019. JR131 was arrested in late June 2019 and interviewed on suspicion of a number of these offences. His evidence is that he "*answered all questions with respect to all allegations*" in interviews with police.

[5] Since allegations of rape and sexual assault have been made against JR131, I have anonymised him in this judgment – not to protect his own interests but in light of the prohibition on the publication of matters likely to identify a complainant (here, JR131's wife) who alleges that she is the victim of a sexual offence, pursuant to section 1 of the Sexual Offences (Amendment) Act 1992.

[6] A number of days after the incident in April 2019, JR131's wife made an application for a NMO on an *ex parte* basis. The application was made on 2 May 2019 and the order was made on that date, to last until 29 May 2019. The case was listed for hearing at Belfast Domestic Proceedings Court on 29 May 2019, with JR131 summonsed to attend. An *inter partes* hearing did not proceed on that date and JR131's solicitor has said that she would have advised the court that she needed time to apply for legal aid and to take instructions. A further order was granted on 29 May 2019 (in similar terms to the order which had been made on 2 May 2019), without any objection on JR131's behalf, and was made "*until further ordered*". Although the affidavit evidence in this application refers to the NMO of 2 May 2019 having been "*extended*" – and this is obviously a common description in use by practitioners – in this case the result appears to have been achieved by the grant of a fresh NMO on 29 May, rather than the making of an order which varied the initial order. In my view, nothing turns on this.

[7] The matter was then before the Domestic Proceedings Court again on 3 July, 21 August and 16 October 2019. On the third of these dates, the district judge listed the matter for an *inter partes* hearing to be held on 27 November 2019. It was initially common case that, also on 16 October 2019, the earlier NMO which had been

granted came to an end; and no further *interim* order was granted. JR131's evidence suggests that this was because he had been granted police bail, the conditions of which included that he have no contact, directly or indirectly, with his wife. The proposed respondent's skeleton argument suggests that it was because the district judge took the view that he had no power to extend the *interim* order (see paragraph [13] below). There is some ongoing controversy about what the current position is, which I address further below.

[8] At a further review hearing before the district judge on 6 November 2019, JR131's solicitor applied to the judge to have the NMO proceedings adjourned until after his criminal proceedings had been dealt with. A comprehensive skeleton argument addressing this issue was provided by Ms Dempsey, the solicitor within the firm representing JR131 who was acting on his behalf in the criminal proceedings. According to the evidence filed by JR131 in these proceedings, the judge refused the application to adjourn the *inter partes* hearing fixed for 27 November, having considered the issue of risk of prejudice to the criminal proceedings, on the basis that there was an obligation on the Domestic Proceedings Court to deal with the serious matters before it, noting that delaying the NMO application to await the conclusion of the criminal proceedings could give rise to substantial delay. The judge said that he did not believe there was going to be a serious impact on JR131's right to a fair trial.

[9] A pre-action letter was then sent on JR131's behalf, evincing an intention to challenge the judge's ruling, on 8 November 2019. On 25 November 2019 JR131 issued his application for leave to apply for judicial review, seeking urgent *interim* relief in relation to the hearing which was scheduled for 27 November. By email of the same date, the Departmental Solicitor's Office indicated on behalf of the proposed respondent that the NMO proceedings could be adjourned pending the determination of these proceedings, so that these proceedings did not require to be dealt with as a matter of urgency.

The facts in Mr Clifford's case

[10] The background to Mr Clifford's case arises from an incident which is alleged to have occurred on 4 May 2020. The applicant's wife, Tracey Bell Clifford, alleges that on that date the applicant tried to kill her by holding a cushion over her face whilst he also held her down.

[11] Mr Clifford was arrested on 6 May 2020 on suspicion of the attempted murder of his wife. He has remained in custody since that time, having been refused bail by the Magistrates' Court on 7 May 2020 and, later, by the High Court. Also on 6 May 2020, Mr Clifford's wife (an interested party permitted to make representations to the Court at the hearing of his application for leave to apply for judicial review) made an application for a NMO and an occupation order. Mrs Clifford's statement in support of that application asked for an order to be made on an *ex parte* basis "*as the behaviour of the respondent is so erratic I could not predict how the respondent would act*

if he was aware of the proceedings". The district judge granted a NMO on 7 May 2020 on an *ex parte* basis, with the order to remain in force until 3 June 2020.

[12] The applicant's evidence in these proceedings makes the point that he does not know what took place when the *ex parte* order was granted and does not know if the district judge was informed that he was in custody at the time when the order was granted. He contends that, had the judge been made so aware, it would have been an important consideration in the exercise of the judge's discretion as to whether or not to grant a NMO and, if he was not made so aware, this would be a serious breach of the obligation of full and frank disclosure which rests on an applicant for an *ex parte* NMO. In light of the court arrangements operating at that time by reason of the Covid-19 pandemic, it is likely that the application was simply considered by the district judge on the papers rather than presented and determined after an *ex parte* oral hearing. Accordingly, the only information the judge was likely to have had in relation to the reasons for the application being made *ex parte* were those set out in the written application. Mrs Clifford's statement did refer to her husband's arrest by police but indicated that, at the time of her application for a NMO, she believed her husband to be in hospital, adding that she did "*not know where he is likely to go when he is deemed fit to be discharged from hospital*", with one possibility being his release.

