R (M) v Secretary of State for Constitutional Affairs & Lord Chancellor, Leeds Magistrates' Court, Leeds City Council

Case No: C1/2003/2715

Court of Appeal (Civil Division)

18 March 2004

Neutral Citation Number: [2004] EWCA Civ 312

2004 WL 412984

Before : Lord Phillips of Worth Matravers (MR) Lord Justice Kennedy and Lord Justice Neuberger

Thursday 18 March 2004

On Appeal from Mr Justice Owen (Administrative Court)

Representation

Mr Peter Weatherby (instructed by Davies Gore Lomax , Leeds, LS1 3BB) for the appellant.

Mr Timothy Otty (instructed by Treasury Solicitor) for the Secretary of State.

Mr Rabinder Singh QC and Mr Anesh Pema for the Leeds City Council (as an interested party).

JUDGMENT

Lord Justice Kennedy:

Introduction

1. For quite some time prior to July 2003 there were increasingly serious problems with drug-dealing and associated crime in the Little London area of Leeds. Police operations were difficult, and there was a lot of violent crime, which made life miserable for law-abiding citizens who lived there, so the City Council and the police, in consultation with other agencies, including the Home Office, decided to seek Anti-Social Behaviour Orders (ASBOs) against those involved with drug-dealing, and their associates. Intelligence was collated from intelligence records, and witness statements were obtained from police officers. By late August 2003 it had been decided to seek orders against 66 individuals said to be linked to the drugs trade in the area.

2. On 27 th August 2003 an application was made to a Justices' Clerk, in fact Mr Martin Lee, the legal manager of the civil team at Leeds Magistrates' Court, and he gave leave for applications for interim ASBOs to be made without notice to those named in the proposed interim orders.

3. The applications were then made by Leeds City Council and West Yorkshire Police and on 2 nd September 2003 sixty six such orders were made by District Judge Darnton, sitting at Leeds Magistrates' Court, including an order against M, who was then 17½ years of age. The court found it just to make the interim order “pending the determination of the application for an ASBO”, which application was attached to the interim order. The interim order in summary required M not to be involved with or to harass others (prohibitions 1, 2, 3, 5, 6 and 7, most of the acts described being criminal offences), and the order also —

> (a) By prohibition 4, required him not to enter or remain within the Little London area (marked on a plan), and—

(b) By prohibition 8, required him not to have contact in public with thirteen named individuals.

The order was granted until 15 th December 2003, but meanwhile, as recorded in the order, the court required that all parties attend at the Magistrates' Court on 15 th September 2003. The other orders which were made at the same time were in broadly similar but not identical terms.

4. On 16 th October 2003 M applied to discharge the interim order made against him. It was modified, but not discharged. Then, by letter dated 12 th November 2003, Leeds City Council applied to extend the interim order to 15 th March 2004, and that application for an extension was granted on 11 th December 2003. Arrangements were made for the application for a full ASBO to be heard before the end of the extension period, and we were told that the hearing has been fixed for 10 th March 2004.

5. On 4 th November 2003 M commenced proceedings for judicial review of the decision to make an interim order on 2 nd September 2003, on the grounds that the order was made at a hearing of which M had no notice. That is envisaged as a possibility by Rule 5 of the Magistrates' Courts (Anti-Social Behaviour) Rules 2002 SI 2784, but the Rule was said to be incompatible with common law and with Article 6(1) of the European Convention on Human Rights . It was further asserted that the hearing was held without notice for no appropriate reason, and there were three further allegations relating to the way in which the District Judge approached M's case, and the weight of evidence in relation to his case. In these judicial review proceedings the Secretary of State for Constitutional Affairs was named as first defendant, and the Leeds Magistrates' Court as second defendant, but the Leeds City Council has appeared as an interested party. The matter was brought before the Administrative Court with commendable expedition, and after hearing argument on 20 th and 21 st November 2003 Owen J gave judgment on 5 th December 2003, refusing M the relief sought, but granting relief to his fellow claimant, Kenny, on the basis that the evidence against him was insufficient.

Findings of the Judge

6. The judge accepted that M and Kenny were entitled to seek judicial review even though they could have appealed against the interim ASBOs to the Crown Court. He rejected the attack on the legality of Rule 5 of the 2002 Rules. He considered the test to be applied by the justices' clerk when deciding whether to give permission to apply for an interim ASBO without notice, and whether that test was applied in this case. The judge then turned to the test to be applied by the District Judge when considering the applications for ASBOs, and whether the District Judge applied the appropriate test in general, and specifically in relation to each claimant. Owen J having found against the claimant refused permission to appeal, but permission was granted by Laws LJ on 12 th January 2004.

Grounds of Appeal

7. The grounds of appeal assert that the judge erred in five respects —

(1) in holding that Article 6(1) of the European Convention did not apply because interim ASBOs do not determine M's civil rights or obligations.

