

THE SUPREME COURT

Keane C.J.  
Denham J.  
Murphy J.  
Murray J.  
Hardiman J.  
*220/00*

BETWEEN:

DAVID KEATING

Applicant

and

JUDGE TIMOTHY CROWLEY, IRELAND

AND THE ATTORNEY GENERAL

Respondents

And By Order

THE DIRECTOR OF PUBLIC PROSECUTIONS

Notice Party And By Order

LORRANE KEATING

Notice Party

JUDGMENT of the Court delivered the 9th day of October 2002 by Keane C.J.

Introduction

On the 3<sup>rd</sup> February 1999, the applicant was given leave by the High Court to apply by way of judicial review for inter alia a declaration that subsections (1), (2), and (3) of the Domestic Violence Act, 1996 (hereafter ‘the 1996 Act’) were invalid insofar and to the extent that they were repugnant to the provisions of the Constitution and, in particular, Article 38.1, 40.3, 41.1 and 50.1.

The proceedings arose out of the granting by the first named respondent on the 6<sup>th</sup> November, 1998 of an interim

barring order pursuant to the 1996 Act on the application ex parte of the applicant's wife who is the second notice party in these proceedings. In addition to the declarations claiming that the provisions in question of the 1996 Act were unconstitutional, the applicant was given leave to apply for judicial review by way of certiorari in respect of the interim barring order.

A statement of opposition having been filed on behalf of the respondents, a notice of motion seeking the reliefs in question came on for hearing before Kelly J. In an *ex tempore* judgment delivered on the 2nd June, 2000, the learned High Court judge refused to grant the reliefs sought. According to the note of his ruling, approved of by him, he did so on the basis that, although the applicant applied to the District Court, within three days of its having been made, for an order discharging the interim barring order, he did not proceed with that application on the date fixed for hearing it, i.e. 23rd November, 1998. In those circumstances, the learned High Court judge concluded that the application was without merit and he accordingly refused to grant the reliefs sought. From that judgment and order, the applicant has now appealed to this court.

One of the grounds of appeal advanced was that the learned High Court judge was wrong in law in failing to find that the making of the interim barring order was "*invalid and repugnant to the provisions of Bunreacht na hEireann.*" In the written submissions lodged on behalf of the applicant in this court, it is argued that s.4(1), (2) and (3) of the 1996 Act are repugnant to Articles 38(1), 40.1 and 40.3.1 and 2 and Article 41.1.1 and 2.

In their written submissions, it was argued on behalf of the respondents that it had not been contended in the High Court that the relevant provisions were unconstitutional but rather that the applicant was entitled to certiorari on the grounds that the first named respondent had acted *ultra vires* in granting the interim barring order. It was also submitted that the notice of appeal did not, in terms, advance as ground of appeal the suggested unconstitutionality of the relevant provisions. It was submitted that, in accordance with the decision of this court in Attorney General (SPUC) —v- Open Door Counselling Limited (No 2) [1994] 2 IR 333, the court should not, other than in the most exceptional circumstances dictated by the necessity of justice, consider an issue of constitutional law which had not been fully argued and decided in the High Court. This ground for resisting the appeal by the applicant was also relied on by Mr Dermot McGuinness S.C. on behalf of the respondents at the outset of the oral hearing of the appeal.

In the note of his judgment in the High Court which was approved by him, the learned High Court judge says

*"The applicant alleges that s. 4(1), (2) and (3) of [the 1996 Act] is unconstitutional. In fact, the whole thrust of the applicant's case was directed to s.4(3)."*

Again, at p.6 of the note of his judgment, the following appears

*"For the applicant, it was alleged that s.4(3) is offensive to the Constitution, constitutes an infringement of the applicant's right to cross-examine or confront a complainant, offends the audi alteram partem principle, constitutes an infringement of the applicant '5 right as a human person to be held equal before the law, and invidiously discriminate against the applicant in the conduct of his defence.*

*It is clear that by its very definition an interim barring order can only exist for a limited period of time. There is no time limit mentioned either in the section or in the Act. In the order made by the District Court on the 6th November 1998 the return date given for the full hearing was not until the 3rd February, 1999, a period of almost three months. The applicant would in my view be on good ground in suggesting that the subsection was constitutionally offensive if an ex parte order with such serious consequences were to remain in place for a period of three months. However, that is not the full picture."*

The learned High Court judge then went on to consider the consequences for the applicant's claim of the fact that, while he had applied for the interim barring order to be discharged, he never proceeded with that application.

