This judgment is circulated in a redacted form to avoid identification of parties.

Neutral Citation Number: [2006] IEHC 147

THE HIGH COURT
JUDICIAL REVIEW

[2004 No. 529 JR]

BETWEEN

C.C.

APPLICANT

AND
JUDGE WILLIAM EARLY
JUDGE JOSEPH MANGAN
DIRECTOR OF PUBLIC PROSECUTIONS
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND
T.C.

NOTICE PARTY

Judgment of the Hon. Mr. Justice John MacMenamin delivered the 28th day of April, 2006.

1. The applicant is presently in receipt of disability benefit but is described in the statement to ground the application for judicial review as being an author, photographer and artist.

He seeks judicial review by way of certiorari quashing an order made by the second named respondent sitting in the Dublin Metropolitan District Court on the 1st February, 2001, granting a barring order to the Notice Party T.C. with whom the applicant then had a relationship. The grounds upon which this relief was granted were:

> 1. The applicant was never notified of the making of the protection order made on the 11th December, 2000, nor of any intention on the part of the Notice Party to seek a barring order against him and
>
> 2. The hearing before the second named respondent breached the rule of *audi alterem partem* and was in breach of the applicant's rights to natural and constitutional justice.

2. The applicant says he entered into a relationship with the notice party herein approximately twelve years ago. There are two children of this relationship namely T. now aged nine years and C. aged seven years. Originally the applicant and the notice party lived at address A. In or about 1997 he moved to address B as a tenant of Dublin Corporation. He says that Dublin Corporation (as it then was) "persuaded him" to have T.C. as a co-tenant. Thereafter differences occurred between himself and T.C.

3. In his first affidavit sworn herein, the applicant states that for a time in the month of December 2000 he was detained in Cloverhill Prison. He states that T.C. sought and obtained a protection order against him while in prison. The order was made by Judge William Early the first named Respondent. The applicant states that he was not served with this order and that the order appears to suggest on its face that he was living at address B at the time. He said that at the time, T.C. knew of his true whereabouts. This protection order was applied for and granted on 11th December, 2000, on foot of an information pursuant to section 5 of the Domestic Violence Act 1996 and a summons for a safety order was made returnable for the 31st January 2001. A certificate of imprisonment exhibited shows that the applicant was conveyed to Cloverhill Prison on 11th December, 2000, but released on 15th of that month.

4. While in the application for leave the applicant sought to impugn the protection order, leave was not granted therefor. After the applicant had left Cloverhill he went to a detoxification centre in Munster for treatment for what he says were "medical problems". He remained there from 15th December to 24th December, 2000. He says that T.C. knew that he was resident there. By order of the District Court T.C. obtained a barring order for three years duration against the applicant on 1st February, 2000. The applicant says he was never served with any summons or notification of this proposed hearing and that the order was granted in his absence. This impugned order was directed to the applicant at an address in Munster. An affidavit sworn herein on 19th June, 2004, the applicant states that he only commenced to reside at that address "some time after the date of the barring order". He believes that T.C. obtained his address from the gardaí.

5. The applicant states that he did not understand the purport of the document addressed to him at the address in Munster and in particular that he did not understand that he was prevented from entering the premises at Address B, which was his home. He says that he has not had the benefit of much formal education. This latter contention should be seen in the light of the averments of Garda E.L. of Stepaside Garda Station who says that he had a number of dealings with the applicant over the past several years, that he is an intelligent and capable person who has actually had a book of poetry published. Garda L. he believes the applicant is a person capable of understanding the content of a barring order and also able to obtain the services of a solicitor when he wished to do so.

