

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 664 J.R.]

BETWEEN

DAITHI O'RAITHBHEARTAIGH

APPLICANT

AND

JUDGE OF THE DISTRICT COURT PATRICIA MCNAMARA

FIRST RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

SECOND RESPONDENT

JUDGMENT of Ms. Justice Baker delivered on the 11th day of July, 2014

1. Section 10(1) of the Non-Fatal Offences Against the Person Act 1997 created the new specific offence of harassment, and set out the test as follows:

"Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence. "

The elements of the offence set out in s. 10(2) of the Act are that an accused either recklessly or intentionally interfered with the peace and privacy of another and/or caused harm, distress or alarm to that other, and that the acts must be such that a reasonable person would realise that they would have such effect. The subjective response of a complainant and the harm, distress or alarm caused to him or her are elements of the offence.

Following a conviction the court may impose a fine or a term of imprisonment, or both, and the legislation made provision for a form of restraining order as a means of protecting a complainant. Because of what was described as an "extraordinary feature" of the Act by the Court of Criminal Appeal in the case of *The People (DPP) v. Ramachchandran* [2000] 2 I.R. 307, a restraining order can be made following an acquittal. It is the making by the District Court of a restraining order against the applicant following his acquittal on a charge of harassment that is the subject matter of this judicial review.

Facts

2. The applicant appeared before the first named respondent in the District Court Area of Dublin Metropolitan District on 10th May, 2012 charged under s. 10(1) of the Act of 1997 with an alleged harassment of the complainant between the 13th and 17th October 2010, when it was alleged the applicant put up posters of a defamatory or inflammatory nature about her. The matter first came on for hearing on 10th May, 2012, and evidence was heard from the complainant and three members of An Garda Síochána. The accused did not go into evidence and argued that the only evidence linking him to the offence were admissions made during interview after his arrest, which it was argued were inadmissible. The accused sought a dismissal and the trial judge reserved her decision to 31st May, 2012, when she held that the evidence obtained subsequent to the arrest under s. 24 of the Public Order Act 1924 was inadmissible, and dismissed the charge.

3. Immediately following on the making of this determination, application was made by the solicitor acting for the DPP pursuant to s. 10(5) of the Act of 1997 for a restraining order pursuant to s. 10(3). Counsel for the accused objected to the making of an order *inter alia* on the grounds that the prosecution had not notified the defence that such an application would be made. The matter was adjourned until later in the day when the solicitor for the State and defence counsel made arguments.

4. The first named respondent having heard the argument but no further evidence made the order sought and heard submissions with regard to its form, and in particular the geographical distance and time frame which might be appropriate. She then made the order, now challenged in this judicial review, restraining the applicant for a period of three years from communicating with the complainant, or approaching within half a mile of any place of residence or employment of the complainant.

5. Peart J. on 23rd July, 2012, granted leave to apply for *certiorari* quashing the said order and for a declaration that the order made under s. 10(3) of the Act was made in a manner inconsistent with the provisions of the Constitution and in particular, Articles 38.2 and 40 thereof. The five grounds set out on which relief was sought were clarified in the course of the hearing, and two grounds were argued, namely that there was a breach of fair procedures and the order was made without an evidential basis.

6. As is usual in these matters, the first named respondent did not take part in the hearing before this Court and counsel appeared on behalf of the second named respondent as a *legitimus contradictor*.

Submissions of the applicant

7. Counsel for the applicant argues the District Judge failed to have regard to fair procedures, and that although the accused was permitted to make submissions on the possibility of the making of a restraining order, evidence was not required from the prosecution or permitted from the applicant. The first respondent made her order on two matters identified by her: the "very sincere and impressive testimony" of the complainant, and that it was in the "interests of justice" to do so, the latter requirement being part of the express statutory test. The applicant submits that there was no evidence of the potential future behaviour of the applicant, his

present living or working arrangements, nor does it appear that account was taken of the fact that eighteen months had elapsed since the matters complained of.

Submissions of the second respondent

8. Counsel for the second named respondent argued that the District Judge was entitled to make the order she did, that there was an evidential basis for doing so and that the hearing was conducted in a manner consistent with the applicant's right to fair procedures and constitutional justice. It is contended that the order was lawfully made within jurisdiction and that even if an error was made in the manner or terms of the order, it was made within jurisdiction and does not give rise to a judicial review.

9. It is submitted that the first respondent, before imposing the order, gave the applicant's counsel time to consider the statutory provisions and heard him with regard to the temporal and geographical limits of the order, and that this was sufficient to meet the test of fairness.

