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Judgment by: Charleton J.

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Neutral Citation Number: [2008] IEHC 241

THE HIGH COURT
JUDICIAL REVIEW

2007 No. 1611 JR

BETWEEN

M. J. L.

APPLICANT

AND

IRELAND AND THE ATTORNEY GENERAL

RESPONDENT

AND

D. L.

NOTICE PARTY

JUDGMENT of Mr. Justice Charleton delivered on the 11th day of July, 2008

1. The applicant seeks a declaration that s. 5 of the Domestic Violence Act 1996, is unconstitutional. In consequence he argues that a protection order that was made against him on an *ex parte* basis on 25th September, 2007, in Kilkenny District Court should fall.

Facts

2. I will refer to the facts in a brief way. Mr. and Mrs. L. have five children who range in age from 24 years to 12 years. This application concerns the two youngest children, as the other three have attained their majority. The applicant describes himself as a deserted husband. At least some of children, and certainly the two youngest children around whom this application principally revolves, were home-schooled by the applicant and his wife for about eight years up to September, 2006. This form of education was pursued because the applicant claimed to have “concerns as to the moral integrity of the schools” that the three eldest children had been sent to. Unhappy differences arose between the husband and the wife. These came to a head during the summer and autumn of 2006. An essential disagreement that seems to have emerged was that the husband wished to continue home-schooling whereas the wife wished to send the children to a State school. In August of that year the husband went to Australia. The next day his wife issued an application for a protection order under s. 5 of the Domestic Violence Act 1996. Conversations between the

husband and wife prior to his leaving had aired their mutual disagreements and he was aware that if he would not agree to a change of schooling that she was considering making an application to court. The hearing in relation to the protection order was to take place on 29th August, before a District Court in Kilkenny. On 28th August following an email and a telephone conversation with his wife, the husband became aware of that application but could not return in time. The children were sent by the wife to be educated at local schools. A safety order was made on 26th September, 2006, and that is the only occasion on which the applicant, on what he has told me, was present in Kilkenny District Court. During that hearing the judge also made an order under the Guardianship of Infants Act 1964, as amended, that the children should continue at school. Subsequently, those schooling orders were continued on an interim basis by the District Court on 13th December, 2006, on 14th February, 2007, on 9th May, 2007, and, finally, an order was made without a return date in July, 2007. The last three of these orders also included provision as to custody.

3. Whereas marriages break up, and whereas this is regrettable, Mr. L. takes the view that he has been deserted. In a letter to his wife dated August 2007, he said:-

> "Your behaviour most especially your desertion, your refusal without just cause or reason, of access by the children to their father guardian, your continued incapacity to provide reasons to justify your behaviour and to put proposals for agreement, has and continues to inconvenience the family and by abusing the power you pretend to exercise, has so obviously and repeatedly shown up to be to the detriment of your childrens' welfare. As you have continued to fail to act even as a guardian let alone a custodian, and so that provision for their welfare is no longer neglected, it is obvious that I and only I am of the disposition to make and manage this manly task. The following therefore are my proposals in regard to the childrens' right to access to both their parents notwithstanding that I do not acquiesce to the unacceptable situation that has arisen both in family and schooling arrangements, from your actions and your mischievous court proceedings … [T]he children should return to the family home so that they can be properly cared for, provided for, educated and protected by me. I am therefore proposing despite your deviancy, that they have access to you on the humanitarian grounds that they deserve it by right and in the interests of their welfare and comfort."

4. No argument as to access or custody has ever been addressed by Mr. L. to the District Court. He has at all times been of the view that all of the court proceedings that have taken place in this matter have been tainted by the original *ex parte* application, are unfair and are a denial of his constitutional rights.

<u>The Order</u>

5. The only order which is impugned as to its validity is that dated 26th September, 2007. The District Court order reads as follows:-

> "Whereas the above named applicant who resides at [redacted] Co. Kilkenny, in the court district aforesaid has caused a summons to issue for hearing at a sitting of the court at Kilkenny on the 10th day of October, 2007, at 10.30am pursuant to the provisions of ss. 2/3 of the [Domestic Violence Acts, 1996 and 2002] for a safety/barring order against the above named – respondent residing at [redacted] County Kilkenny, which application

has not yet been determined by the court;
And whereas the court is of the opinion that there are reasonable grounds for believing that the safety or welfare of the above named - applicant and dependent persons, so requires,
The court hereby orders that the above – named respondent shall not use or threaten to use violence against, molest or put in fear the above – named applicant or any dependant persons, and
Further orders that the respondent shall not watch or beset the place where the applicant or dependant persons reside."