(2) In holding that Rule 5 is not unlawful, in allowing an application for an interim ASBO to be made without notice.

(3) In finding that Article 6 became engaged only after an interim order was made, and that section 1D(4)(b) of the Crime and Disorder Act 1988 and Rule 5(8) ensured procedural fairness.

(4) In his formulation of the test for the making of an interim order.

(5) In finding that this application, in relation to M, necessitated a ‘without notice’ procedure.

Statutory framework

8. Before we turn to the arguments advanced in relation to each of the five grounds of appeal it is necessary to set out in summary form the statutory framework in relation to ASBOs, and in particular in relation to interim ASBOs.

9. Section 1 of the 1998 Act enables a relevant authority (such as a local authority or the police) to apply to a Magistrates' Court for an ASBO if it appears to the authority that certain conditions are fulfilled with respect to any person aged 10 or over, namely —

> "(a) that the person has acted, since the commencement date, in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself and
>
> (b) that such an order is necessary to protect relevant persons from further anti-social acts by him."

If when the application is heard by the Magistrates' Court those conditions are proved then the Magistrates' Court may make an ASBO prohibiting the defendant from doing anything described in the order. The prohibitions that may be imposed are those necessary to protect people from further anti-social acts by the defendant. The order when made has effect for a period of not less than two years specified in the order, or until further order, and by subsection (8) the defendant may apply by complaint to the court which made the ASBO for it to be varied or discharged by a further order. But subsection (9) provides that except with the consent of both parties an ASBO cannot be discharged before the end of two years beginning with the date of service of the order. Subsection (10) sets out penalties which can be imposed if a person is convicted of contravening the prohibitions set out in an ASBO. Following conviction on indictment the penalty can be up to 5 years imprisonment and a fine.

10. Provision for interim ASBOs was made by section 65 of the Police Reform Act 2002 , which introduced section 1D into the 1998 Act. Such an order must be for a fixed period, may be varied, renewed or discharged (section 1D(4)(b)), and if not previously terminated ceases to have effect on the determination of the main application. The power to impose prohibitions, and the sanctions available, are the same when an interim order is made as are available in relation to a full ASBO, but a defendant may apply to the court which made an interim order for that order to be varied or discharged (see section 1D(5) referring back to section 1(8) , but not to section 1(9)). An interim order can also be appealed to the Crown Court under section 4 of the 1998 Act, as amended.

11. The Magistrates' Courts (Anti-Social Behaviour Orders) Rules 2002 , by Rule 5 , provide as follows —

> "(1) An application for an interim order under section 1D, may, with leave of the justices' clerk be made without notice being given to the defendant.
>
> (2) The justices' clerk shall only grant leave under paragraph (1) of this Rule if he is satisfied that it is necessary for the application to be made without notice being given to the defendant.
>
> (3) If an application made under paragraph (2) is granted, then the interim order and the application for an anti-social behaviour order under section 1 (together with a summons giving a date for the defendant to attend court) shall be served on the defendant in person as soon as practicable after the making of the interim order.
>
> (4) An interim order which is made at the hearing of an application without notice shall not take effect until it has been served on the defendant.
>
> (5) If such an interim order made without notice is not served on the defendant within 7 days of being made, then it shall cease to have effect.

> (6) An interim order shall cease to have effect if the application for an anti-social behaviour order is withdrawn.
>
> (7) Where the court refuses to make an interim order without notice being given to the defendant it may direct that the application be made on notice.
>
> (8) If an interim order is made without notice being given to the defendant, and the defendant subsequently applies to the court for the order to be discharged or varied, his application shall not be dismissed without the opportunity for him to make oral representations to the court."

12. Rule 6 makes provision for applications for the variation or discharge of an ASBO. An application must be made in writing, setting out the reasons why it is contended that the order should be varied or discharged, and the Rule continues —

> "(3) Subject to Rule 5(8) above, where the court considers that there are no grounds upon which it might conclude that the order should be varied or discharged, as the case may be, it may determine the application without hearing representations from the applicant for variation or discharge or from any other person.
>
> (4) Where the court considers that there are grounds upon which it might conclude that the order should be varied or discharged, as the case may be, the justices' chief executive shall, unless the application is withdrawn, issue a summons giving not less that 14 days notice in writing of the date, time and place appointed for the hearing."

Grounds 1, 2 and 3

13. Mr Weatherby, for M, began his submissions to us in relation to the first 3 Grounds of Appeal by stressing the adversarial nature of the English judicial process, which renders proceedings of which one party has no prior notice an anomaly. He accepted that it is, in certain circumstances, a necessary anomaly, but submitted that the reasons for proceeding in that way must be compelling, and the prescribed procedure should provide for what he described as a return to normality as soon as possible. In other words, even if it can be shown to be necessary to take the first step without prior notice the prescribed procedure should provide for that step being no more than provisional until, at an early date, the matter can be properly considered at a hearing of which both sides have prior notice. As Mr Weatherby pointed out, the primary legislation in relation to interim orders does not address the question of whether they can be made without notice being given to the defendant, nor does it say anything about such an order being re-considered at a hearing of which the defendant does have notice, but it does provide for re-consideration if any party seeks to have an order varied or discharged. Mr Weatherby submits that such provision does not go far enough.