6. More directly to the applicant's contentions, Garda L. in a replying affidavit sworn on 5th December, 2004, demonstrates that the applicants contentions about his address at the time of the barring order are incorrect. After the applicant discharged himself from Cuan Mhuire, he was admitted to Limerick Regional Hospital on 26th December, 2000 and discharged therefrom on 2nd January, 2001. On 19th January, 2001, he was arrested and brought to a Garda Station in Munster. A custody record was completed. This record demonstrates that the applicant was actually arrested at an address in Munster on the date in question. The home address given on the custody record for the applicant was the same. It is now accepted that the applicant's contention that he commenced to reside at that address some time after the date of the barring order is therefore incorrect.

7. The barring order granted by the Dublin District Court on 1st February, 2001, was effective from that date until 31st January, 2004. It recites that the respondent therein, that is (the applicant in suit) was to leave the place where he resided at address B, and was prohibited from entering therein. He was further prohibited from using or threatening to use violence against T.C. or any such dependent person of hers or molesting or putting in fear Ms. C. or any such dependent person. He was prohibited from attending at, or in the vicinity of, or watching or besetting a place where the applicant or any dependent person resided during the said period of three years. The order contained a warning indicating that a respondent who contravened the order or refused to permit the applicant or any dependent person to enter the place the residence in question might be arrested without warrant by a member of the Garda Siochána and on conviction for such an offence might be fined the sum of €1500 or sentenced to twelve months imprisonment. While appreciating that the applicant is not a legal person, the effect of the order granted by the District Court on 2nd

February, 2001, should be evident to an average reader.

8. The applicant accepts that on 13th July, 2001 he went to the premises at address B. The Gardaí were called and he was charged with the offences set out in C. Charge Sheets 344 and 345, of 2001. These charges allege that contrary to s. 17(1) of the Domestic Violence Act 1996, the applicant had entered address B; and secondly that on the same date and time he had assaulted T.C.. The applicant was released on bail and the charges were then adjourned on a substantial number of occasions. He says that he was advised by an unnamed person to seek to apply to extend the time to appeal against the barring order and he arranged to do this. He says that his application however was refused and that he lodged an appeal against that refusal. No date is provided in his affidavits for these events. The applicant states that he consulted the Law Centre Ormond Quay to act for him in his appeal. He does not say when this occurred. He says that the hearing date of this appeal on 24th January, 2003, was the same date upon which he was charged with the two charges to which reference has been made immediately above that is unlawfully entering to address B and assault on T.C. The applicant says:

> "I was also due in the District Court on the charges set out in paragraph 12 hereof. When I attended in Circuit Court for my appeal against refusal I discovered it was struck out."

No evidence is adduced as to what submission was made in the Circuit Court or whether Mr. Michael Gleeson, the solicitor from the Law Centre was made aware of the alleged clash of dates or communicated with Mr. Peter Mullan Solicitor of Garrett Sheehan & Co acting for the applicant in the District Court. The applicant alleges that Mr. Gleeson did not apply to adjourn the appeal. No source of knowledge of this contention is averred to in affidavit, and no affidavit has been sworn by the solicitor. No information is provided as to when the applicant himself became aware of the clash of dates or of what steps he took to deal with the situation, at a time when he also had a privately retained solicitor to represent him in the District Court.

9. The applicant states that the two charges were ultimately listed for hearing on 24th February, 2004. He was then represented by Mr. Peter Mullin a highly experienced solicitor in Garrett Sheehan and Company a leading firm of solicitors in the area of Criminal Law. In the course of that hearing the applicant alleges that his solicitor submitted that there was no valid barring order in force on 13th July, 2001. No further information is given on this issue or on any other point which arose. Garda L's affidavit does further advance what transpired on at least one of the numerous occasions the matter was adjourned in the District Court. On 24th January, 2002, Mr. Peter Mullin for the applicant sought an adjournment. He stated to the court on that occasion that the applicant had lodged an appeal to the Circuit Court against the validity of the barring order. He also stated that there was a separate case going on in which a matter relating to the barring order was being appealed. On that basis the District Court granted the adjournment sought. Thereafter, from time to time, the case came before the District Court but on each occasion the applicant sought and obtained an adjournment on the basis that he was appealing the barring order and that the associated case he had referred to was still in being. No affidavit evidence from Mr. Mullin has been sworn, nor any from the solicitor from the Law Centre. No letters from either solicitor have been exhibited although both were involved in matters central to the issues in theses judicial review proceedings.