It is, accordingly, clear from the judgment that the question as to whether s.4(1), (2) and (3) of the 1996 Act, or any

part thereof, are invalid having regard to the provisions of the Constitution was in fact the subject of arguments in the High Court. Nor can there be any question as to the locus standi of the applicant to advance such an argument. The court is also satisfied that the notice of appeal made it clear that the applicant would be seeking to reverse the order of the High Court insofar as it declined to grant a declaration that the provisions in question were unconstitutional.

It was not suggested on behalf of the respondents in this court that, in the event of this court being satisfied that the issue of constitutionality had been argued in the High Court, the finding by the High Court judge that he was not entitled to the reliefs sought solely on the ground that his claim was, in the view of the High Court judge and for the reasons given by him, without merit could be supported. The court is satisfied in these circumstances that it should proceed to consider the issue as to the constitutionality of the relevant provisions, which was the only ground of appeal relied on in this court.

### The Factual Background

The applicant was married to the second notice party on the 31st May, 1991. There is one child of the marriage, a girl aged six years. The wife also has a son from a previous relationship who was adopted by the applicant.

In the information sworn by her on the 6th November, 1998 which grounded her application for the interim barring order, the wife said

*“For about the last year and a half my husband has been physically and verbally abusive to me. He has a drink problem. He has hit me and pulled me around by the hair. He has smashed ornaments and articles. The children have witnessed this. Last night he came home drunk. I went down to my friend. The kids were with him. He did not like this and began shouting at me, the children and the neighbours. I called the gardai. He wouldn’t give me my children. I had to stay in my friends.*

*This morning the lock was changed and he was gone with the children.*

*Similar occurrences happen on a weekly basis. I am under stress and in fear and am seeking an interim barring order.”*

In his affidavit grounding the application for leave, the applicant deposed that he was *most distressed at the contents of* the information which, he said, were *“largely untrue”*. He also said that, he had been *‘forced by events in the early hours of the 6th November, 1998’* to leave and take his children with him to his brother’s house. He said that he subsequently brought his children back to his wife who returned with them to the family home on or about the 10th November, 1998 and that she also asked him to return home to care for the children on the

11th November, 1998. He said that he returned to the family home *“on congenial terms”* on the 15th November, 1998 at which stage his wife and the children were out. He said that when his wife returned, she *“verbally and physically abused me”* at about 1.30 a.m. and, on leaving the family home, he was then arrested by a garda and charged with an offence of being in breach of the interim barring order.

In a supplemental affidavit, the applicant said that, on the 9th November, 1998, *“on the advice of a friend”* he had applied to the District Court for the discharge of the barring order. He said that subsequently, on the 23rd November, 1998, after taking legal advice he agreed to postpone the application to discharge the interim barring order until the 3rd March, 1999, the date fixed for the hearing on the 6th November, 1998. This would appear to be an error, since the interim barring order itself is stated to be effective until the 3rd February, 1999.

### Submissions of the Parties

On behalf of the appellant, Mr O’Kennedy, S.C. submitted that s.4(1), (2) and (3) of the 1996 Act deprived the applicant of natural justice and of his constitutional right to equal treatment before the law and to fair procedures. The applicant was deprived of his right to be present in court to hear the allegations made against him and of his right to confront or cross-examine the second named notice party on the accusations made against him in her sworn information. The court, in operating the provisions of the 1996 Act, had also failed to protect and vindicate his good name contrary to the provisions of the Article 41(1) of the Constitution.