14. As Mr Weatherby pointed out, the Magistrates' Court has very little inherent jurisdiction. In general it can only exercise powers granted to it by statute, and where it is proposed to curtail freedoms the court must act with scrupulous fairness at all stages of the proceedings (see *R (McCann) v Manchester City Council [2003] 1 AC 787* at paragraph 80 in the speech of Lord Hope). In domestic law that, Mr Weatherby submits, militates against orders being made of which the defendant has no notice, and he invited our attention to what was said by Ormrod LJ in *Ansah v Ansah [1977] Fam 138* at 142. In that case it was pointed out that orders made ex parte are anomalies in our system of justice which generally demands service of notice of the proposed proceedings on the opposite party. But the court recognised that they are necessary anomalies and when that power is used it must be used with great caution and only in circumstances in which it is really necessary to act immediately. In the context of family law Ormrod LJ said that such cases should be extremely rare and that if an order is to be made ex parte it must be strictly limited in time if the risk of causing serious injustice is to be avoided. Similar observations have been made in other reported cases.

15. In support of his submission that domestic law leans against orders being made without notice and where that is necessary requires an early return date, Mr Weatherby invited our attention to section 45(2) of the Family Law Act 1996 , section 152(7) of the Housing Act 1996 , section 3 of the Protection from Harassment Act 1997 and part 25 of the Civil Procedure Rules .

16. Mr Weatherby submitted that the procedure under Rule 6 makes provision for supervening changes of circumstance. It was not designed to provide a safeguard against an interim order having been made when no such order should have been made. But of course, as he recognised, what matters is whether or not the procedure is effective for that purpose. He submitted that it is insufficiently effective because it has to be initiated by the defendant, and it is not designed to operate urgently. When an application is made under Rule 6 to vary or discharge an interim order the justices' chief executive is required by Rule 6(4) to issue a summons giving not less than 14 days notice in writing of the date, time and place appointed for the hearing. Mr Weatherby submits that more urgency is required because when an interim order is made the civil rights and liabilities of the defendant are determined, if only for a limited period. He recognised that the fact that the burden of initiating review proceedings is cast upon the defendant cannot of itself be decisive (see *Southwark LBC v St Brice [2002] 1 WLR 1537* at paragraphs 17 and 18, citing *Schuler-Zgraggen v Switzerland [1993] 16 EHRR 405*) but he submitted that in each of those cases the circumstances were unusual. In the *St. Brice* case there had been earlier proceedings, and in the hasis *Schuler-Zraggen* case the person claiming relief had had an earlier opportunity to make representations in writing.

17. Mr Weatherby invited our attention to the speech of Lord Nicholls in *Re S [2002] 2 AC 291* paragraph 71, where it is pointed out that as a result of the implementation of the Human Rights Act 1998Article 8 rights are now part of the civil rights of those who live in the United Kingdom — in that case parents and children — for the purposes of Article 6(1) , requiring a degree of judicial control which will vary according to the subject-matter of the impugned decision. Mr Weatherby submits that the prohibitions under an ASBO can interfere significantly with recognised freedoms, so there should be a high degree of judicial control.

18. In *R v Lord Chancellor ex parte Witham [1998] QB 575 the Divisional Court* was concerned with the effect on an unemployed man of an increase in the fees required to take legal proceedings, coupled with the withdrawal of an exemption from the payment of fees previously available to those in receipt of income support. The intending litigant was thus denied access to the courts. That was held to be a constitutional right of which he could only be deprived by primary legislation, not by the purported exercise of subordinate legislation in relation to fees. From that decision Mr Weatherby sought to draw support for his submission that under domestic law the state must by primary legislation make provision for an early return date in order to vest the Magistrates' Court with the necessary jurisdiction to make an interim ASBO without notice. Whilst we understand the submission we did not entirely understand how it was supported by the authority to which we were referred.

19. Turning to the impact of the European Convention , and in particular Article 6 , Mr Weatherby reminded us that in hasis *McCann the House of Lords* held that the making of a full ASBO is a civil proceeding which can involve a determination of civil rights, and thereby engage the right to a fair trial under Article 6(1) . In the present case the judge held that there is no determination of civil rights within the meaning of Article 6(1) on the making of an interim ASBO without notice. Mr Weatherby submits that the judge was wrong to distinguish as he did between an interim order and a final order because an interim order can contain the same prohibitions and is subject to the same sanctions as a final order, so, he submits, when an interim order is being made Article 6(1) must be applied, at least if it is to last for more than a minimal amount of time. In *Le Compte and others v Belgium [1981] 4 EHRR 1* the doctors were only suspended for short periods, but that, as Mr Otty for the Secretary of State pointed out, was as a result of a final decision of the relevant professional body, so it was the procedure leading to the final decision, and not to an interim decision, which was in issue in that case.