10. The charges were finally heard in Dublin District Court No. 50 on 12th January, 2004. The applicant pleaded not guilty. The issue as to whether the applicant had known about the barring order was raised and the first named respondent Judge Early heard evidence from the Notice Party and was satisfied that the applicant was aware of the existence of the barring order on 13th July, 2001, that is the date of the alleged breach thereof. No information has been provided as to the nature of the evidence from the notice partly or whether it was challenged or not. The applicant was convicted for breach of the barring order and sentenced to three months imprisonment suspended, for two years. The assault charge was taken into consideration. An order exhibited suggests the assault charge was struck out on 26th January, 2001, but presumably must have been reinstated. This conviction was appealed pending the making of the application for judicial review.

It is said the Notice Party applied to renew the barring order, that this application was apparently granted in the District Court, and that order too is now under appeal. The order has not been exhibited.

11. With regard to the address, the applicant now accepts that he was residing at an address in Munster before the date of the barring order. He ascribes his error partly to the fact that the incidents occurred a number of years ago and also because he says his intention was to emphasise that he was not resident at the Munster address when the barring appears to have been applied for. He says that he commenced to reside in Munster after he left the Regional Hospital. The Munster property belongs to a friend of his named A.O'N.

12. The applicant has said that he was detained in custody in Cloverhill Prison from 10th December, 2000. This is not entirely borne out by the certificate of imprisonment which dates his imprisonment from the following day. Therefore he states he had ceased to reside at that address at the time that the summons for the barring order was issued. He says that T.C. misled the District Court when she applied for the barring order and made no reference to the fact that he was no longer resident at address B. The applicant says Ms. T.C. obtained his address in Limerick from a Garda W.R. attached to the Gardaí at Sundrive Road, Dublin 12. She so informed him on one occasion when she telephoned him on his mobile telephone. He says that he was in contact with T.C. in January, 2001 and that at that stage she did not indicate she had applied for a barring order against him, nor did she inform him that a protection order had been drafted. The applicant alleges that the reason why T.C. sought a barring order against him was because she wished to obtain a transfer of the Dublin Corporation tenancy held in their joint names into her sole name. The applicant states that he was, at a time not identified, unsure as to how to resolve his problem about being barred from his house. It was then he was in contact with the unnamed friend who arranged for him to seek an extension of time to appeal. He says that this application was eventually refused by District Judge Gerard Haughton. While it was stated that this order would be produced, the order has not been made available.

13. The applicant contends that at an unspecified time he was advised of a possibility of judicial review and informed of the possibility that he could seek to challenge the making of the barring order by way of judicial review. However he states that the various solicitors he consulted at that time were not in a position to assist him.

14. The applicant states first that he inquired about the issue of judicial review from Mr. Peter Mullin of Garrett Sheehan and Co. No date is identified for this inquiry. He says that Mr. Mullin indicated that his firm generally only did criminal work. The applicant states that he mentioned the matter to Thomas Collins Solicitor of Thomas Collins and Company in Terenure who is acting for him in a claim in relation to residential abuse. Mr. Collins in return referred him to Mr. Gerald Griffin of North King Street, Dublin 7, who decided not to take the case. The applicant also said that he saw Ms. Anne O'Sullivan of Ferry Solicitors but she was not in a position to assist either. The applicant further deposes that his current solicitor asked Tom Collins by letter to confirm that he had mentioned the matter to him and that Mr. Collins indicated that he did not do judicial review cases. Some brief correspondence from the solicitors is exhibited.