[13] A review hearing was held on 3 June 2020, in advance of which Mrs Clifford's solicitor lodged a Form FCI1 with the Court (that is, the requisite form to permit the court, during the altered procedures applicable as a result of the Covid-19 pandemic, to understand what was at issue and to case manage the proceedings appropriately). In the Form FCI1, Mrs Clifford's solicitor indicated that she was seeking a further NMO in order to ensure her continued safety. A remote hearing took place on 3 June 2020, at which the district judge declined to extend the NMO which had been granted on an *ex parte* basis. It seems that this decision was taken at a time when the district judge considered that he had no power under the 1998 Order to extend a NMO which had been granted *ex parte*. That erroneous view of the powers available to the court has since been corrected in the judgment of O'Hara J in *Re JR118's Application* [2020] NIQB 54, which was handed down on 20 July 2020 but which related to a decision made on 27 May 2020 (shortly before the review hearing in the present case on 3 June 2020), in which the same district judge similarly declined to extend a NMO.

[14] The district judge's decision not to extend the NMO which had been granted on 7 May 2020 was not, however, treated as dispositive of the proceedings as a whole. The judge instead considered that the proceedings had simply moved to the *inter partes* stage and fixed a further date for hearing of 10 June 2020, albeit that no NMO would be in force in the meantime.

[15] This led to the submission of a further FCI1 on 9 June 2020. This time, the form was agreed between both Mr and Mrs Clifford's respective legal representatives, Mr Clifford having then recently engaged a solicitor to act for him in

relation to the NMO proceedings. The agreed proposal in this form was that the court should adjourn the *inter partes* hearing which had been fixed for the next day; should extend the NMO which had been granted on an *interim* basis; and should postpone any *inter partes* hearing on Mrs Clifford's application for a NMO until the Crown Court proceedings which Mr Clifford faced (arising out of the incident on 4 May) were concluded. There was some debate in the current proceedings as to whether this was a "*joint*" application between the parties to adjourn the hearing proposed for 10 June or whether it was Mr Clifford's application to which Mrs Clifford consented (provided she retained the protection of a non-molestation order in the meantime). Nothing turns on this. The key point is that both parties were content for there to be no evidential hearing on 10 June but for an order in Mrs Clifford's favour to remain in force (without prejudice to Mr Clifford's potential opposition to the application at a later stage).

[16] The FCI1 form contained the following summary of Mr Clifford's position:

> "*The evidence proffered by the Applicant should not be tested in the DPC before being heard by the Crown Court for a number of reasons, mainly prejudice to the Respondent's case pending the outcome of a psychiatric assessment. Furthermore, the Applicant would not have the same protective measures in the DPC as she may be afforded in the Crown Court e.g. Special Measures for giving evidence.*
>
> *The Respondent does not object in principle to an extension of any interim Orders on a without prejudice basis until 1. Outcome of psychiatric assessment and 2. Conclusion of related criminal proceedings.*"

[17] In the event, the district judge declined to take the course which had been proposed to him in the Form FCI1 of 9 June. At a review hearing on 10 June 2020, the district judge fixed the case for an *inter partes* hearing on 17 June 2020. On that latter date the applicant appeared remotely by video-link from HMP Maghaberry, where he was still on remand. He contested the application for a NMO. Mrs Clifford gave evidence in support of her application and was cross-examined on Mr Clifford's behalf by his solicitor, Ms Edge. Mr Clifford himself declined to give evidence but submissions were made on his behalf in opposition to the application. The judge made (what Mr Clifford's affidavit refers to as) a 'final' NMO to remain in force for 12 months.

[18] In Mr Clifford's case, pre-action correspondence was sent on 1 July 2020. A response was provided by the Departmental Solicitor's Office dated 12 July 2020 rejecting the points on which the applicant relied and pointing out that he could avail of the statutory appeal mechanism to the County Court if he wished to challenge the order made by the district judge.

The grounds of judicial review

[19] In each case the applicant challenges the decision of the district judge to proceed to list an *inter partes* hearing of the NMO application at a time when a related criminal investigation was (or proceedings were) ongoing, which, it is said, gives rise to a breach of each applicant's common law right to fairness and/or of his fair trial rights under Article 6 ECHR. Although in each case there is a suggestion that unfairness would arise in relation to the determination of the criminal charge or allegation, at the leave hearing Mr Heraghty focused his submissions very much on the alleged unfairness which arises in relation to each applicant's defence of the NMO proceedings. Simply put, the argument is that the respondent in such proceedings would be unduly encumbered in their defence of them for fear of in some way prejudicing their later defence of the related criminal proceedings.