Mr O’Kennedy further submitted that the proceedings in question were civil in character and, accordingly, the burden of proof on a person seeking a barring order was to satisfy the court simply on the balance of probabilities that the making of an order was justified. The effect of the 1996 Act was, accordingly, to enable a person who made an allegation that there was “*an immediate risk of significant harm*” to him or her or any dependant person to a hearing in the absence of the person against whom the allegations were made, thus depriving the latter, the applicant in this case, of fair procedures and the rights and protections afforded by the criminal law. This was so, although the consequences of a breach of an interim barring order were significantly more draconian than those which resulted from a breach of civil orders generally, involving as they did a sentence of twelve months imprisonment and/or a fine of £1,500.

Mr O’Kennedy said that, while it was conceded that the court would seek to construe the Act, if it were possible to do so, in accordance with the Constitution, it is not possible so to interpret s.4(1), (2) and (3) of the 1996 Act. The Act expressly permits a form of procedure, i.e. an application *ex parte* for an interim barring order, which had the effect of removing the applicant against his will from the family home and the society of his child in proceedings where he was not heard and had no opportunity of protecting his rights. He submitted that the guarantee of fair procedures under the Constitution was not confined to proceedings which were criminal in nature and extended beyond the traditional canons of natural justice, citing *Re: Haughey* [1971] I.R. 217.

Mr O’Kennedy urged that it was a notable feature of the procedures prescribed by the Act that an interim barring order could last for an unspecified period of time. He pointed out that this was in contrast to the provisions of the Child Care Act, 1991, replicating the equivalent provisions of the Children Act, 1908, under which a “*fit person*” order depriving a parent of the custody of a child could not last for more than eight days.

Mr O’Kennedy submitted that the fact that the applicant could apply to the District Court for an order discharging or varying the interim barring order and would, in any event, be entitled to a substantive hearing of the application for a barring order in due course did not in any way cure the serious constitutional defects in the procedures provided for obtaining an *ex parte* interim order. Unlike the normal form of injunction granted in civil proceedings, the interim barring order was mandatory in effect, deprived the applicant without any hearing of his constitutional right to occupy the family home and rendered him guilty of a criminal offence in the event of his not complying with the order. The legislation placed the applicant in the position of having to persuade the District Court that the original interim order should never have been granted; the Act clearly placed the burden on him to satisfy the court that this was so.

On behalf of the respondents, Mr McGuinness submitted that the provisions contained in the 1996 Act for the making of barring orders constituted an essential protection for victims or potential victims of domestic violence and spousal and/or parental abuse. He said that it constituted a necessary and reasonable legislative response to an accepted and pressing social need. An interim barring order could only be made *ex parte* in exceptional cases where the court considered it necessary and expedient in the interests of justice and where there was an immediate risk of significant harm to the applicant or dependants of the applicant.

Mr McGuinness submitted that the 1976 Act enjoyed not merely the presumption of constitutionality but also the consequential presumption, identified in the judgment of this court in *East Donegal Co-Operative Limited -V- the Attorney General* [1 970J I.R. 317, that the Oireachtas intended that any procedures permitted or prescribed by an Act of the Oireachtas would be conducted in accordance with the principles of constitutional justice. He said that, while it was accepted that the remedy of a barring order was one with serious and far-reaching consequences for the person against whom it was made, the provisions of the 1996 Act were designed to ensure substantive and procedural fairness for those against whom such an application was made. In particular, the purpose of s.4 was to ensure that the safety and welfare of an applicant spouse and/or children was protected in the period between the issuing of the summons for a barring order and its final determination. The pre-conditions which had to be met before an interim barring order could be made were so restrictive as to constitute a fair and just balance between the rights of the person whose safety or welfare was being protected and the person against whom the order was sought to be made.