15. It must be noted that no correspondence is exhibited from Garrett Sheehan and Company. There is no evidence or correspondence exhibited indicating that a letter had been sent to that firm or any request made to Mr. Mullin to swear an affidavit on the merits or on delay.

16. Second, there is exhibited a letter of the 1st December, from Messrs Tom Collins and Company responding to a letter from the applicants present solicitor Mr. Anthony Murphy of the 19th November, 2004. Mr. Collins states that he remembers being getting involved in a judicial review but he stated that his reason for not getting involved was that he did not do that kind of work.

17. Third, Mr. Gerald Griffin solicitor wrote a letter on 19th December, 2005 simply confirming that he had been consulted by the applicant in relation to challenging the barring order against him and indicating that he was not prepared to act. Finally there is exhibited a memorandum from an Anne O'Sullivan of Messrs Ferry Solicitors who recollected being consulted by the applicant at a time when he was being advised by Tom Collins regarding an abuse case, that he had also instructed the Ormond Quay Centre of the Legal Aid Board regarding the barring order and further stating her recollection at the time that the matter would be time consuming and costly. Ms. O'Sullivan recorded she was not sure why the applicant was not staying in touch with the Law Centre.

18. In summary, while clearly most salient information might have been obtained from Garrett Sheehan and Co., no evidence such has been adduced. Mr. Peter Mullins the solicitor who acted for the applicant has not sworn an affidavit in these proceedings. There is no indication that he was asked to do so. No other correspondence has been exhibited from Garrett Sheehan and Co. With regard to the other correspondence, none of the solicitors, referred to have identified precisely when they were consulted by the applicant. This is unsurprising as they were merely asked to indicate whether or not they had been consulted by the applicant. The applicant states that he was in bad health in the year 2001 and says that he could not adequately direct his mind to resolving his legal problem. No sufficient evidence is adduced at all in relation to this issue, nor has any medical evidence been adduced as to the duration and extent of the applicants illness. The applicant has not fully indicated the nature of his medical problem or how such problems would have prevented him at any point from directing his mind to the legal issues in question.

Clearly on 13th July, 2001, the applicant went to address B. Garda L. swears that he was called to that address on the date in question. He found the applicant in an upstairs bedroom. The front door had been kicked in and the notice party alleged that she had been assaulted. He arrested the applicant and charged him with a breach of s. 2 of the Non Fatal Offences Against the Person Act 1997 and breach of s. 17(1) of the Domestic Violence Act 1996. At no time in his dealings with the applicant on that day did he claim that he was unaware of the barring order or that it had been made without notice to him. These averments by Garda L. were made on 8th December, 2004.

Finally the applicant states that the appeal in Garda L's case was in the list in the Circuit Court on 23rd November, 2004. The applicant states that "as his solicitor was not in court" he decided to withdraw his appeal. Accordingly there is now no appeal pending against the conviction of 12th January, 2004. No further explanation is given as to why this decision was made.