20. To substantiate his reliance on Article 6(1) Mr Weatherby invited our attention to *Markass Car Hire v Cyprus E.Ct. H R 6th November 2002* . A fleet of car hire vehicles were registered in the name of Markass, which Markass contended it was entitled to sell. Kemtours Ltd alleged that the vehicles were subject to a rental agreement under which it was entitled to possession, and it began proceedings against Markass. It obtained an interim order requiring Markass to deliver up the vehicles. Markass appealed. The Cyprus courts took over two years to decide that the interim order was null and void. In the European Court Markass alleged against Cyprus that the delay violated Article 6(1) , but no complaint was made as to the ex parte nature of the order. The court noted in paragraph 29 of its judgment, that what was at stake for Markass was its financial survival, because of the content of the interim order. Article 6(1) was regarded as applicable, and was found to have been violated by the delay. So Mr Weatherby submits that an interim order can attract the fair trial guarantees of Article 6(1) , but it is instructive to go back to the admissibility decision of the European Court in *Markass, delivered on 23rd October 2001* , to see how the court came to the conclusion that in relation to the interim order under consideration Article 6(1) could be said to apply. It noted at page

8, that the interim decision partly coincided with the main action, and unless reversed by the appeal court within a short time-limit was to effect, as it did for a substantial period, the legal rights of the parties resulting from the purported contract. The decision continues —

> "In this respect the Court cannot overlook the drastic character of the interim decision which concerned, as the applicant maintains, almost the whole of the company's fleet of vehicles and disposed to a considerable degree of the other relevant civil action against the applicant. The combined effect of the measure and its duration caused irreversible prejudice to the applicant's interests and drained to a substantial extent the final outcome of the proceedings of its significance.
>
> In these circumstances, the Court considers that the interim decision in effect partially determined the rights of the parties in relation to the final claim against the applicant in civil action 3315/98, and thereby acquired the character of a 'dispute' over a civil right and obligation to which Article 6 of the Convention was applicable."

In the present case Mr Weatherby submits that because ASBO prohibitions can interfere with fundamental rights the character of the dispute renders Article 6(1) applicable to the interim order, and in particular to the process by which it comes into existence.

21. As to the standard of fair process which is required by common law and by the European Convention , Mr Weatherby submitted that context is vital. The standard required depends on the subject matter, and he identified three categories, namely —

> (a) Administrative decisions:
>
> (b) Quasi-judicial decisions, and —
>
> (c) Judicial decisions.

In relation to the first of those categories he invited our attention to *R (Alconbury) v Secretary of State for the Environment [2001] 2AC 295* which concerned the powers of the Secretary of State in relation to planning matters. At paragraph 69 Lord Hoffmann said —

> "In a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them."

Having referred to Article 6(1) he said at paragraph 74 —

> "I would have said that a decision as to what the public interest requires is not a 'determination' of civil rights and obligations. It may affect civil rights and obligations but it is not, and ought not to be, a judicial act such as Article 6 has in contemplation …. The administrator may have a duty, in accordance with the rule of law, to behave fairly ('quasi-judicially') in the decision making procedure. But the decision itself is not a judicial or quasi-judicial act. It does not involve deciding between the rights and interests of particular persons. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires."

As an example of his second category Mr Weatherby invited our attention to *Calvin v Carr [1980] AC 574, in which the Privy Council* considered a decision of the Australian Jockey Club to disqualify a part-owner of a horse and a jockey. The original decision was that of the stewards from whom there was an appeal to the committee of the Club. The judge held that although the stewards might have failed to observe the rules of natural justice in certain respects the hearing before the committee was a fresh hearing and cured any defects. In the particular case that approach was approved by the Privy Council, but Lord Wilberforce said at page 592 that "no clear and absolute rule can be laid down on the question whether defects in natural justice appearing at an original hearing, whether administrative or quasi-judicial, can be 'cured' through appeal proceedings".

22. In *Albert and Le Compte v Belgium [1983] 5 EHRR 533 the European Court* at paragraph 29 of

the judgment said that disciplinary proceedings before a professional body which concerned a civil right must themselves comply with Article 6(1) or be subject to subsequent control by a judicial body with full jurisdiction. So Mr Weatherby contends that in relation to his category of quasi-judicial decisions it may be sufficient if there is at least fairness at one level, but he contends that where, as here, the proceedings are wholly judicial there must be fairness at every stage. To support that proposition he invited our attention to *R v Hereford Magistrates' Court ex parte Rowlands [1998] QB 110 where the Divisional Court* was concerned with procedural irregularities in the Magistrates' Court, from which the defendant could have appealed to the Crown Court. It was held that a party complaining of procedural unfairness or bias in the Magistrates' Court should not be denied leave to move for judicial review, and left to whatever rights he might have in the Crown Court.