[20] JR131 contends in his affidavit evidence that the listing of the NMO application for full hearing places him "*in an extremely difficult position, primarily in terms of hampering [his] capacity to properly and fully contest that application*". This is, he says, because of the impact of the pending criminal investigation and any trial which is likely to flow from that. In particular, he is concerned that anything he might say in the course of the NMO proceedings might be deployed by police in a future PACE interview or by the Crown in any later criminal prosecution. He also says that "*there is a substantial, perhaps complete overlap*" between the facts relied upon by his wife in seeking the NMO and the matters about which he has been interviewed by police. He is concerned, therefore, about being faced with the choice of either not giving evidence in opposition to the NMO application (the option taken by Mr Clifford) or, on the other hand, giving evidence which could then be used by the prosecution or police at a later stage in the criminal investigation or proceedings looking at the same incidents. Likewise, Mr Clifford relies on the fact that the subject matter of the NMO hearing in his case on 17 June 2020 "*was really identical to those of the criminal proceedings.*"

[21] The applicants point to the absence, in relation to the NMO proceedings, of any protection such as exists in some Children Order proceedings against the use of statements or admissions made in the proceedings as evidence for other offences: see Article 171(2) of the Children (Northern Ireland) Order 1995.

[22] It is also said in each case that the district judge lacked jurisdiction to go on to hear an application for a NMO on an *inter partes* basis. In the JR131 case, the extant NMO came to a conclusion on 16 October 2019 and there was no order in force between then and the planned *inter partes* hearing to be held on 27 November 2019. In light of this, the applicant contends that the Domestic Proceedings Court no longer had jurisdiction to list the case for an *inter partes* hearing and its order doing so was *ultra vires*. In the Clifford case, there was no order in place between 3 June

2020 and the *inter partes* hearing on 17 June 2020; and the applicant again contends that this hiatus means that the NMO application had fallen away.

[23] Each applicant also raises what is essentially a rationality challenge to the district judge's ruling to proceed to a full hearing: in the Clifford case because the parties had agreed (on a 'without prejudice' basis on Mr Clifford's part) that the existing NMO could simply be extended; and in the JR131 case because, in his view, the protection his wife was afforded through the bail conditions to which he was subject at that time provided her with "*at least the same level of protection as the proposed NMO*".

Relevant statutory provisions in the 1998 Order

[24] The statutory basis for the making of a NMO is contained in the Family Homes and Domestic Violence (Northern Ireland) Order 1998. Article 20(1) defines a non-molestation order as meaning 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."*

[25] For present purposes, it is unnecessary to rehearse the definition of an 'associated' person; but that is dealt with in Article 3 of the 1998 Order. Article 20(2) is the key empowering provision. It provides as follows:

> "*The court may make a non-molestation order –*
>
> *(a) if an application for the order has been made (whether in other family proceedings or without any other family proceedings being instituted) by a person who is associated with the respondent; or*
>
> *(b) if in any family proceedings to which the respondent is a party the court considers that the order should be made for the benefit of any other party to the proceedings or any relevant child even though no such application has been made.*"

[26] In deciding whether to exercise its powers to grant a NMO, either on an application for a NMO or in the course of other family proceedings to which the respondent is a party, the court must, pursuant to Article 20(5) "*have regard to all the circumstances*". That requires the court to have regard, amongst other matters, to "*the*

need to secure the health, safety and well-being" of the applicant, the person for whose benefit the order would be made and/or any relevant child, as the case may be. This provision indicates that the court's power is essentially a protective one, designed to address risk to health, safety and well-being.

[27] By virtue of Article 20(6), "*a non-molestation order may be expressed so as to refer to molestation in general, to particular acts of molestation, or to both*." This gives a judge a discretion to tailor the terms of the order with a view to imposing a prohibition which meets the particular facts of the case. In determining the particular terms of a NMO (which may also, *per* Article 20(6A), exclude the respondent from a defined area in a dwelling-house, from any other defined area and/or from any premises specified in the order), the court must again have regard to all the circumstances and the specific issues mentioned in Article 20(5). That is because those are mandatory considerations not only in relation to "*whether*" but also in relation to "*in what manner*" the court should exercise its powers.

[28] Article 20(7) and (8) makes provision for the duration of a NMO. Article 20(7) provides that, "*A non-molestation order may be made for a specified period or until further order*." Article 20(8) provides that a NMO which is made in other family proceedings "*ceases to have effect if those proceedings are withdrawn or dismissed*". This appears to deal with a case where the NMO is granted as an ancillary order (whether upon application of a party or not) in the course of *other* family proceedings rather than a simple application for a NMO on its own. I return to this provision below.