Mr McGuinness urged that it was legitimate to depart from established principles of natural justice, including *audi alteram partem*, where there was an immediate risk of significant harm. There were well established procedures

under our law enabling court orders to be made either of a restrictive or a mandatory nature without the persons affected having been afforded an opportunity to be heard. The procedures under the 1996 Act for the granting of interim barring orders on an *ex parte* basis reflected the procedures established by Order 52 Rule 3 of the Rules of the Superior Courts for the granting of injunctions on an *ex parte* application. He cited in this connection, the decisions of this court in *O'Callaghan -v- Commissioners of Public Works [1985]* ILRM 364, *The State (Lynch) -v- Cooney [1982]* I.R. 337, *Irish Family Planning Association -v- Rvan [1979]* I.R. 295 and *Murphy -v- M(G)*, (unreported), judgment delivered 18th October, 2001.

Mr McGuinness further submitted that the constitutional right of the applicant's wife and children had to be considered when the constitutional validity of s.4 of the 1996 Act was in issue. The State was bound to uphold the right of the applicant's wife and children not to be physically endangered. The interim barring order procedure had been introduced in order to remedy a lacuna in the Family Law (Protection of Spouses and Children) Act, 1981 whereby applicant spouses and children who sought the protection provided by a barring order were left in a position where the respondent would continue to reside with them between the issuing of the summons and the hearing of the application for a barring order. The provisions, accordingly, represented a reasonable and proper balance between the constitutional right of the applicant and her dependant children not to be physically endangered and the constitutional right to fair procedures of the person against whom the order is made.

Mr McGuinness further submitted that s.4(3) did not infringe Article 40.3 of the Constitution in failing to protect and vindicate the applicant's good name; proceedings of this nature were held in camera and no publication of the order was made other than that necessary to ensure its enforcement by An Garda Síochána.

#### The Applicable Law

The 1996 Act is described in its long title as

*"An Act to make provision for the protection of a spouse and any children or other dependant persons and of persons in other domestic relationships whose safety or welfare requires it because of the conduct of another person in the domestic relationship concerned..."*

The Act enables defined categories of persons to apply for and obtain from the Circuit Court or the District Court four forms of order, i.e., a barring order, an interim barring order, a protection order and a safety order. These proceedings are concerned with barring orders and, in particular interim barring orders. Section 3(1) of the Act specifies the category of persons who may apply for and obtain such orders, i.e. a spouse of the respondent or a person who has lived with the respondent as husband or wife for a period of at least six months on aggregate during the period of nine months immediately prior to the application and a parent of the respondent if the latter is of full age and not, in relation to the parent, a "*dependant person*" in the meaning of the Act.

Under s.3(2)(a) a court may make a barring order, on the application of such a person, where

*"It is of the opinion that there are reasonable grounds for believing that the safety or welfare of the applicant or any dependant person so requires."*

Such an order may

*"(i) direct the respondent if residing at a place where the applicant or that dependant person resides, to leave such place and*

*(ii) whether the respondent is or is not residing at a place where the applicant or that dependant person resides, prohibit the respondent from entering such place until further order of the court or until such other time as the court shall specify."*

Under subparagraph (b), the court, in deciding whether or not to grant a barring order, must have regard to the safety and welfare of any dependant person in respect of whom the respondent is a parent or *in loco parentis*, where the dependant person is residing at the place to which the order, if made, would relate.

The barring order may, if the court thinks fit, prohibit the respondent from doing one or more of the following:

- “(a) Using or threatening to use violence against the applicant or any dependant persons;*
- (b) Molesting or putting in fear the applicant or any dependant person;*
- (c) Attending at or in the vicinity of or watching or besetting a place where, the applicant or any dependant person resides.”*

Subsection (6) enables the court, on the application inter alia of the respondent to make an order varying a barring order. The barring order, under subsection (8), is to expire three years after the date of its making or on the expiration of such shorter period as the court may provide for in the order. A further barring order may, however, be made with effect from the expiration of the original barring order.