23. The same approach, Mr Weatherby submits, can be seen to have been adopted in relation to Court Martial proceedings by the European Court in *Findlay v UK [1997] 24 EHRR 221* . It was said at paragraph 78 to 79 of the judgment that there were fundamental flaws in the Court Martial system which were not remedied by the presence of safeguards, and could not be corrected by subsequent review proceedings — “since the applicant's hearing was concerned with serious charges classified as ‘criminal’ under both domestic and Convention law, he was entitled to a first instance tribunal which fully met the requirements of Article 6(1) ”.

Grounds 4 and 5

24. As to his fourth Ground of Appeal, where he criticises the judge's test for the making of an interim order, without notice, Mr Weatherby reminded us that in *McCann the members of the House of Lords* agreed that, given the seriousness of the matters involved, before making a full ASBO the magistrates must be sure that the defendant has acted in an anti-social manner. But of course we are only concerned with an interim order. As to that, the District Judge, having considered the need for action, the role of the defendants, and the need for simultaneous and urgent action, said that he was quite satisfied that there was sufficient evidence that the main application was properly made, and that it was just to make an interim order until resolution of the full applications. He also had express regard to proportionality, saying that he was satisfied that the application was proportionate, that the right of the defendants to a private life and a fair trial had not been offended, and that it was therefore proper to grant the application. Owen J endorsed that approach. Mr Weatherby submits that on an application without notice a more rigorous test was required. The applicants should have been required to put forward an extremely strong prima facie case that the full application would succeed on its merits.

25. The fifth Ground of Appeal concerns the evidence in relation to M. Mr Weatherby contended that there was no need in his case for an application for an interim order to be made without notice. Although there was clearly a serious situation in the area, police operations had been going on for over a year, and the schedule of incidents allegedly involving the defendant extended back over a considerable period. As far as he was concerned there was no obvious catalyst. There were no identified vulnerable witnesses, and if notice had been given of intended applications any consequential delay could have been minimised by good case management.

The response by the Secretary of State and Leeds City Council

26. Mr Otty, for the Secretary of State, submitted that this appeal gives rise to five questions, namely —

> (1) Whether the procedure to obtain an interim order without notice is in conflict with Convention law because there is no automatic early return date:
>
> (2) Whether such a procedure conflicts with natural justice and/or abrogates the right of access to the Courts:
>
> (3) The proper test to be applied when deciding whether or not to make an interim order where no notice of the application for the order has been given (Ground of Appeal 4):

(4) Whether the test was properly applied in this case (Ground of Appeal 5), a matter on which we heard from Mr Rabinder Singh QC for the City Council:

(5) Whether the relief sought in these proceedings is too broad.

Mr Otty began by pointing out the safeguards which primary and secondary legislation have put in place to ensure, as far as possible, that interim orders without notice are only sought and made when required. First of all there can be no application for such an order without the leave of the justices' clerk, who can only grant leave "if he is satisfied that it is necessary for the application to be made without notice being given to the defendant." Leave having been given the application then has to be made to a Magistrates' Court, which can only make the order if it considers it just to do so. If it decides to make an order it must give reasons in writing, because Rule 4(6) requires the order to be in the form set out in Schedule 6 , and that form makes provision for reasons. The form also requires the court to specify when the order will end, and either to fix a return date when the matter will be brought back before the court or to fix a hearing date for the main application. Unlike some interlocutory orders made without notice an interim ASBO is ineffective until it is served (and ceases to be available for service if not served within 7 days) so a defendant has to be aware of its terms before he can be bound by them. He can apply to vary or discharge the order at any time, and if the order was made without notice he must then be heard. Rule 6(4) is clumsily drafted in relation to interim orders made without notice, because when an application is made by a defendant to vary or discharge such an order he must be heard, whether or not the court considers that there are grounds for granting him the relief sought, but the Rule can be interpreted as requiring the justices' chief executive to give 14 days notice of the hearing date. Such a period is, we accept, realistic to enable the parties to prepare properly for the hearing, and in this context it is relevant to remember the relatively limited extent to which, at least in this case, the freedoms of the defendant are being impaired.

27. As the judge held, in paragraph 61 of his judgment, and as Mr Otty accepts, if an application is made by a defendant to vary or discharge an interim order made without notice the defendant does not assume any burden of proof. The relevant authority has to justify the continuation of the order in its present form, and the defendant can still appeal to the Crown Court or seek relief by way of judicial review.

28. Mr Otty pointed out that the Magistrates' Court does have some inherent jurisdiction. It can protect itself from abuse of process, as indicated by the *House of Lords in ex parte Bennett [1994] 1 AC 42* and by the *Divisional Court in R (DPP) v Camberwell Green Youth Court [2003] EWHC 3217* Admin at paragraph 63, a case concerned with the power to re-open a decision as to mode of trial. So, as Mr Otty submits, a Magistrates' Court could reconsider an interim ASBO if for example, it was alleged to have been obtained in bad faith, but it is difficult to envisage that situation arising in circumstances where the court would not also have jurisdiction pursuant to Rule 6 .