[29] Also of relevance for present purposes is the provision of the 1998 Order which deals with the making of a NMO without the respondent having been given notice of the application. Article 23(1), under the heading '*Ex parte orders*', provides that:

> "*The court may, in any case where it considers that it is just and convenient to do so, make an occupation order or a non-molestation order even though the respondent has not been given such notice of the proceedings as would otherwise be required by rules of court.*"

[30] In such cases, the general approach to the making of a NMO under Article 20 still applies: that is to say that the court should take all of the circumstances into account in determining whether, and if so in what terms, to make an order. The significance of Article 23(1) is that it permits the court, exceptionally, to exercise its powers without the respondent having been given notice of the proceedings as he or she would otherwise expect. The court should only do so where it considers that this is "*just and convenient*" in the circumstances. In determining whether or not to grant an order without notice of the proceedings having been given to the respondent, the court must again have regard to all of the circumstances. Further provision is made about this in Article 23(2), which is in the following terms:

"*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."

[31] Although strictly speaking there is not, as is sometimes suggested, a higher test on the merits for the grant of a non-molestation order in an application which is determined without notice, that may be the practical effect of the terms of Article 23(1) and (2). The same risk-based approach as applies under Article 20 in an application which is made *with* notice is still the approach which is to be taken in an application made *without* notice. That is because, in granting an *ex parte* order, the court will still be exercising its powers under Article 20. However, the difference is that the court will not proceed to exercise those powers, exceptionally, without notice having been given to the respondent (so affording them the opportunity to oppose the application) unless it is *also* satisfied that it is just and convenient in all the circumstances to do so. As the mandatory considerations set out in Article 23(2) suggest, assessment of this question will generally involve an assessment of whether there is a risk of *significant* harm if the order is not made immediately; whether the provision of notice would result in the application being prevented or deterred; and/or whether the respondent is seeking to thwart the court process by evading service in a manner which cannot be dealt with appropriately by the court's powers in relation to service. These are not exhaustive grounds on which the court may consider that the making of an order without notice is just and convenient; but they will generally cater for the vast majority of cases where that exceptional course is warranted.

[32] As appears from Article 23(3) however, any NMO granted without notice is designed to be a holding mechanism only. That provision requires that, if the court makes an order without notice, "*it shall specify a date for a full hearing*". By virtue to Article 23(5), a "*full hearing*" in this context does not necessarily mean either a

hearing at which the application is opposed, nor a hearing at which oral evidence is given, but simply "*a hearing of which notice has been given to all the parties in accordance with rules of court*".

[33] Indeed, it may promote clarity in this area simply to refer to NMOs as either orders made 'with notice' or 'without notice', rather than using the more common terminology of an *ex parte* order or 'full' order. That is because an order made after notice has been given to the respondent is not, in law, an *ex parte* order – even if the respondent has declined to play any role in the proceedings. In addition, an order which is made on notice to the respondent (and so not an *ex parte* order) may still be an *interim* order (and so not a 'full' order) if it is designed to hold the ring only until a full evidential hearing has taken place.

[34] Finally, it is worth noting that a NMO may be varied or discharged by the court on an application either by the respondent or the person on whose application the order was made: see Article 24(1). Additionally, where a NMO was made by virtue of Article 20(2)(b), that is to say in family proceedings to which the respondent is a party and the court makes the order of its own motion, the court may also vary or discharge that NMO without any application to that effect having been made: see Article 24(2).

Discussion

The* ex parte *order in Mr Clifford's case

[35] At the leave hearing, Mr Clifford's counsel did not press his case in relation to the pleaded challenge to the grant of the *ex parte* NMO by the district judge on 7 May 2020. In my view, he was correct not to do so. It is common case that that order ceased to have effect on 3 June 2020. At the time when these proceedings were commenced, the *ex parte* order therefore had, and has now, no continuing legal effect. Any challenge to it is entirely academic in terms of any live dispute currently existing between the parties. The judge's decision not to extend that order has some evidential relevance in relation to the applicant's *vires* challenge (see paragraphs [40]-[47] below); but an order purporting to quash the district judge's *ex parte* order would not now serve any useful purpose. I therefore refuse leave to apply for judicial review in Mr Clifford's case insofar as his application seeks to challenge the grant of that order.

[36] In passing, however, I would note that the premise of Mr Clifford's challenge to that order – that it could not rationally have been granted in circumstances where he was in custody – does not necessarily hold good. Firstly, as set out in paragraph [12] above, at that stage both the applicant for the NMO and the district judge were working on the basis that Mr Clifford was in hospital and there was uncertainty both as to when he may be discharged from hospital and, when he was, whether he would be on remand in custody or released again.

[37] In addition, as is apparent from the discussion of the relevant statutory provisions above, a NMO can, and such orders often do, prohibit molestation otherwise than in person. Molestation within the terms of the 1998 Order may occur indirectly, for instance through correspondence, social media or the actions of some third party at the instigation of the respondent to the application for the NMO. This is clear from the definition of "*molest*" in Article 2(2) of the 1998 Order which includes the idea that the respondent may "*incite, procure or assist any person to molest*". It was also helpfully underscored in the judgment of Stephens J (as he then was) in *Re Alwyn (Non molestation proceedings by a child)* [2009] NIFam 22, at paragraph [4], where he noted that molestation for these purposes is "*wider than violence*" and "*encompasses any form of serious pestering or harassment and applies to any conduct which could properly be regarded as such a degree of harassment as to call for the intervention of the court*".