The legislative framework

10. Sections 10(3) and (5) provide as follows:-

"(3) Where a person is guilty of an offence under subsection (1), the court may, in addition to or as an alternative to any other penalty, order that the person shall not, for such period as the court may specify, communicate by any means with the other person or that the person shall not approach within such distance as the court shall specify of the place of residence or employment of the other person.

(5) If on the evidence the court is not satisfied that the person should be convicted of an offence under subsection (1), the court may nevertheless make an order under subsection (3) upon an application to it in that behalf if, having regard to the evidence, the court is satisfied that it is in the interests of justice to do so. "

A person who fails to comply with the terms of an order under subs. 3 shall under s. 10(4) be guilty of an offence and breach of an order carries penal sanctions set out in s. 10(6) as follows:

"(6) A person guilty of an offence under this section shall be liable

(a) on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or to both, or

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 7 years or to both. "

The hearing in the District Court after the acquittal

11. I have had the benefit of a transcript of the DAR for the relevant part of the hearing on 31st May 2012, and from this the following appears: after the charge was dismissed, application was made by the solicitor acting for the DPP for an order under s. 10(5) of the Act of 1997. Counsel for the accused objected to the making of the order primarily on the ground that his client had not been put on notice during the hearing of the trial that such an application might be made. The judge gave an opportunity to counsel to take instructions and to consider the statutory provisions, but she made it clear that she wished to dispose of the matter that day. It is clear that the trial judge had no personal experience of the statutory provisions, and she expressly stated that she had not heard mention at all of s. 10(5) in the course of the hearing until after she dismissed the charge. This is not surprising as the subsection appears not to be used much in practice, and the District Judge can in no way be criticised as the jurisprudence in regard to the making of a restraining order is not developed.

12. A short adjournment was granted to enable counsel to consider the statutory provisions and consult. Legal argument was then had as to the meaning of s. 10(3) and s. 10(5) and the trial judge was told that little or no jurisprudence had evolved with regard to the section, albeit that it appeared that the solicitor acting for the DPP had some personal knowledge of orders being made under the subsection in District Court applications with which she had been involved.

13. Following legal argument, the trial judge accepted that she had jurisdiction to make the order, as she undoubtedly had, and said that she would do so having regard to the "very sincere and impressive evidence" she had heard from the complainant and because she was satisfied having regard to the evidence before the court that it was "in the interest of justice" to do so.

14. After the order was made, argument was had as to the duration of the order, it having been proposed by the solicitor for the DPP that the order should have a duration of ten years. The trial judge made an order for three years, saying she was taking some guidance from family law barring or exclusion type orders for that purpose.

15. It is clear from the transcript that the District Judge did not expressly address herself to the weight of the evidence given by the complainant, nor to the extent to which the evidence she heard might have not been tested.

The nature of the order

16. Sections 10(3) and (5) of the Act of 1997 are novel in a criminal context as they in effect provide for a form of restraining order, in addition to or as an alternative to a criminal sanction, for the offence of harassment and the restraining order can be made even after an acquittal. An order may be imposed upon the accused where the court is satisfied that it is in "the interests of justice to do so" to prevent that person from communicating or approaching the complainant from a certain distance and for such a time as the court sees fit. There is a certain logic to the statutory power as it enables a court to make a wide range of orders protective of a complainant and obviates the need for separate civil legislation. While an order made under s. 10(3) of the Act cannot be said to be penal in the absence of a conviction, there is potential for penal sanctions to follow from a failure to comply with the terms of an order.

No appeal

17. Counsel for both parties agree that the legislation appears not to provide for an appeal from an order of the District Court made under s 10(3) of the Act of 1997 where the order is made following an acquittal, although an appeal would lie if the restraining order followed upon a conviction under s. 10 of the Act.

18. Section 18(1) of the Courts of Justice Act 1928 provides the legislative basis for an appeal from the District Court in a criminal matter:-

"An appeal shall lie in criminal cases from a Justice of the District Court against any order (not being merely an order returning for trial or binding to the peace or good behaviour or to both the peace and good behaviour) for the payment of a penal or other sum or for the doing of anything at any expense or for the entreating of any recognizance or for the undergoing of any term of imprisonment by the person against whom the order shall have been made."

19. A right of appeal to the Circuit Court does not arise in this case from s. 18(1), given that the order was of a civil nature, and no express right of appeal arises in any other enactment.