29. There are, as Mr Otty submitted, distinctions to be drawn between interim and final ASBOs. First, and most obviously, an application for a full ASBO is the initiating step taken by an authority if it appears to the authority that the specified conditions are fulfilled. An application for an interim ASBO is ancillary and the application for the interim order, or the interim order if already made, will become ineffective if the application for an ASBO is withdrawn. In order to make a full order the Magistrates' Court must be sure that the defendant has acted in an anti-social manner, and must judge that the order is necessary to protect persons in the area from further anti-social acts (see *McCann* paragraph 37). For an interim order the legislation requires a different approach. The Magistrates' Court may make such an order where it considers that it is "just" to make it, pending the determination of the main application. So the approach of the court must be different. Although it must always act fairly it is patently not inhibited from acting unless it is *sure* that the defendant has acted in a particular way. We were told that in practice the time span from the initiation of proceedings to a final order is usually between three and six months. An interim order must be for a fixed period, whereas a final order must be for at least two years, and may be until further order. Once a final order has been made it cannot be discharged within the first two years, except by consent, but an application to vary or discharge an interim ASBO can be made at any time. As already noted, the form which must be used to make an interim order requires the court to order all parties to attend on a specified date unless the date for the hearing of the main application can be specified, in which case the summons requiring attendance will relate to that date. It follows that from first to last an interim order will be kept under the court's

supervision and control. In the case with which we are concerned all parties were required to attend court on 15 th September 2003, 13 days after the order was made, and although that attendance was not pursuant to any summons issued under Rule 6(5) , it seems to us that the court must then have been able to act to vary or discharge the order, otherwise there would seem to be no justification to fix that return date.

30. Finally in terms of distinctions, as Mr Otty pointed out, whereas an ASBO is the end of the road an interim ASBO can facilitate a fair and proper hearing of the full application by reducing the scope for witness intimidation, allowing for orderly resolution of overlapping applications, and ensuring that further instances of anti-social behaviour are not allowed to take place pending the determination of the substantive application.

31. Turning to the first of his five questions, Mr Otty submitted that when an interim order is being sought without notice Article 6(1) of the Convention is not engaged because no determination is being made of the defendant's civil rights. That is not the case with a final order (see *McCann*) but a final order is made on notice, it takes effect immediately, and it cannot be discharged for at least 2 years. By contrast an interim order can be made without notice, and if so made takes effect only on service. It exists for a defined period, and can be brought back before the court at any stage. Its impact on the defendant may be similar to that of a final order, and that can be relevant, as in *Markass* , but as Clayton and Tomlinson say at paragraph 11.157 of their “Law of Human Rights” in the passage cited by the judge, determination in this context refers to the final decision on the merits of the case, and so in general applications for interim relief are by their nature not determinative. They are only regarded as determinative if they cause irreversible prejudice to the defendant's interests, and drain to a substantial extent the final outcome of the main proceedings of its significance, as was the case in *Markass* .

32. In the present case the interim order is not drastic in its effect, it causes no significant irreversible prejudice, it is of limited duration, allows for prompt discharge or variation, and is accompanied by a host of safeguards. It certainly does not drain the proceedings for a final order of its significance. Although the matter is not critical in this case Mr Otty made it clear that the Secretary of State does not accept that Article 6 has any application even to attempts to set aside or vary interim ASBOs, but it is of course accepted that the requirements of natural justice apply at every stage.

33. Mr Otty did not accept that anything of value emerges from an attempt to categorise decisions according to whether they are administrative, or made by a quasi-judicial or judicial body. As he pointed out, it would be odd if the participation of lawyers were to render procedures even more open to challenge but he submitted that even if the procedure to obtain and maintain an interim order did have to comply with Article 6 , in fact it did so. The first thing to be recognised was that this was a civil procedure, and under Convention law contracting states have greater latitude when dealing with civil cases. The interests of others such as victims, witnesses, and the community at large, can be taken into consideration (see *McCann* at paragraphs 7 and 113). In the civil context the whole process by which rights are determined must be taken into consideration to see if Article 6 is breached, and there need not be compliance at every stage (see *Alconbury* especially Lord Clyde at paragraph 152).*Ex parte Rowlands* can be distinguished because it was concerned with criminal trials and the defect relied upon could not be cured at the same judicial level, only by an appeal. That is not so in this case. Similarly *Findlay* was concerned with criminal proceedings, so Article 6 had to apply at every level, and in fact the procedure was found to be flawed at every stage, which cannot be said in this case.