[38] That is not to say that an order, much less an order made without notice under Article 23 of the 1998 Order, should readily be granted in circumstances where the respondent to the NMO application is in custody at the time of the application. As the Court of Appeal made clear in *Wallace v Kennedy* [2003] NICA 25, where a NMO is sought without notice, the court should apply careful scrutiny to the application and the making of such orders should generally be limited to emergency cases which clearly demand the immediate intervention of the court. However, it is not the case that the fact that the respondent to the application has been arrested and is then in custody will necessarily, of itself, be determinative of the application. It is likely to be highly unusual for a NMO to be granted against a person who is in custody with no immediate or short-term prospect of release, particularly on an *ex parte* basis. Nonetheless, the court retains power, in a suitable case, to grant an order where the respondent's behaviour may still give rise to a relevant risk to an associated person.

[39] In any event, in light of the agreed position that the effect of the *ex parte* order granted in Mr Clifford's case on 7 May 2020 has long since passed, I am not required to, and therefore do not, express any view on the propriety or otherwise of the particular order which was made on that date.

The jurisdiction issue

[40] I turn then to the applicants' case that, the *ex parte* order in each case having expired, the district judge was thereby deprived of any jurisdiction to hear or determine the application for a further non-molestation order. The applicants contend that, at that point, the grounding application had run its course, resulting in an order which had expired, and thus the court's jurisdiction fell away. For the reasons given below, I consider this contention to be clearly ill-founded.

[41] When an application is made to the Domestic Proceedings Court for a NMO, it commences a set of court *proceedings*. Not only is this the common sense view of what occurs, it is also clear from the provisions of the 1998 Order. By virtue of

Article 2(2), read together with Article 2(3), "*family proceedings*" includes "*any proceedings… under*" the 1998 Order itself. As noted above, Article 20(2)(a) of the 1998 Order also permits a court to make a NMO upon an application "*in other family proceedings or without any other family proceedings being instituted*" [underlined emphasis added]. Article 23(1), dealing with orders made without notice, refers to the respondent not having been given "*notice of the proceedings*", that is to say, notice of the application for an order under Article 20. The application for an order therefore amounts to "*family proceedings*". Once those proceedings have been commenced, their management and, crucially, their disposal fall to the judge dealing with the proceedings. A district judge may decline to grant a particular application in the course of the proceedings, or may discharge an *interim* order made in the proceedings; but in the absence of an order specifically disposing of the proceedings, the judge does not thereby deprive himself or herself of any jurisdiction to act further in those proceedings.

[42] In the one instance where the duration of a particular order and the life of the proceedings are tied together, this is expressly provided for in Article 20(8) of the 1998 Order. That provision (discussed at paragraph [28] above) concerns the grant of a NMO in "*other*" family proceedings in which the respondent happens to be involved, which do not simply consist of an application for a NMO on its own. Where a NMO is granted in such proceedings, it will expire ('cease to have effect') when the proceedings are brought to a conclusion, either by being withdrawn or dismissed. This provides no support for the applicants' proposition that the lapsing of an *ex parte* or *interim* NMO of itself deprives the relevant court of power to go on to grant a further order. On the contrary, what is significant about this provision for present purposes is the recognition that there is a conceptual distinction between the order and the proceedings in the course of which it is granted.

[43] Moreover, the continuing jurisdiction of a court to deal with proceedings under the 1998 Order is not governed exclusively, or even mainly, by the provisions of Articles 20, 23 and 24 but, rather, by article 34 (headed '*Jurisdiction of courts and procedure*') and the provisions of the Magistrates' Courts (Northern Ireland) Order 1981 ('the 1981 Order'), read together with the Magistrates' Courts (Domestic Proceedings) Rules (Northern Ireland) 1996 ('the 1996 Rules').

[44] Where applications under the 1998 Order are dealt with in a court of summary jurisdiction, they are classed as "*domestic proceedings*": see Article 88 of the 1981 Order. The 1996 Rules then make more detailed provision for the practice and procedure to be followed where an application for a NMO is made. Under rule 10(1), an application by way of complaint for a NMO under the 1998 Order is to be made in writing in Form F1 contained in the Schedule to the Rules. The complaint will result in a summons being issued under rule 10(2), the summons being in Form F2. Rule 10A makes specific provisions for *ex parte* applications, in which case Article 77(2) of the 1981 Order and rule 10, which relate to civil proceedings being commenced by way of complaint, are dis-applied. However, the applicant for an *ex parte* order is required by rule 10A(2) to file a written copy of the application in

Form F1 with the clerk of petty sessions, so leading to the commencement of the proceedings by summons in the usual way. Some of these provisions were examined by the Court of Appeal in the judgment of Stephens LJ in *Murphy v Murphy* [2018] NICA 15, see paragraph [23].