6. According to an information, sworn under the Domestic Violence Acts 1996 and 1992, and verified before this Court on affidavit, the circumstances behind the wife applying for, and being granted, a protection order in the foregoing form, arose by reason of her visiting the United States of America in the summer and autumn of 2007. This was one year after the original rift had occurred between the husband and wife. She had decided to visit a relative who had been diagnosed with cancer in the United States. This was done for support, and to see whether she might have the necessary potential to donate bone marrow. In her absence she had been reluctant to grant Mr. L access, which had hitherto proceeded on a twice a week basis, and instead caused the children to stay in the care of the older children and her mother. She was of the view that because Mr. L allegedly had a history of mental illness and held "unorthodox views about his role" in his childrens' lives, and had refused up to that date to recognise any court orders, that it would not be safe for access to continue during that period. In any event, while she was away, Mr. L arrived at the family home and tried to physically take the two children away. His older son intervened and took them out of the car. She said that she was "uneasy about his demeanour and the threatening tone of his letters".

The Domestic Violence Acts

7. I am concerned only with s. 5 of the Domestic Violence Act 1996, as amended by s. 1 of the Domestic Violence (Amendment) Act 2002. A brief reference to some other provisions of the Act may be useful, however. Section 2 of the Act allows for a court to make a safety order where it is of the opinion that there are reasonable grounds for believing that the safety or welfare of an applicant, or of a dependent person, requires it. This kind of order can require a respondent not to use violence or put an applicant or dependent person in fear; not to watch or beset the place where the applicant resides; and may be made subject to conditions. It may be varied by application of the respondent or of a Health Board. This order lasts for five years, or such lesser time as may be specified. A barring order may be made under s. 3 of the Act. This may require a respondent to leave the place where he or she resides and to prohibit that person from returning until further order of the court. It may, in addition, prohibit a respondent from using or threatening violence, from molesting, or from watching and besetting an applicant or dependent person. A barring order expires three years after it was made, or such lesser period as the court specifies. Under s. 4 an interim barring order can be made. Originally, no time limit was put on this order, which had the same serious effect as a barring order under s. 3 of the Act. In consequence of the Domestic Violence (Amendment) Act 2002, where an application for an interim barring order is made *ex parte* it can only have effect for a period not to exceed eight working days, to be specified in the order, and ceases unless the interim barring order is confirmed within that period by an order of the court. Under s. 5 a protection order may be granted by a court.

8. This legislative change to interim barring orders occurred in consequence of the Supreme Court decision in *D.K. v. Judge Timothy Crowley, Ireland and the Attorney General and Ors* [2002] 2 I.R. 744. In that case the Supreme Court declared that s. 4(3) of the Domestic Violence Act 1996, as it then stood, was invalid having regard to the provisions of the Constitution. It is necessary to quote from the judgment of Keane C.J. at pp. 758-760:-

"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 dependent 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 a barring order 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."

9. In summary, the Supreme Court reasoned that an order constituting a serious interference with, and abridgment of constitutional rights in consequence of a court application made in the absence of a party, should be proportional, in terms of the time it lasts and its effect, and no more than is reasonably required to secure a competing constitutional right. The applicant claims that the infirmities identified by the Supreme Court in respect of an interim barring order with no statutory limit as to the time it may last, must also be found in the legislation providing for a protection order. The decision just quoted, in other words, it is argued is of direct application here.

Protection Order

10. The remedies set out in ss. 2, 3, 4 and 5, of the Domestic Violence Act 1996, as amended by the Domestic Violence Act 2002, share the penalty provisions of s. 17 of the 1996 Act, and make the contravention of any order made under ss. 2, 3, 4, and 5 of the Act, a criminal offence, carrying a monetary penalty and the possibility of imprisonment and summary conviction for a term not exceeding twelve months. Looking at the provisions in detail, however, there are marked differences between the consequences of a court making a barring order against the respondent and making a protection order. Section 5 of the Act, as amended, provides:-

"5(1) If, on the making of an application for a safety order or a barring order or between the making of such an application and its determination, the court is of the opinion that there are reasonable grounds for believing that the safety or welfare of the applicant for the order concerned or of any dependent person so requires, the court may by order (in this Act referred to as a "protection order") direct that the respondent to the application-

(a) shall not use or threaten to use violence against, molest or put in fear the applicant or that dependent person, and

(b) if he or she is residing at a place other than the place where the applicant or that dependent person resides, shall not watch or beset the place where the applicant or that dependent person resides,

and the court may make the protection order subject to such exceptions and conditions as it may specify.