19. The respondent's case can be thus summarised:

> 1. The applicant is not entitled to the relief sought by reason of his gross and inordinate delay in seeking judicial review. The order which he seeks to quash was made on 1st February, 2001 and yet leave for judicial review to quash it was not sought until 21st June, 2004 some three years and five months later. Even if the applicant's assertion that he did not know about the hearing on 1st February, 2001 was correct (which is denied), he must have become aware of the barring order at the very latest on 13th July, 2001 when he was arrested for a breach of it. Even after his ultimate conviction on 12th January, 2004 (which he has not been given leave to challenge), the applicant waited over five months before seeking leave for judicial review.
>
> 2. The applicant is not entitled to the relief sought by reason of his conduct in not putting the correct facts before this Honourable Court. In particular the applicant was properly served with the proceedings which led to the making of the barring order and was aware of its existence at the time when he was arrested for its breach. In addition the applicant is not correct when he claims that he only commenced to reside at the address in Munster some time after the date of the barring order.
>
> 3. The applicant's proceedings are vexatious and an abuse of process in that they are an attempt to wrongfully prolong a family law dispute by means of a judicial review commenced years after the impugned order was made.
>
> 4. On 12th January, 2004 the first named respondent rejected the applicant's claim that there was no valid barring order in place. The applicant has not been granted leave to challenge this finding.
>
> 5. The applicant elected to seek to appeal to the barring order made on 1st February, 2001 and should thus not now be permitted to seek to challenge that same order by means of judicial review.
>
> 6. The applicant has not been granted leave to challenge the validity of his conviction and thus these proceedings represent an improper collateral attack on the validity of that conviction.
>
> 7. The barring order dated 1st February, 2001 records on its face that the applicant came before the court "by summons duly served". Pursuant to s. 14 of the Courts Act 1971 and substituted by s. 20(v) Miscellaneous Provisions Act 1997 regard shall not be had to any record other than this order.
>
> 8. It is denied that the applicant was never informed of any intention of the notice party to seek a barring order against him. It is clear from the face of the barring order that the summons was duly served.
>
> 9. It is denied that the hearing before the second named respondent breached the rules of *audi alteram partem* or was in breach of the applicant's right to natural and constitutional justice. It is denied that the barring order is void in law and of no effect. It denies that the applicant that was not afforded due process.
>
> 10. The applicant has not been granted leave to challenge the validity of the protection order made on 11th December, 2000 and so the question of what notice he did or did not have of it is not relevant to this judicial review.
>
> 11. The applicant has not been granted leave to seek damages.

20. It will be readily appreciated that in view of the many lacunae in the evidence, any advocate would face an uphill task. I would

not wish any of the omissions identified to be taken as criticism of the applicants legal representations. The elapse of time and delay which occurred was not their fault. The same elapse of time may, perhaps, account or for at least some of the areas of omission.

In the course of submissions Mr. Michael O'Kennedy S.C. has frankly stated that his client's purpose in proceeding is to now seek to impugn the order of the 1st February, 2004 with a view ultimately to declaring that order null and void. The applicant's intention is thereafter to launch other plenary proceedings in which he claims damages for breach of his constitutional rights of access to his children which he claims, were breached as a result of the making of that order without due notice to him. However the statement of grounds seeking judicial review included a claim for damages. Leave was not granted to permit the applicant to seek that relief.

Consideration of the Issues
It is now necessary to consider a number of the issues that arise in the course of these judicial review proceedings.

The Order is Spent
21. The first is a fundamental issue which arises in this case. That is that the issue is in fact moot. In the instant case the order impugned expired on 31st January, 2004. It is no longer in force. The clear delay in the case outweighs any alleged injustice to the applicant. It is well established that relief will not be granted by way of judicial review where it serves no useful purpose or would be pointless.

22. In *Barry v. District Judge Fitzpatrick and the Director of Public Prosecutions* [1996] 1 ILRM 512 the Supreme Court had to consider the issue of orders which, albeit made in excess of jurisdiction, were, by the time the application was brought spent. As stated by Hamilton CJ (with whom Blayney J. concurred, Denham J. dissenting):

> "Though the remand in each of these cases was granted by the learned District Judges in excess of their jurisdiction, the fact remains that the orders made in each case are spent and that the learned trial judge is correct in the exercise of his discretion to refuse the relief sought in respect thereof by the applicant."
>
> As stated by him, "the relief of judicial review is a discretionary remedy" and I am satisfied that the learned trial judge properly exercised his discretion in this matter. He was quite correct in holding that an order of certiorari, if granted, would have no effect in quashing an order which was already spent and would be a pointless exercise."

Approbation and Acquiescence
23. The submission made by the respondent under this hearing is that the court in its discretion, should refuse relief because of approbation of the impugned order due to the delay of the applicant in seeking relief and his acquiescence in undergoing a criminal trial in the District Court.