34. As noted above it is not intrinsically wrong to require the person whose rights are in issue to initiate process, or to apply for an oral hearing. In the *Schuler-Zraggen* case there had been no earlier inter partes hearing, and the relevant rules of procedure provided for the possibility of a hearing on the application of one of the parties or of the court's own motion. At paragraph 58 the European Court observed —

> “As the proceedings in that court generally take place without a public hearing, Mrs Schuler-Zgraggen could be expected to apply for one if she attached importance to it. She did not do so, however. It may reasonably be considered, therefore, that she unequivocally waived her right to a public hearing in the Federal Insurance Court.”

Mr Otty submitted that there is no reason why the institution of proceedings without notice should have any impact on the fairness of the proceedings as a whole, provided that appropriate guarantees are available when the matter is considered inter partes. That, he submitted, is illustrated by the

admissibility decision in *Dick v UK application number 26249/95 decided on 23rd October 1997* . The applicant was a Canadian citizen, with a permanent address in Jersey, but living in Germany. Whilst on a visit to Jersey he was arrested and incarcerated because of money owed in family proceedings in the United States. He was not even allowed to collect insulin which he required, but the Commission held that the draconian interim measure had no impact on the fairness of the proceedings as a whole. Later hearings were inter partes, the applicant was legally represented, and he was ultimately successful.

35. Mr Otty then turned to his second question, namely whether the procedure for obtaining an interim order without notice is in breach of natural justice or interferes improperly with access to courts. As he pointed out, there are many types of orders which are made without notice, for example, freezing orders, search orders and non-molestation orders in family proceedings. That is because they are considered to be necessary and safeguards are in place to enable the absent party to be heard. That, Mr Otty submitted, applies equally to interim ASBOs and in this context it is important to note that where such an order is obtained without notice it is ineffective until served, and the person affected has an immediate right to have it varied or discharged.

36. As to question 3, the proper test to be applied when deciding whether or not to make an interim order without notice, Mr Otty pointed out that the test applied by the judge reflected section 1D(2) of the 1998 Act. An order can be made when "the court considers that it is just to make an order", and in guidance given by the Home Office in November 2002 it is stated that —

> "When considering when to make an interim order the court will be aware that it may not be possible at the time of the interim order application to compile all the evidence that a full ASBO is necessary. Rather the court will determine the application for the interim order on the question of whether the application for the full order has been properly made and whether there is sufficient evidence of an urgent need to protect the community."

There is, Mr Otty submitted, no statutory or other justification for Mr Weatherby's submission that the test should be more stringent, and in this context the judge was right to have regard to matters such as the need to protect members of the public, including children, the seriousness of the behaviour in issue, the need to take urgent action, the extent to which action will be rendered less effective if notice is given, and the relatively limited impact of an order upon the defendant.

37. That brings us to Mr Otty's fourth question, namely whether the test was properly applied in this case, and as to that we heard from Mr Rabinder Singh. He pointed out that on the evidence it is not right to say that the police operation had been going on for many months, and the need for an interim order without notice was set out in writing as part of the application for the interim order. That paragraph is worth quoting. It reads —

> "There is an urgent need for an order to be made without notice. Such an order is needed as the community in which the defendant has committed the acts of anti-social behaviour and where the activities of drug sale and usage are perpetrated (being the same area) are at significant risk of retaliatory behaviour from the defendant and his associates. The residents and those engaged in a lawful activity in the area are extremely concerned that if an interim order is not made immediately they will be victimised before any on notice hearings could occur. In the light of the organisation of the drug 'industry' in this area if orders are not made without notice the residents will be without protection for some considerable period as hearings for on notice hearings could not be capable of being heard for many weeks especially as the defendant would be likely to seek legal advice and seek an adjournment pending such advice. The orders which are sought in the interim are not draconian and only reflect basic levels of reasonable behaviour and an exclusion for non-residents from the particular area where drugs are being sold and taken on a daily basis. The defendant will have the opportunity to contest these matters at an on notice hearing and to contest the making of a final order and the more restrictive terms at a final hearing."

Mr Martin Lee set out in writing his reasons for concluding that it was necessary for the application for an interim order to be made without notice, and again it is worth setting out what he said —

> "Having read the working documents setting out the incidents complained of and having heard from (counsel) the detail and background to these applications, I am satisfied that it is necessary that these applications are heard without notice for the following reasons.
>
> 1. There are a number of potential witnesses who would be able to provide first-hand evidence but would be unwilling to do so if notice that they were to give evidence were given because of fear of reprisals from those involved.
>
> 2. The incidents complained of, all related in one way or another, to large scale drug dealing, are continuing daily and I accept that there is a risk that there could be an escalation before the matters could all be listed for an on notice application.
>
> 3. Giving notice of the applications might undermine the overall effectiveness of any orders that might be granted by the court.
>
> I am mindful that granting permission for these applications to be heard without notice does affect the rights of the defendants named below, as they will not have an immediate opportunity to challenge the making of the orders. However, I am told that the applications made at the interim stage will be somewhat less far-reaching than the orders that will be sought at a hearing on notice.
>
> I am therefore satisfied that the rights of the defendants will be protected sufficiently in view of the fact that they will have an opportunity of a full hearing within a reasonable period of time, that the orders will be less onerous than those ultimately sought in respect of each person and that, in effect, the order will seek to remove the defendants from the area where they do not live and do not have any apparent legitimate reason for visiting."