20. Article 34.3.4 of the Constitution provides that the right of appeal from a court of limited and local jurisdiction is one that may be determined by law and Hogan and Whyte, authors of the authoritative *J.M Kelly, The Irish Constitution*, 4th Ed. (Dublin, 2003), suggest that:

"While there are conflicting views on whether Article 34.3.4° requires the Oireachtas to provide a right of appeal in all cases from decisions of courts of local and limited jurisdiction, it seems implicit in such limited case law as there is on this topic that although the Oireachtas is not obliged to create a right of appeal by law in respect of each and every decision of a court of limited and local jurisdiction, the exclusion without obvious objective justification of such a right of appeal may be constitutionally suspect. "

The question of the constitutionality of the provisions of section 10(5) of the Act of 1997 is not before me and accordingly I must decide the question raised in the judicial review as if no right of appeal exists, as one is not provided by any statutory enactment.

Consequence of a breach of an order

21. Breach of a restraining order is a criminal offence and carries a penal sanction. In *DK v Crowley* the Supreme Court make the following apposite comment with regard to the effect of a barring order that it was 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."

22. The restraining order made against the applicant was less draconian in its effects that would be a barring or exclusion order in regard to a person's home, but the order is nonetheless one breach of which can, like breach of a barring order or an order binding to the peace, lead to a criminal conviction and penal sanction, and has more immediate penal effect than a civil injunction.

Analogous orders

23. A restraining order under the Act of 1997 is akin to a barring or exclusion order under family law legislation, or to an order binding a person to the peace under s. 54 of the Courts (Supplemental Provisions) Act 1961. The Law Society's *Criminal Litigation*, 2nd Ed. (Oxford, 2009) at para. 14.8.2 explains the matter thus:

"the power to bind a person to the peace, or to good behaviour, or both, and to enter into a recognisance may be exercised by a judge of the Supreme Court, High Court, Circuit Court, and District Court. The power may be used on conviction of the defendant in addition to any other punishment imposed (.Ex p. Harken (1889) 24 LRI 427) and it may also be used in relation to a defendant whose case has been dismissed on the merits (.Ex p. Davis (1871) 35 JP 551)."

24. However, a distinction can be noted in that s. 16 of the Criminal Justice Act 1951 provides that an appeal could lie from orders made to bind to the peace and good behaviour in the absence of a criminal conviction. An appeal does lie to the granting of a barring or exclusion order under family law legislation. No appeal lies to the form of the order the subject matter of this judicial review.

Constitutional fairness

25. It is well established in Irish law that where the consequence of the making of an order can have adverse and significant consequences procedure adopted by an adjudicating body must comply with basic rules of fairness and constitutional justice. The duty is broadly explained in *Dellway Investments Ltd. v. NAMA* [2011] 4 IR 1 by Fennelly J.:

"It does not appear to me that it has been established that the right to be heard before a contemplated decision is made depends on establishing interference with a specific and identifiable legal right. It is difficult to discern a principled basis for restricting the right in that way. The courts have never laid down rigid rules for determining when the need to observe fair procedures applies. Everything depends on the circumstances and the subject matter. The fundamental underlying principle is fairness. If a decision made concerning me or my property is liable to affect my interests in a material way, it is fair and reasonable that I should be allowed to put forward reasons why it should not be made or that it should take a particular form. It would be unjust to exclude me from being heard"

26. The substance of the rights were identified in *In Re Haughey* [1971] IR 217, and the dicta of Ó Dálaigh C.J. at 263 is often quoted:

"Having thus apparently accepted the necessity for such immunity, counsel's submission was that, in all the circumstances, the minimum protection which the State should afford his client was (a) that he should be furnished with a copy of the evidence which reflected on his good name; (b) that he should be allowed to cross-examine, by counsel, his accuser or accusers; (c) that he should be allowed to give rebutting evidence; and (d) that he should be permitted to address, again by counsel, the Committee in his own defence."

27. As Walsh J. stated in his seminal judgment in *East Donegal Co-operative Livestock Mart Ltd v. Attorney General* [1970] 1 IR 317 at p. 341:-

"[T] he presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. "

In *DK v Crowley* [2002] 2 IR 744 the Supreme Court explained the imperative to give effect to a constitutional application of a

legislative power as follows at p. 757:

"The court must also give effect to the decision in East Donegal Co-operative Livestock Mart Ltd. v. Attorney General [1970] I.R. 317, 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. "

28. It is undoubtedly the case that the making an order under section 10(3) can significantly impact upon the personal liberty of a person, both because of the restraining element in the order and because breach of an order can lead to penal sanction. Accordingly the making of an order under the subsection must be done in manner consistent with the obligation of fair procedures.