(2) Where a protection order has been made, any of the following may apply to have it varied, that is to say:

(a) if the application for the order was made by a health board in respect of any dependent person by virtue of section 6 -

(i) the health board

(ii) the person referred to in subsection *(1) (c)* of that section, or

(iii) the respondent to that application;

(b) if the application for the order was made by a health board in any other case by virtue of section 6 -

(i) the health board,

(ii) the person who was the applicant for the order, or

(iii) the respondent to that application;

(c) in any other case -

(i) the person who was the applicant for the order, or

(ii) the person who was the respondent to the application for the order,

and the court upon hearing any such application shall make such order as it considers appropriate in the circumstances.
(3) For the purposes of subsection (2), a protection order made by a court on appeal from another court shall be treated as if it had been made by that other court.
(4)[A protection order may be made *ex parte*]
(5) A protection order shall cease to have effect on the determination by the court of the application for a safety order or a barring order.
(6) Notwithstanding subsection (5), so much of a protection order as was made for the benefit of a dependent person shall cease to have effect in accordance with that subsection or upon such person ceasing to be a dependent person, whichever first occurs.
(7) For the purposes of this section, an applicant or a dependent person who would, but for the conduct of the respondent, be residing at a place shall be treated as residing at such place.

11. The subsection in brackets is the only change introduced into this section by the 2002 Act.

12. A person has a right to reside in their own home. This right must include the right to come and go as they please. A person has a right to see their spouse and to see their children and to enjoy their company, engaging in the responsibilities of family life. These rights are entirely removed, as regards access to the home, by a barring order and are also thereby severely restricted, at the least, from the point of view of associating with one's family. In contrast, under a protection order, the matters which are restricted are already unlawful. A protection order is in effect, no more than a warning that indicates that a spouse, or other person entitled to apply, has gone to court and that the court has noted behaviour which, if it is true, is so unacceptable that the respondent must be reminded, on pain of criminal conviction, that proper behaviour in accordance with law is required of him or her. It is never lawful to threaten to use violence against a person, unless one is oneself under attack or one is effecting a lawful arrest. It is not lawful to molest a person or make a person fear for dire consequences. These are all already criminal offences of long standing at common law. It is not lawful to watch a person's premises as other than by passing and re-passing on the highway, for lawful and reasonable purposes, and no one has a right to sit outside another person's home staring in. That is, at the least a trespass against the subsoil under the public road and as an intrusion into privacy it may be subject to injunctive relief. Nor is it lawful to beset a premises, meaning to surround the persons residing there with a feeling of hostile intent. Watching and besetting was first made an offence by s. 7 of the Conspiracy and Protection of Property Act 1875, there in the context of trade disputes, the necessary mental element being that of requiring a person to do, or to refrain from doing, something. This is replaced by s. 7 of the Non-Fatal Offences against the Person Act 1997. With regards to threats and the offence commonly known as stalking, ss. 9 and 13 of that Act are also relevant.

13. One asks, in those circumstances as to what the applicant loses by a protection order being made against him? The answer, it seems to me, is that there is certainly a threat of an especial kind that if he does something that is already unlawful, and which may be merely tortious, depending on the circumstances, he runs the risk of the commission of a criminal offence with subsequent prosecution. That is the worst that can happen. At best, he may merely be annoyed. Most torts are in some way also criminal offences, depending on the

definition of the external and mental elements of the crime. It is within the province of the Oireachtas to decide what activity should be made criminal, provided the definition is precise and the wrong that is characterised as a crime is truly an attack on the good order of society. A protection order breach fits comfortably within that competence. Of course, an application for a protection order may be made on fraudulent grounds for malicious purposes. In those circumstances a respondent has the remedy of seeking to have the order overturned at the earliest possible date. Unlike in the *D.K. v. Crowley* case, the District Court in respect of this order sensibly made any issue as to domestic violence returnable fifteen days hence. Such a practice is entirely appropriate and accords with the legislation. Indeed it would hardly seem sensible to look for a protection order in the long term since a safety order or a barring order provides the best protection to a spouse or other applicant, who is at risk of domestic violence. It is certainly the case that a protection order under s. 5 of the Act can continue in force indefinitely, but this argument as to constitutional invalidity ignores that such an order ceases to have effect under s. 5(5) on the determination of an application for a safety order or barring order by the court. Further, a person who seeks a protection order must, under the legislation, do so only when they have applied for a safety order or barring order. If they do not, they are not qualified to receive the benefit of a protection order. This proviso ensures that there will always be a return date where the protection order will be extinguished on the granting or refusal of the application for a barring order or safety order.