Section 4, the constitutionality of which is impugned in these proceedings, is as follows:

*“(1) If on the making of an application for a barring order or between the making of such application and its determination, the court is of the opinion that there are reasonable grounds for believing that —*

*(a) there is an immediate risk of significant harm to the applicant or any dependant person if the order is not made immediately, and*

*(b) the granting of a protection order would not be sufficient to protect the applicant or any dependant person, the court may, subject to s.7 and having taken into account any order made or to be made to which paragraph (a) or (d) of subsection (2) of s.9 relates, by order (in this Act referred to as an “interim barring order”) -*

*(i) direct the respondent, if residing at a place where the applicant or that dependant person resides, to leave such place, and*

*(ii) whether the respondent is or is not residing at a place where the applicant or that dependant resides, prohibit that respondent from entering such place until further order of the court or until such other time as the court shall specify.*

*(2) Subsections (3), (4), (5), (6), (7) and (12) of s.3 shall apply to an interim barring order as they apply to a barring order.*

*(3) where the court in exceptional cases considers it necessary or expedient in the interests of justice, an interim barring order may be made ex parte or notwithstanding the fact that the originating document or other notice of the application required to be duly served on the respondent to the application for an barring order has not been so served.*

*(4) An interim barring order shall cease to have effect on the determination by the court of the application for a barring order.*

*(5) Notwithstanding subsection (4), 50 much of an interim barring order as was made for the benefit of a dependant person shall cease to have effect in accordance with that subsection or upon such person ceasing to be a dependant person, whichever first occurs.”*

The District Court and, on appeal, the Circuit Court has jurisdiction to make such barring orders and interim barring orders. The “*protection order*” referred to in s.4(1) is one which directs the respondent to an application for a barring order not to use or threaten to use violence against, molest or put in fear the applicant or a dependant person and not to watch or beset the place where the applicant or the dependant person resides.

Section 10 provides inter alia that a barring order or an interim barring order is to take effect on notification of its making being given to the respondent. Section 17(1) provides inter alia that a respondent who contravenes a barring

order or an interim barring is to be guilty of an offence and liable on summary conviction to a fine not exceeding £1,500 or, at the discretion of the court, to imprisonment for a term not exceeding twelve months or to both. Section 18(1)(a) empowers a member of An Garda Síochána to arrest the respondent without warrant where he has “reasonable cause” for believing that an offence has been committed under s.17.

Section 13 provides inter alia that, where a barring order or an interim barring order has been made, the court, on the application of the respondent

*“Shall discharge the order if it is of the opinion that the safety and welfare of the applicant or such dependant person for whose protection the order was made does not require that the order should continue in force.”*

Some important features of these provisions should be noted. First, an interim barring order — including one made ex parte in the absence of the respondent as in this case continues in effect until the determination of the application for the barring order unless, of course, it is discharged in the meantime under s.13. Secondly, an interim order, including one granted ex parte, takes effect immediately upon the respondent being notified of its having been made, renders the respondent guilty of a criminal offence if it is not complied with and enables the Gardaí to arrest him or her without warrant if a garda suspects that he or she has been guilty of such an offence. Thirdly, there is no indication of the criteria by which the District Court, in the case of an ex parte application for an interim barring order, is to decide whether it is an exceptional case in which it is necessary or expedient in the interests of justice to grant the application.

Order 59, Rule 6 of the District Court Rules provides

*“(1) Where an interim barring order is made under the terms of s. 4 of the [1996 Act] on the occasion of the making of an application for a barring order, it may be made on the evidence of applicant viva voce and on oath.*

*(2) Where an interim barring order is made under the terms of s.4 of the Act between the making of an application for a barring order and its determination, it shall be made on the information on oath and in writing of the applicant in Form 59.5 Schedule C.*

*(3) where the court in exceptional cases considers it necessary or expedient in the interests of justice, an interim barring order may be made ex parte or notwithstanding the fact that the summons referred in Rule 5 of this order has not been served.”*

Order 66 Rule 5 of the Circuit Court Rules @40. 1) (Domestic Violence Act 1996) 2000 provides that