[45] More detailed provision as to the district judge's jurisdiction in such proceedings is then set out in Part VIII of the 1981 Order, dealing generally with '*Civil Proceedings Upon Complaint*.' Article 84 is of particular relevance, since it permits the court to dismiss the complaint either without prejudice to a further complaint alleging the same cause or on the merits. The simple point is that the district judge can refuse to grant an order without notice or can refuse to extend an order originally made without notice (or, indeed, an *interim* order made on notice) but that, unless and until he or she dismisses the proceedings arising out of the complaint, the judge is not thereby deprived of the power to grant a further order in those proceedings.

[46] In light of the above analysis, I consider the submission that, when an *ex parte* order (whether having been extended or not) ends, the court is thereby deprived of jurisdiction to hold an *inter partes* hearing to be clearly wrong and insufficient to surmount even the modest hurdle for the grant of leave to apply for judicial review. The ground was advanced without detailed reference to the procedural provisions governing the jurisdiction of the Domestic Proceedings Court. When regard is had to these provisions it becomes clear that this ground of challenge is entirely without merit.

[47] No doubt it may be unusual for a judge, having initially granted a NMO, particularly where he or she did so on the basis of the circumstances warranting the grant of such protection on an *ex parte* basis, to withdraw that protection for a period pending an *inter partes* hearing. There may, however, be circumstances where that is an appropriate course; for instance, if the immediate risk giving rise to the making of the initial order has dissipated in some way, but where the applicant for an order nonetheless wishes to proceed with an application (on notice) for a further order and the court feels that, after a further hearing, it may be convinced that the threshold for making a NMO is met or met again. In the Clifford case, it seems that the discharge of the order on 3 June 2020 was not on the basis of any particular reassessment of risk to the applicant for the NMO but, rather, because of the (mistaken) view which was taken about the court's lack of power to vary an order by way of extending it. The position is less clear in the JR131 case. In any event, I consider it clear that the court seised with the relevant proceedings has power to discharge an *ex parte* or *interim* NMO without depriving itself of the power to grant a further such order in the same proceedings at a later date. The decision to dismiss the proceedings, and therefore bring an end to them and to the court's jurisdiction to grant orders in the course of them, is a separate consideration from the determination of whether or not to discharge (or decline to extend) any order which the court has made at an earlier stage in those proceedings.

Interplay of NMO proceedings with ongoing criminal investigations or proceedings

[48] A more complex issue is raised by the suggestion that it is procedurally unfair, and/or in breach of fair trial guarantees, to require a respondent to a NMO application to defend that application at the same time as that individual is facing a criminal investigation or criminal charges for precisely the same behaviour on which the application for the NMO is grounded.

[49] This Court will be slow to interfere with the case management decisions of lower courts unless they give rise to procedural unfairness, result in some breach of Convention rights or are susceptible to challenge on rationality grounds. District judges are well experienced in running their courts and ought to be afforded a considerable amount of leeway in terms of the proper management of proceedings before them. They will often have a 'feel' for a case which is not apparent from the affidavit evidence provided to this court in a later judicial review application, particularly where (as here) the lower court has considered the matter at a number of review hearings.

[50] However, it seems to me that there is an issue which has been raised by these cases in respect of which it would be helpful for there to be further investigation and legal argument, namely the correct approach to the management of proceedings seeking a NMO at a time when the factual circumstances giving rise to the application are the subject of likely or pending criminal proceedings. This is an issue which may arise relatively frequently.

[51] On one view, the law may be said to be relatively well settled in this area, with a number of cases which were put before me indicating that civil proceedings should only be stayed where there is a real risk of serious prejudice to the defendant's right to fair trial in related criminal proceedings which cannot be adequately mitigated by the use of appropriate safeguards – which is a fairly high threshold: see, for example, *Keeber v Keeber* [1995] 2 FLR 748. It also seems to me that the risk of undue interference with pending criminal proceedings is likely to be capable of being managed in a range of ways; and that an applicant for a NMO deserving of the court's protection should not readily have their rights outweighed or restricted by the respondent to the application simply wishing to keep his or her 'powder dry' in relation to the criminal investigation or proceedings. However, it is arguable that it may be unlawful for a judge to force on a contested NMO hearing in certain circumstances where the factual matters to be addressed are also to be the subject of criminal proceedings. This is an area which, in my view, does warrant a closer look.

[52] I therefore grant leave, in JR131's case, to enable this issue to be explored further and, if appropriate, for some additional guidance to be given by this court as to how the interplay between NMO proceedings and criminal proceedings ought to be addressed and managed. There is no need for leave to be granted in each case in

order to permit this issue to be addressed. The reason for granting leave in respect of this issue in JR131's case, and not that of Mr Clifford, are addressed below.

Alternative remedy

[53] In each case, the respondent urged the court to refuse the application for leave to apply for judicial review on the basis that there was an alternative remedy available to the applicant, namely a statutory right of appeal. Article 39(3) of the 1998 Order provides as follows:

> "*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.*"

[54] By virtue of Article 39(8), on an appeal under Article 39, the appellate court – which includes the county court (see Article 39(7)) – may make such orders as may be necessary to give effect to its determination of the appeal.