Previous decisions on the subsection

29. The jurisdiction of the courts to make an order under s. 10(3) & (5) came before the Court of Criminal Appeal in the case of *The People (DPP) v. Ramachchandran* [2000] 2 IR 307. The applicant, in what is believed to be the first conviction under the Act, was convicted on two counts of harassing the complainant and her mother under s. 10 of the Act of 1997. He was sentenced to three years imprisonment and was restrained from besetting, harassing or communicating with the complainant or any member of her family or from going within a twenty five mile radius of the family home. The applicant appealed the conviction on the basis of the judge's charge and that prejudicial evidence, which was evidence relating to correspondence and acts before the commencement of the Act of 1997, was improperly put before the court. The charge related to events during a limited period in June and July 1997 but the prosecution introduced the whole history and all correspondence between the applicant and the complainant dating back to 1994.

30. The Court of Criminal Appeal quashed the conviction and did not order a new trial. However, under what was termed by Barrington J. as *"a remarkable feature of the Act"*, the court held that even in the event of an acquittal the court had the power under s. 10(5) of the Act to grant an order restraining a person from communicating with or approaching the complainants. The court was satisfied, on the balance of probabilities and having considered the evidence, that the complainant and her mother were entitled to protection from further unwanted communication from the applicant. An order was made prohibiting the applicant from communicating with or approaching the complainant or her mother for a period of ten years.

31. One must assume that the Court of Criminal Appeal found the power "remarkable" partly because the order could be made in a criminal trial where a wholly different standard and burden of proof exists, and where the order could be made, as it was in that case, following an acquittal. The court however gave no guidance as to the procedural requirements for the making of the order and the question of fair procedures was not considered in the judgment.

Discussion on the first ground: fairness

32. This court must determine if there was an error of such a fundamental nature that it breached the applicant's right to constitutional justice and fair procedures. An accused must be deemed to be aware of the statutory framework which provides the potential for an order to be made, even in the absence of a criminal conviction, and the District Judge gave counsel an opportunity to consider the statutory provisions and to consult. There was no lack of fairness in that regard.

33. The District Court must govern and manage its own procedures but in a case where there is no appeal, as in the case of an order under s. 10(3), the constitutional imperative of fair procedures is one to which the court must have particular regard. Further, the effect of the restraining order was to impede the movement of Mr. O'Raihbheartaigh in the particular area then defined by reference to the place of work and place of resident of the complainant. She might over the period of three years for which the order was imposed have moved either her home or place of work, and the restraining order therefore could, in practice, have had an effect on Mr. O'Raihbheartaigh and on where he himself lived, worked and on the places he visited far beyond that envisaged by the District Judge at the time she made her order.

34. Having regard to the potential consequences of the order and the fact that it significantly restricted, both actually and potentially, the freedom of movement of Mr. O'Raihbheartaigh, and his future personal and work life, as well as the fact that the legislation expressly provides the breach of an order is a criminal offence, means that a high standard of fair procedures must be imported into the conduct of the hearing of an application for a s. 10(3) order.

Was fair procedure afforded?

35. The evidence adduced by the complainant in the course of the trial was not adduced for the broader purpose of an application for a restraining order but for the purpose of putting in context and showing the personal and subjective response of the complainant to the posters, and her subjective response of distress or alarm are necessary elements in the offence. The defence was entitled to and did in fact choose not to test this part of the evidence as its position, which was legally correct, was that the only evidence which could link the accused to the charge was his own admissions, taken during a time when he was not lawfully in custody.

36. After the prosecution evidence had closed, an application to dismiss was made by the accused on the basis that the accused had no case to answer, there being no admissible evidence to link him to the alleged offence of fixing the posters. The trial judge heard no further evidence and made the restraining order on the basis of the evidence of the complainant adduced for the purpose of meeting the subjective test of her response to the alleged fixing of the posters. This evidence was not adduced for any other substantive purpose, or at least none identified or capable of being ascertained, and without it the prosecution would likely have failed even had there been evidence linking the accused to the fixing of the posters, as the crime is one specifically referable to the emotional response of the complainant.