*“An application for a protection order may be made by motion on notice or by ex parte application after the institution of proceedings for a barring order or safety order and an application for an interim barring order may be made by motion on notice or by ex parte application after the institution of proceedings for a barring order and such application shall be grounded upon an affidavit to be sworn by the applicant or such other person as may be appropriate. An application for the discharge or variation of a protection order or interim barring order made pursuant to this rule shall be by motion on notice or by ex parte application and shall be grounded upon an affidavit to be sworn by the respondent or such other person as may be appropriate. Urgent applications under this rule may be made to a judge at any time or place approved by him or her by arrangement with the County Registrar. Where interim relief of any nature is granted following an ex parte application, the applicant shall forthwith cause a notice of motion to issue in respect of the reliefs which are being sought and or affirming the ex parte orders which have been made, such motion to be returnable before the court not later than eight days following the granting of the ex parte relief and to be served upon the respondent in accordance with the provisions of Rule 9 hereof unless otherwise directed by the court. Save where otherwise directed by the court, all ex parte orders obtained shall lapse upon the expiration of the eight days following the making thereof*

It is noteworthy that, in contrast to the provisions in the District Court Rules, the Circuit Court Rules expressly require the applicant to issue a notice of motion returnable not later than eight days following the granting of ex parte relief seeking the same relief and provide that any ex parte orders obtained are to lapse upon the expiration of eight days following their having been made, unless the court otherwise directs.

In considering whether the impugned provisions of the 1996 Act are invalid having regard to the provisions of the Constitution, the court notes at the outset that they enjoy the benefit of the presumption of constitutionality and that the onus is on the applicant to establish that they are constitutionally invalid. The court must also give effect to the principle laid down in McDonald -v- Bord na gCon (No 2) [1965] I.R. 217, that if in respect of any provision or provisions of the Act two or more constructions are reasonably open, one of which is constitutional and the other is unconstitutional, it is to be presumed that the Oireachtas intended only the constitutional construction.

The court must also give effect to the decision in East Donegal Co-Operative -v- Attorney General that it is to be presumed that the Oireachtas intended that any proceedings, procedures, discretions or adjudications permitted, provided for, or prescribed by any enactment would be conducted in accordance with the principles of constitutional justice and that any departure from those principles would be restrained or corrected by the courts.

The principal complaint of the applicant in these proceedings is that these provisions, even when construed in the light of the constitutional presumptions mandated by those authorities, necessarily fail to protect his rights under Article 40 of the Constitution which provides

*“1. The State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.*

*2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.”*

An application for a barring order or an interim barring order is properly characterised as a civil rather than a criminal proceeding. It has none of the characteristics of a criminal proceeding identified in the judgments of the court in Melling -V- O Mathghamhna and Anor [1962] I.R. 1 and in the more recent judgment of the court in Murphy -v- M (G) (unreported; judgment delivered 18th October, 2001.) Accordingly, the burden of proof on the applicant for an interim barring order is to satisfy the court on the balance of probabilities that the order should be granted. However, although the proceedings are civil in character, the respondent remains entitled to the benefit of the constitutional guarantee that he or she will be afforded fair procedures in the hearing of the proceedings in accordance with the principles laid down by this court in Re: Haughey [1971] I.R. 260.

While the Oireachtas in upholding other constitutional rights in this case the rights of spouses and dependant children to be protected against physical violence — is entitled to abridge the constitutional right to due process of other persons, the extent of that abridgement must be proportionate, i.e. no more than is reasonably required in order to secure that the constitutional right in question is protected and vindicated. (See Heaney -v- Ireland [1996] IIR 5.80.) In reaching a decision as to whether that constitutional balance has been achieved in the legislation under consideration, it is of paramount importance to bear in mind the consequences of the order made. Thus, in the present case it results in the forcible removal of the applicant from the family home and the society of his child on the basis of allegations in respect of which he has no opportunity of being heard, treats him as having committed a criminal offence resulting in a possible custodial sentence in the event of his non-compliance with the order and makes him liable to arrest by a garda without a warrant if the latter entertains a reasonable suspicion that he has failed to comply with the order.