[55] In Mr Clifford's case, where he is aggrieved at the grant of a NMO by the district judge, I consider that an appeal against that order to the county court would be both a more effective and convenient remedy, and indeed likely to be a more cost effective remedy from the perspective of the public purse (since he is legally assisted), than an application to this court. I do not accept that the arguments advanced on behalf of that applicant in this court could not have been raised before, and determined by, the county court judge in any appeal which was made to that court.

[56] Mr Heraghty argued, in reliance upon the course adopted by Kerr J (as he then was) in *Re Jamison's Application* [1996] NIJB 214, that this was a case where the applicant's complaints lay "*clearly in the realm of public law*" so that the High Court was particularly well placed to deal with them, rather than the county court. As I have indicated above, I do consider it appropriate that the High Court examine the issue of principle raised by these cases; but that is not to say that the county court could not also have been asked to take a different course than that urged upon, although rejected by, the district judge; nor that the county court would have been unequipped to deal with those submissions. Insofar as Mr Heraghty's eschewal of appeal as the appropriate remedy was grounded on the applicant's case on jurisdiction (namely that it would be inappropriate to appeal a decision which was simply *ultra vires* in light of the *ex parte* order having expired), I have already found that that ground of challenge lacks any merit. An appeal to the county court seeking

to have the NMO made by the district judge on 17 June 2020 set aside, or to have an order made on consent without any hearing, would have been an appropriate remedy in Mr Clifford's case, which has not been exhausted.

[57] Slightly different considerations arise in relation to JR131's case, where he is not seeking to challenge the grant of a NMO against him. That is because his application for judicial review was effective to upset the course which had been planned by the district judge, namely the convening of an *inter partes* hearing. The current position in relation to the JR131 case is discussed briefly below. Without deciding the matter, it is much less clear that the district judge's case management decision to list the application for an *inter partes* hearing is appealable to the county court under Article 39(3) in the same way as the NMO which was actually made in the Clifford case. I am prepared to give JR131 the benefit of the doubt on the question of alternative remedy, bearing in mind that, even if there is an alternative remedy, that is not an absolute bar to the grant of leave to apply for judicial review in the exercise of the court's discretion: see *Re DPP's Application* [2000] NI 174, at 178a-b; with the *Jamison* case relied upon by the applicant providing an illustrative example of this discretion in practice.

Whether the Clifford case is academic

[58] I also consider there to be a strong case that the challenge in the Clifford case, properly understood, is academic. As set out at paragraphs [15]-[16] above, Mr Clifford was prepared to consent to the grant of a NMO against him, provided that there was no *inter partes* hearing, until the conclusion of the related criminal proceedings. In the event, although a NMO was granted after the contested hearing on 17 June 2020, he exercised his right not to give evidence at that hearing. I am not persuaded that, in light of that outcome, there is any material difference between what Mr Clifford was prepared to agree to and what actually transpired. If the district judge had adopted the course urged upon him by Mr Clifford's solicitor, the end result would again have been the making of an order against him, without Mr Clifford having given evidence in the Domestic Proceedings Court, for a period of considerable duration (until the conclusion of any related criminal proceedings).

[59] Mr Heraghty contended that there was a material difference between the two situations since, had an order simply been made on consent, it would have been less difficult for Mr Clifford in due course to have obtained a variation or discharge of that order than it will now be, the order having been made after a contested hearing. I do not accept that submission. Mr Clifford remains at liberty, in either case, to apply for the order to be discharged: see Article 24(1) of the 1998 Order. In considering any such application, the district judge would have to consider the facts as they stood at that point and whether, in all the circumstances, the risk to Mrs Clifford still warranted the order being maintained. Mr Clifford would be free to give evidence in support of an application to discharge the NMO and the judge would no doubt carefully consider all that he had to say, particularly in circumstances where he had not previously given evidence on his own behalf. The

factual picture at that stage might well be different if the criminal proceedings had concluded, one way or the other. The fact that the order which was sought to be discharged had been granted after a contested hearing (without evidence from Mr Clifford), as opposed to having been granted without opposition from him, would in my view be a marginal consideration for the judge, if it was considered relevant at all.

[60] Accordingly, since the outcome in the Clifford case was similar to that for which Mr Clifford was himself contending in June 2020, namely that an order should be granted without his having to give evidence on the factual issues which were the subject of criminal investigation, I am not persuaded that anything of substance would be gained from an order quashing the NMO made by the district judge with the substitution of a 'new' NMO made on consent. This is a further reason for the refusal of leave in the Clifford case.

The current position in JR131's case

[61] There has been some contention in the exchanges between the parties in JR131's case as to what the position presently is with respect to whether or not a NMO is in place. JR131's position is that the final *interim* NMO made in his case ceased to have effect on 16 October 2019.