24. The applicant alleges that he was served the documents at the address in Munster but states he did not understand from them that he was prevented from entering address B. He does not state when he was made aware of this. Having regard to the tenor of the affidavit however it would appear to be prior to 13th July, 2001. In any event, when the applicant was arrested on 13th July, 2001 and charged with breaking the barring order he must at that point at the very latest been aware of the existence of the order. It is clear that the applicant then sought legal advice. He ultimately lodged an appeal against the barring order but this was refused. He appealed against that refusal and that appeal was struck out. The applicant has not fully or sufficiently explained why it was struck out or why he did not attempt to reinstate it or so instruct his solicitor. He was aware of his right to bring judicial review proceedings. Having been charged with the offence he sought numerous adjournments in order to challenge the original barring order in the Circuit Court but ultimately did not do so. Having been legally advised he proceeded with his criminal trial and on 24th February, 2004 was convicted.

25. In *M.Q. v. The Judge of the Northern Circuit* (McKechnie J.) (Unreported, 14th November, 2003) that judge dealt with the question of acquiescence and waiver in circumstances where the applicant for a judicial review had actually opted or elected to contest allegations on their merits in a criminal trial. As in the instant case the applicant was legally advised at all material times. As in *M.Q.*, with the benefit of advice, a decision was made to contest the criminal proceedings on their merits.

In *M.Q.*, the trial having taken place, the jury disagreed. Another 12 months then elapsed before the applicant sought leave to bring judicial review proceedings. Thereafter he was fully aware of the intention of the Director of Public Prosecutions to seek a re-trial as and from the early part of the year 2000. The application for leave to seek judicial review was made however only on 15th January, 2001.

26. At p. 37, paragraph 51 of the unreported judgment, McKechnie J. stated:

> "There is another way in which the actions of the accused person throughout 1999 and 2000 can be considered. As previously stated he was fully and completely aware of the moves by the D.P.P. as and from January 1999. He was brought to the District Court within one week or so of having been arrested. He was thereafter part of and in the judicial process. This was a process which in the absence of challenge continued up to and including his trial. He chose to adopt this route. He elected to contest allegations on their merits. He was perfectly entitled to so do. Having done so however I am of the view that by his conduct he must be taken as having surrendered, waived, or abandoned his constitutional rights, and his rights to natural justice which I have above identified. That one can so do is not in dispute. See the *State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567 and *G. v. An Bord Uchtála* [1980] I.R. 32. Once an individual without other disability has full knowledge of the relevant circumstances and once that can be established or inferred from his conduct, then he will be taken to have unambiguously surrendered such rights. The same applies to natural justice. See *Corrigan v. Irish Land Commission* [1977] I.R. 317 and *O'Brien v. Bord na Mona* [1983] I.R. 255.
>
> As a result of this separate ground I would conclude that he cannot attempt to re-establish a position which is open to him in January 1999 but which, as of now, has been superseded by a process which he willingly submitted."

McKechnie J. continued:

> "52. This result is I think supported by the decision of Butler J. in *State (Conlon) Construction Company v. Cork County Council* (Unreported, High Court, 31st July, 1975). Although that case was decided under the 1962 Rules of the Superior Courts, it remains I feel applicable.

The learned judge said:

> "The making of an order is within the discretion of the court, the court must consider all the circumstances of the case including the conduct of the parties where mandamus is sought to secure a right, the right must be promptly claimed and the claim pursued vigorously without being abandoned. Among well known grounds for refusing the remedy is delay on the part of the applicant in pursuing the claim and abandonment of the claim in favour of alternative remedies. Where such delay or abandonment was deliberate because the claimant may have thought such a course to be in his better interest he cannot repent his decision and ask for the discretion of the court to be exercised in his favour by the making of the order."

27. In my view the considerations outlined and quoted by McKechnie J. in *M.Q.* are applicable here. The applicant must by his conduct on legal advice, and by his engagement with the District Court process, be taken to have "surrendered waived or abandoned" his constitutional rights and his rights to natural justice, insofar as applicable.