The applicant, accordingly, is unarguably deprived of the protection of one of the two central maxims of natural justice audi alteram partem - in proceedings which may have profoundly serious consequences for him in his personal and family life. The issue in this case is not as to whether the Oireachtas was entitled to abridge, even in a relatively drastic fashion, the right of the applicant to be heard, in order to protect spouses and dependant children from domestic violence. That the legislature were entitled to effect such an abridgement of the rights of individual citizens in order to deal with the social evil of domestic violence is beyond dispute. The question for resolution in this case is as to whether the manner in which the abridgement of the right to be heard has been effected is proportionate in the sense already indicated.

### Conclusion

It is understandable that the legislature, in dealing with the problem of domestic violence should have conferred on the courts the jurisdiction to grant what are effectively injunctions to protect spouses and dependant children against

such violence. As has already been noted, however, there are significant differences between the statutory jurisdiction conferred on the District Court to grant barring orders and the jurisdiction traditionally enjoyed by Courts of Chancery to grant injunctions in civil cases where damages would not be an adequate remedy.

The mandatory nature of the interim barring order, even when granted on an ex parte application, is in sharp contrast to the nature of the interim or interlocutory injunctions typically granted in civil proceedings. Such injunctions are normally intended to do no more than preserve the status quo pending the determination of the parties' rights in plenary proceedings. While they may on occasions be mandatory in nature, that is unquestionably the exception rather than the rule. It is even rarer for mandatory injunctions to be granted on an interim basis on the ex parte application of the plaintiff.

Even more strikingly, although an interim injunction may be granted on an ex parte application in the absence of the defendant, the courts have always been concerned to ensure that the interference thus effected with what may very well be a right which the defendant is entitled to exercise without such interference is as limited in its duration as is practicable. In the High Court, the injunction will not normally last beyond the next motion day and, in many cases, the court will abridge the time for service of a notice of motion so as to ensure that the defendant is heard in a matter of days. With the hearing of the notice of motion, the interim injunction automatically expires.

The interim barring order, moreover, even where obtained on an ex parte application, is not merely mandatory in its effect but brings in its wake draconian consequences which are wholly foreign to the concept of the injunction as traditionally understood. A person who fails to comply with such an injunction commits no offence, although the plaintiff may put in train the process of attachment for contempt in order to obtain compliance with the order. In the case of an interim barring order obtained ex parte in the absence of the respondent, the latter automatically commits a criminal offence in failing to comply with the order, even if it should subsequently transpire that it should never have been granted. He or she is, moreover, liable to be arrested without warrant by a garda having a reasonable suspicion that he or she is in breach of the order.

Even in a case where the District Court or the Circuit Court concludes that the interim order should never have been granted, it can do no more than discharge the order. The applicant cannot be required to compensate the respondent in any way for an order which may have had the most damaging consequences for him. Again, the contrast with the position of a defendant who is subject to an interim or interlocutory injunction is stark: such an injunction will only be granted where the plaintiff has undertaken to pay any damages to which the defendant may be entitled in the event of it being held that the injunction should not have been granted.

It must also be borne in mind that an interim barring order will typically be granted in a case where the relationship between the parties has effectively broken down and disputes have arisen, or will arise, in relation to matters such as custody of children, the payment of maintenance and adjustment of property rights. The granting of an interim order in the absence of the defendant may in such cases crucially tilt the balance of the entire litigation against him or her to an extent which may subsequently be difficult to redress. In particular, the order ultimately made by the court dealing with the custody of the children of the marriage may necessarily be affected by the absence of one spouse from the family home for a relatively significant period as the result of a barring order: necessarily, because the paramount concern of the court on such an application will be the welfare of the children and the removal of one spouse from the home by legal process for a relatively lengthy period, even though subsequently found to have been wrongful, may be a factor to which the court may have to have regard in determining a custody issue.