Conclusion

37. There will be many cases of persons charged with harassment under the legislation where the evidence runs to its conclusion, and evidence is given by both accused and complainant and tested by and on behalf of each of them. This did not occur in this case. Mr. O'Raihbheartaigh was charged with a specific offence both in time and location, and it was not until the prosecution case closed, and all opportunity to cross examine the complainant on her evidence had passed, that the DPP make application for a restraining order. Both the District Judge and the DPP treated the evidence as closed, and the accused tested the evidence actually given in the context and for the purpose for which it was adduced, and not for any other purpose of which he was aware. In particular no testing of the evidence of any future risk to the complainant was made to the accused and it is reasonable to suppose that had he known that a s.10(3) application would be made, such testing would, or at least could, have occurred.

38. How the test of fair procedures might be satisfied is a matter for the individual judge hearing an application under the section and there may be circumstances where notice is required to be given to an accused of the possibility that an application will be made under the subsection, whether on a conviction or an acquittal, at an sufficiently early time in the process to enable the accused to

consider whether to test the evidence of the prosecution or to adduce evidence himself or herself. The degree of notice and the extent of the obligation to meet the test of fairness will differ in each case, but the requirement is that there be reasonably sufficient opportunity afforded to the person faced with an order to deal fully with the evidential and legal requirements of the order. The evidence of the complainant formed the entire evidential basis of the order, and after the prosecution case had concluded the accused was not afforded an opportunity to test the evidence which was so crucial to the decision of the court. Indeed, it would have been difficult if not impossible after the conclusion of the evidence in the case for the accused to have given contrary evidence to challenge the version of events given by the complainant as some or all of the matters that he might address in his evidence would not properly have been put in cross examination to her.

39. A criminal trial has a particular and unique structure grounded in the presumption of innocence, and the right of accused to remain silent and put the prosecution on proof of the charge beyond a reasonable doubt. An accused may opt, as the accused in this case did, not to adduce any evidence and to rely in defence on the testing of the prosecution evidence and on legal argument. The applicant was entitled not to cross examine the evidence of the complainant as he was reasonably taking the view that the evidence was not probative of the charge being prosecuted. The charge brought against Mr. O'Raihbheartaigh was narrow in scope both in terms of time and in regard to the specific allegations in respect of which the charge was brought, and he was not charged with harassment flowing from a series of events of unwelcome following and communicating with the complainant, the charge being confined to an allegation that he fixed posters at identified locations.

40. In my view, having regard to way the case proceeded, and that the evidence was concluded after the prosecution closed its case, the requirement of fair and proper procedure was not met. Notice ought to have been given to the accused of the possibility of an application for a restraining order at a time when the evidence on foot of which the order was made could still be tested. The trial judge did not satisfy the test of fair procedures and in this particular case the following individual factors arise:-

- (i) The evidence adduced by the prosecution was tested in the context of the actual charge and it was clear to the District Judge, and must have been clear to the DPP and to the counsel for the accused, that the evidence was not tested nor required to be tested in any other context, there being no other context before the court at the time when the evidence was adduced.
- (ii) Fair procedure would have required notice be given to the accused of the intention of the DPP to make an application under the subsection before evidence concluded.
- (iii) The case having concluded, the District Judge fell into error and breached fair procedures in not either requiring or permitting additional evidence, whether by way of cross examination or direct evidence from the accused himself or other persons on his behalf.

41. The fact that the particular order in this case admits of no appeal, that the consequence of breach of the order can involve the imposition of a criminal sanction, and because the effect of an order can have significant effect on the life of a person against whom an order is made, taken together or singularly, imposes a heavy burden of fairness on the District Judge. The making of the order cannot in my view be seen as fair and the trial judge gave no opportunity to the applicant to test any evidence of adduce any evidence in rebuttal.

42. The making of a restraining order is a form of preventative justice recognised as an important element in the administration of justice. But equally important is the manner in which an order is made and where the order is made after the conclusion of a criminal trial where an accused was acquitted, the differing standards of proof give rise to a particular difficulty in assessing whether and how fairness is achieved. A judge hearing a charge under the Act is in a unique position to assess the desirability of making orders of a preventative nature, but the requirements of constitutional justice and fair procedures must be kept in mind in the operation of what must be seen as an unusual and, to borrow the language of the Court of Criminal Appeal in *The People (DPP) v. Ramachchandran* "extraordinary" powers of the court following an acquittal.

43. Having regard to my finding on the first ground I do not propose to consider the second ground on which leave was granted.

44. I therefore make an order of *certiorari* quashing the order.