Delay
28. The above finding must be seen in the light of a further determination on the question of delay. It is quite evident that there has been a failure to comply with the time limits as laid down under Order 84 Rule 21 of the Rules of the Superior Courts. Although time limits may be extended "for good reason" the applicant has not put before the court any sufficient or good reason for extension. The statements made on affidavit to which reference has been made earlier do not constitute such sufficient evidence. It is not adequate to say that during a period of one year the applicant was suffering from illness, without fully disclosing the nature of the illness, or why it proved an obstacle to initiating judicial review proceedings at any time during that period. Moreover even were the applicant ill, this in no way accounts for the failure to bring judicial review proceedings in relation to an order of 1st February, 2001 which is now sought to be impugned in judicial review proceedings initiated in June 2004 more than three years later, and during much of which time he was in receipt of highly experienced legal advice.

29. In *O'Donnell v. Dun Laoghaire Corporation* (No. 2) [1991] ILRM Costello J. indicated that the test in relation to the extension of time in judicial review proceedings is an objective one and that the court should not extend time merely because an aggrieved plaintiff believes that he or she was justified in the delay in instituting proceedings. The plaintiff had to show that there were objectively "reasons which both explain the delay, afford a justifiable excuse for the delay". Similar principles have been identified by the Supreme Court in the case of *de Roiste v. The Minister for Defence and Others* [2001] 1 I.R. 190 and *Dekka Éireann Teoranta v. The Minister for Environment and Local Government* [2003] 2 I.R. 270. Moreover in the latter two authorities the Supreme Court has indicated that the Superior Courts have an inherent jurisdiction to dismiss proceedings where the party instituting them was guilty of inordinate and inexcusable delay. (See also *Connnolly v. The D.P.P.* [2004] I.R.). There being no evidence upon which "good reason" can be established the court has no jurisdiction to extend the time for bringing the application. While of course the time was extended for the bringing of the leave application up to 21st June, 2004 on an *ex parte* basis, this must be subject to the submissions and evidence which have now be adduced on behalf of the respondent.

Alternative Remedies
30. One then turns then to the question of alternative remedies available to the applicant. If the applicant was dissatisfied with the order impugned it is clear there were alternative remedies available to him. It was open to him to apply for a variation or discharge of the order. The Domestic Violence Act 1996 provides a scheme for respondents who are aggrieved at barring orders to apply to have the barring orders varied or discharged. Under s. 3(6) of the Act of 1996, a respondent to an application for a barring order may apply to have it varied. On such application, the court shall make such order as it considers appropriate in the circumstances. Section 13(1) provides that the respondent to a barring order may make an application to have the barring order discharged and the court shall discharge the order if it is of the opinion that the safety and welfare of the applicant does not require that the order should continue in force.

31. At no stage did the applicant take any of these steps even after the point when he must have known of the order. In fact he elected to appeal but ultimately for reasons not furnished to this court an application to extend the time for leave to apply for the appeal was struck out and no application appears to have been made to reinstate the application. In the circumstances not only was there an alternative remedy, but there was a more suitable and less costly alternative remedy available to the applicant of which he did not avail.

Abuse of the Court Process
32. A further issue is whether not these proceedings are a collateral attack on the orders made in the family law proceedings. On the facts it is not open to the applicant to impugn convictions which were made in relation to breach of the barring orders, because he has not obtained leave to do so. Accordingly it is difficult to avoid the conclusion that these proceedings are motivated by an attempt to engage in a collateral attack upon the barring order by seeking judicial review in relation to the conviction made for its breach. Combined with the fact that the order is now spent an issue arises as to how the court should view this application. It is very difficult to avoid the conclusion that the proceedings are vexatious. The applicant has now withdrawn his assertion that he was not living at the address in Munster at the time that the barring order was granted.