[62] The response to pre-action correspondence on behalf of the proposed respondent, sent by the Departmental Solicitor's Office (DSO) on 15 November 2019, indicated that the matter came before the district judge on 16 October "*who discharged the NMO…*". By email of 5 March 2020 to JR131's solicitors, however, the DSO stated that:

> "*The proposed respondent has had the opportunity to consider again the decision to discharge the Non Molestation Order [on 16 October 2019] and is of the view that that decision should not stand, Article 24 having not been satisfied. Therefore, the* ex parte *Non Molestation Order remains in place, the* inter partes *hearing of which stands adjourned initially for four weeks to facilitate the ongoing public law proceedings.*"

[63] In the skeleton argument for the proposed respondent in the JR131 case, this statement is explained. It is contended that the district judge had no power to discharge the order made (by a different district judge) on 29 May 2019 'until further order', since he could only discharge that order under Article 24 of the 1998 Order if an application for its discharge had been made by either the applicant or the respondent in the proceedings, neither of whom made such an application. The district judge's position is that he could not discharge the order of his own motion, and could only do so on application, given the terms of Article 24(1). (Curiously, it is also contended in that skeleton argument that, in any event, the NMO which was

in force terminated on 16 October 2019, although without a clear explanation as to why this was so in light of the fact that it had been made "*until further ordered*").

[64] Without having to reach a concluded view on this issue, it seems to me likely that the making of a NMO "*until further order*" – an outcome specifically envisaged by Article 20(7) of the 1998 Order – reserves to the Domestic Proceedings Court a power to discharge that order of its own motion, by the making of a further order to that effect. The position may be different where an order has been granted with a specified end-date. In this case, contrary to the position now expressed by the proposed respondent, I consider that it would have been open to him to discharge the order which had been granted on 29 May 2019 when the case came before him on 16 October 2019. The issue of having to extend that order (and whether the district judge did or did not have power to do so) should not have arisen, since the order was expressed to remain in force until further order.

[65] More importantly though, the question remains as to what actually happened on that date. Exhibited to the affidavit of JR131's solicitor is a copy of what purports to be the order actually made on 16 October 2019. It is a further NMO made on 16 October 2019, which purports to remain in effect only until 16 October 2019. Whether this was the means used to bring the earlier order to an end, or whether the district judge simply purported to discharge the earlier order, I am satisfied that it was the district judge's intention at that point that the order of 29 May 2019 should not remain in force; and that that would have been the impression of all parties after the hearing on 16 October 2019.

[66] JR131's representatives have taken issue with the suggestion that the district judge could, after the commencement of these proceedings, simply revisit his decision in October 2019 with the effect of reviving a NMO which was previously thought by all no longer to be extant. I am inclined to agree with that position. In my view, the proper approach to the present position, in light of the documents before this Court, is that the order of 29 May 2019 ceased to have effect after 16 October 2019 by virtue of the order made by the district judge on that date.

[67] In light of this, I consider the current position to be that there is presently no NMO extant in favour of JR131's wife. It is important that there is clarity about this, since any behaviour in the meantime which would have been in breach of such an order could result in criminal penalties for JR131. For the reasons discussed above, the proceedings generated by JR131's wife's application for a NMO are extant (and stand adjourned). If it is considered that a NMO in her favour remains necessary at this point for her protection, her representatives should have the matter re-listed before the Domestic Proceedings Court in order to seek a further order. It may be, however, if JR131 remains on bail subject to conditions which provide similar protection as might a NMO, or if circumstances have changed by reason of some development of which I am not aware, that this is not presently necessary. If a further NMO is to be sought, I would hope that a pragmatic approach to this might be adopted (as was the case in Mr Clifford's case), rather than a further stand-off

arising by reason of the matters on which leave has been granted; although plainly this court cannot tie the hands of either party in that regard.

Conclusion

[68] In summary, therefore:

(a) I decline to grant leave in respect of the challenge to the *ex parte* order of 7 May 2020 in the Clifford case on the basis that this challenge is academic.

(b) I further decline to grant leave in respect of the challenge to the on-notice NMO of 10 June 2020 in the Clifford case on the bases that: (i) the applicant had an effective alternative remedy which he has failed to exhaust before seeking to invoke this court's supervisory jurisdiction; and (ii) the challenge is, in any event, academic in light of the (sensible) approach which he adopted to the extension of the earlier *interim* order which had been made against him.

(c) In addition, in each case I refuse leave to apply for judicial review in relation to the applicant's challenge that the district judge was deprived of jurisdiction to convene an *inter partes* hearing, or make an order on foot of such a hearing, merely by virtue of the fact that an earlier order in the proceedings had been discharged or had expired. When the relevant statutory scheme is properly analysed, I do not consider that aspect of these challenges to be sufficiently arguable to have any prospect of success.

(d) I grant leave in the JR131 case on grounds 5(a)-(c) only in his amended Order 53 statement dated 4 February 2020, on the basis that these grounds raise an issue worthy of further investigation for the reasons outlined in paragraphs [50]-[52] above. Grounds 5(d)-(e) do not add anything, in my view, to the issues already raised in grounds 5(a)-(c).