When the matter came before District Judge Darnton he was addressed about not only the general situation but also the position of each defendant in turn. In the case of M there was, attached to the application for a full order, a schedule setting out in the first section thirteen incidents of anti-social behaviour in the relevant area in which M was alleged to have been involved between March and August 2003. The District Judge had before him a detailed bundle of statements, which we have seen. He also heard oral evidence from Detective Sergeant Thompson and saw a video film of what was said to be drug dealing in the area. It was against that background that he reached his conclusions, as set out in paragraph 18 of the judgment of Owen J. Plainly, it was submitted, if the test adopted by the District Judge was correct, then his conclusions must stand because there was before him a wealth of evidence to support it.

38. Mr Otty's fifth question addresses the remedy claimed in these proceedings. The judge found it unnecessary to decide whether the court had power to quash Rule 5 . Mr Otty submitted that even if the appeal were to succeed that would not be an appropriate remedy. In accordance with section 3 of the Human Rights Act 1998 the procedural rule could and should be read in such a way as to overcome the identified defect. Mr Weatherby submitted that would not be possible because it would be tantamount to re-writing legislation.

Conclusion

39. In the light of the helpful submissions which are summarised above it seems to us that it is possible to reach certain conclusions —

> (1) Although it is unusual for a court in this country to make an order against a person who has not been given notice of the proceedings that course is adopted when it is necessary to do so, and subject to safeguards which enable the person affected at an early stage to have the order reviewed or discharged.
>
> (2) The more intrusive the order the more the court will require proof that it is necessary that it

should be made, and made in the particular form sought, but there is nothing intrinsically objectionable about the power to grant an interim ASBO without notice.

(3) It is important to note that an interim ASBO made without notice is ineffective until served, and when made as required in the standard form it does make provision for all parties to attend at court, either on a return date or on a date fixed for the hearing of the full application. If it be the former then, in our judgment, it would be open to the court to re-consider the order, either to vary it or discharge it, if it considered that to be the appropriate course. We were told by Mr Rabinder Singh that it is the practice at Leeds always to ask the court to fix an early return date — in the present case it was 13 days after the date of the order, and that seems to us to be desirable. Reliance upon the date for the hearing for the full application would seem to be undesirable unless it can be heard at a very early date.

(4) From the time that the order is served the person upon whom it is served can apply under Rule 6 to have the order varied or discharged, and the requirement that the justices' chief executive give not less than 14 days notice of the hearing of the application is in our judgment a sensible and realistic procedural requirement, which does not undermine the right of the person affected to seek rapid relief. Nothing, in our judgment, can be made of the fact that under Rule 6 it is for the parties and not for the court to seek a review.

(5) Because an application for an interim order without notice can only be made when the justices' clerk is satisfied that it is necessary for the application to be made without notice, and because the order can only be made for a limited period, when the court considers that it is just to make it, and in circumstances where it can be reviewed or discharged as indicated above, it seems to us to be impossible to say that it determines civil rights. Certainly for a time it restricts certain freedoms, and the restriction can be enforced by sanctions, but that is the nature of any interim order, so in our judgment provided the interim order follows its normal course Article 6 of the European Convention will not be engaged.

(6) Although Article 6 is not engaged the procedure must be fair, and there is no apparent unfairness in the procedure we have had to examine.

(7) If Article 6 were engaged it would be appropriate to look at the process as a whole, bearing in mind that the application for an ASBO is a civil procedure to which an application for an interim order is ancillary, and if that approach were adopted no contravention of the requirements of Article 6 could be discerned.

(8) The test to be adopted by a Magistrates' Court when deciding whether or not to make an interim order must be the statutory test, whether it is just to make the order. That involves consideration of all relevant circumstances, including in a case such as this the fact that the application has been made without notice. Obviously the court must consider whether the application for the final order has been properly made, but there is no justification for requiring the Magistrates' Court, when considering whether to make an interim order, to decide whether the evidence in support of the full order discloses an extremely strong prima facie case.

(9) The correct test having been used in the present case, there was ample evidence to support the conclusion of District Judge Darnton that in relation to M it was just for an interim order to be made. The fact that no vulnerable witnesses were identified by name was of no significance when the available evidence and information was considered as a whole.

(10) There is therefore no substance in any of the grounds of appeal, and it is unnecessary to consider the availability of the relief sought. If the procedure had been successfully impugned it would certainly be necessary to consider the possible impact of section 3 of the Human Rights Act before deciding to quash Rule 5 .

For those reasons we therefore dismiss this appeal.

Order: Appeal dismissed. No order as to costs save that the costs of the Appellant be subject to a detailed Community Legal Service Funding assessment.