Seen in that context, the failure of the legislation to impose any time limit on the operation of an interim barring order, even when granted ex parte in the absence of the respondent, other than the provision that it is to expire when the application for an interim barring itself is determined, is inexplicable. While in the present case, the District Judge fixed the hearing of the application for a barring order for a date three months into the future, the court notes that the statute nowhere imposes on the District Court any obligation, when granting an interim barring order, to limit its duration in time. If no date is fixed for the hearing of the application for the barring order itself, as distinct from the interim barring order, it would be a matter for the applicant for the interim barring order to bring the matter before the District Court again. Manifestly, he or she will have little incentive to do so while the interim order remains in force.

It is undoubtedly the case that the respondent may apply to the court at any time to have the interim order discharged

or varied. No reason has been advanced, however, presumably because there is none, as to why the legislature should have imposed on respondents in this particular form of litigation, with all its draconian consequences, the obligation to take the initiative in issuing proceedings in order to obtain the discharge of an order granted in his or her absence which, it may be, should never have been granted in the first place. It has not been demonstrated that the remedy of an interim order granted on an ex parte basis would be in some sense seriously weakened if the interim order thus obtained were to be of a limited duration only, thus requiring the applicant, at the earliest practicable opportunity, to satisfy the court in the presence of the opposing party that the order was properly granted and should now be continued in force.

The court fully appreciates the considerations which the executive and legislature would have had in mind in providing for the granting, of interim barring orders on an ex parte basis. In the many cases where the spouses are still living together and one is being subjected to violence by the other which may also extend to the children, it may simply not be practicable for the application to be made on notice to the respondent. It is not the existence of a jurisdiction to grant interim barring orders on an ex parte basis which creates a serious constitutional difficulty. It is the manner in which the legislation has provided for the granting of such orders.

The court has already noted that the Circuit Court Rules expressly provide that an interim barring order granted on an ex parte application is not to remain in force for longer than eight days. It is understandable that, in the light of the considerations already referred to, the rule making authority should have considered it appropriate to include that limitation. The fact remains that no such limitation is contained in the District Court Rules. It may be that this was because the rule making authority were doubtful as to whether such a time limit would have been intra vires the parent statute. The court, however, finds it unnecessary to surmise whether that was the reason for not including any such provision in the Rules or, indeed, whether the corresponding rule in the Circuit Court Rules was ultra vires the parent statute.

In the present case, it was not suggested on behalf of the respondents that the District Judge was not entitled to fix the hearing of the application for the barring order itself on February 3rd, i.e. almost three months from the making of the interim order. On the contrary, the application for an order of certiorari in respect of the granting of an interim order to continue until that date was successfully opposed in the High Court. It is to be borne in mind that the District Court is a busy court of summary jurisdiction which deals with a huge volume of litigation and it may simply not be practicable to find a day for the hearing of the substantive barring order - as distinct from an interim order - until, as in the present case, a period of some months has elapsed. In these circumstances, the presumption that the District Court will observe the requirements of constitutional justice and that any departure therefrom will be corrected by the superior courts must be seen in the light of the constraints imposed by the statute itself on the District Court and the well established reluctance of the superior courts to interfere with what may subsequently be perceived as errors by courts or tribunals, where they have acted throughout within their jurisdiction: see R (Martin) -v- Mahony [1910] 2 I.R. 695; Killeen -v- Director of Public Prosecutions [1997] 3 I.R. 218.

The court is, accordingly, satisfied that the procedures prescribed by subsection (1), (3) and (4) of the 1996 Act, in failing to prescribe a fixed period of relatively short duration during which an interim barring order made ex parte is to continue in force deprive the respondents to such applications of the protection of the principle of audi alteram partem in a manner and to an extent which is disproportionate, unreasonable and unnecessary. The appeal will accordingly be allowed, the order of the High Court set aside and an order substituted therefor granting a declaration that sub—section (3) of S4 of the 1996 Act is invalid having regard to the provisions of the Constitution and an order of certiorari quashing the interim barring order of the District Court.