14. It follows, that there is no want of proportionality in terms of any rights that are affected by such an order. Indeed, there is nothing in law which would prevent a respondent who is subject to a protection order from going to his or her home, living there, seeing his or her spouse and children and speaking to them in a calm and reasonable way and sharing a meal or a TV session with them. Nothing in such an order prevents a respondent from making any ordinary use of his or her family home or from attempting in a calm and reasonable way to enjoy the society of the constitutional family.

15. I note that in *Goold v. Collins* [2004] I.E.S.C. 38, an application was made to challenge the constitutionality of this section. The Supreme Court rejected the case on the basis that any decision it might make in the case was moot. However, in the course of his judgment, Hardiman J. made the following comment at p. 4417, which I would adopt as correct:-

> "*DK v. Crowley* related not to a Protection Order, but to an interim barring order. This, unlike the Protection Order, has an immediate physical consequence: the respondent to it must leave his or her home and remain out of it until the order lapses or until further order. The Protection Order, by contrast, merely enjoins the respondent to it against the use of violence or threats of violence, which are in any event intrinsically unlawful."

Procedural Points

16. The applicant further argues for the unconstitutionality of s. 5 of the Domestic Violence Act 1996, as amended, on a number of subsidiary points which I can deal with shortly. These claims of infirmity relate to his right to his constitutionally guaranteed good name and to the effect of the Act in bringing into the jurisdiction of the court hearing an application for a remedy consisting of a protection order, a safety order, or a barring order, the possibility of making an order as to the guardianship of children or the financial maintenance of children or a spouse.

17. The making of a protection order is not a stain against someone's character.
No right-thinking person would consider it to be the case that because a protection order has been made on an *ex parte* basis against a respondent that he or she is guilty of contumelious conduct. A protection order application must be followed up by an application for a safety order or a barring order. On that application, a respondent has the choice of being heard. The proceedings take place in private. In such circumstances, nothing has been proven against an applicant to the detriment of his character. If a respondent feels that a protection order should never have been made, then he or she can apply to revoke it, on

notice to the applicant. Such an order has no effect on subsequent court proceedings. It is not necessary for the order to be removed prior to the applicant making any argument under the Guardianship of Infants Act 1964, in respect of his children, their schooling or who has custody of them or what access is appropriate. The protection order is removed under s. 5(5) of the Domestic Violence Act 1996, when the court determines any subsequent application for a safety order or a barring order. I must assume that the courts in operating this section will do so sensibly, as has the District Court in Kilkenny, in this case. In particular I am entitled to presume that they will apply procedures which are fair; *East Donegal Co-Operative Limited v. Attorney General* [1970] I.R. 317.

18. No court is compromised by having heard an application *ex parte.* No judge will take the view that having heard one side of the story that no other account can exist in truth. Were that to be the case, a defendant could never be fairly heard by a judge because the plaintiff is usually required, apart from cases of a defence of set off, to present their evidence first. A defendant has to wait before presenting by cross-examination or positive evidence the nature of the defence case. That simply cannot be helped as there is no other way of doing a case.

19. Finally, this is nothing wrong with a court hearing an application for an order under the Domestic Violence Act, to also hear an application for another family law remedy. Section 9 of the Act provides:-

> "(1) Where an application is made to the court for an order under this Act, the court may, on application to it in the same proceedings and without the institution of proceedings under the Act concerned, if it appears to the court to be proper to do so, make one or more of the orders referred to in subsection (2).
> (2) The provisions to which subsection (1) relates are as follows, that is to say:
>
> > (a) an order under section 11 (as amended by the Status of Children Act, 1987) of the Guardianship of Infants Act, 1964 ;
> > (b) an order under section 5, 5A , 6 , 7 or 21A of the Family Law (Maintenance of Spouses and Children) Act, 1976 (as amended by the Status of Children Act, 1987);
> > (c) an order under section 5 or 9 of the Family Home Protection Act, 1976;
> > (d) an order under the Child Care Act 1991."

20. It is by reason of an order being made under the Guardianship of Infants Act 1964, one as to schooling, that the applicant took the view that he could no longer participate in any court proceedings. He argues that a person might not know that such an order might be made. Yet, the reality in this case is that the applicant had notice of the concerns of his wife and that she intended to ventilate them before a court. Clearly, the requirement of constitutional procedures demands that reasonable notice should be given that an application is going to be made for orders under the Act set out in section 9. The Rules of Court may provide for forms of notice. It is for the judge, ultimately, to insure that fair procedures are applied. Sometimes it is both necessary and legitimate for a court to make, on a limited and temporary basis, an order preserving a situation, or temporarily rectifying it, because the circumstances of the situation are urgent. Such orders invariably provide for an early hearing of the case of both parties. There is nothing to suggest that fair procedures were not applied in this case.

Result

In the result I refuse the applicant all of the orders that he has sought in this judicial review application