Service of the Summons
33. The granting of a barring order is a statutory remedy available to a person whose protection is an issue under the terms of the Domestic Violence Act 1996. It grants to the District Court civil jurisdiction to make certain orders in order to protect the physical and emotional welfare of persons who claim that their welfare and safety are in issue. The Act of 1996 sets out the applicable scheme. Section 16 of the Act provides that proceedings under the Act should be heard otherwise than in public. It will be noted that the third named respondent chose, perhaps for understandable reasons, not to place any matters before this court which may have arisen in the course of the District Court proceedings.

34. An application for a barring order is by way of summons (District Court Rules 1997 Order 59 Rule 9). However unlike a summons in other areas of the civil and/or criminal law the summons for a barring order is served by the Clerk of the District Court on the person to whom it is directed (Order 59 Rule 12(1)). Accordingly in order to effect service, the District Court Clerk must conduct an inquiry in relation to where the respondent may be found.

35. In this regard the protection order granted on the 11th December, 2000 is relevant. The protection order provides *inter alia* that the applicant is not to watch or beset the place where the applicant resides. Section 2(b) of the Domestic Violence Act 1996 gives to the District Court power to make such an order if a respondent is residing "at a place other than the place where the applicant … resides". In other words, if that court believed that the respondent was still living at address B it would not have had the jurisdiction to make the safety order. It now transpires that the applicant had a number of different addresses during the month of December 2000. In such circumstances prima facie it would appear not unreasonable for his former family home to appear on the order. In

Brennan v. Judge Desmond Windle and Others [2003] 2 ILRM 520 the Supreme Court held (Hardiman and Geoghegan JJ; Murray J. concurring) that the general presumption that a court order regular on its face creates the presumption that the proceedings which led to it were in order, does not apply to questions of proof of service which have been the subject of specific provision. That specific provision requires proof of certain matters. If, that proof having failed, the person who had sought to rely on those provisions could fall back on a more general presumption, the statutory requirement of proof would be rendered entirely meaningless.

36. The Supreme Court concluded on the facts that the applicant had established *prima facie* that the hearing before the District Judge was fatally flawed by reason of a failure to observe natural and constitutional justice where the applicant had done enough to shift the onus of proof on the question of whether there was sufficient evidence of service of the summonses before the District Court. Such a matter was peculiarly within the capacity of the respondents to prove. The respondents had produced no evidence that the proof required by s. 22(2) had been before the District Court in any form.

37. In *D.K. v. Judge Timothy Crowley, Ireland and the Attorney General* [2002] I.R. 744 the Supreme Court considered the effect of an interim barring order.

In the course of the judgment at p. 359 Keane C.J. identified what he termed the "draconian consequences" on the making of such an order. The person breaching the order commits a criminal offence in failing to comply with the order even if it should transpire that it should never have been granted. Even in a case where the District or 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 anyway for an order which may have had the most damaging consequences for him. 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 children of the marriage may necessary be affected by the absence of one spouse from the family home for a relatively significant period of time as a result of the barring order necessarily having the paramount effect of protection of welfare of the children. The statutory power must be subject to the doctrine of proportionality and interpreted having regard to constitutional rights.

38. However these important findings must be contrasted to the situation in the instant case. First the order impugned is spent. Second, there is the delay which has taken place. Third, there was acquiescence and waiver at a time when the applicant was legally advised. Fourth, the delay is unexplained. Fifth, there is a want of evidence upon which the court could conclude that judicial review should lie in any case. In particular there is an absence of the evidence necessary to negative the inference that the real issue was raised was raised in the District Court and a dearth of information on the circumstances of the withdrawal of the appeal to the Circuit Court. It is insufficient for the applicant to rely on brief letters from solicitors which do nothing to fully set out the position on extension of time. It is certainly not helpful when these letters do not identify the dates or times when the applicant attended at the solicitors offices. There is an absence of any other evidence in relation to what actually transpired in the District Court. I consider all of these factors are to be borne in mind having regard to the observations of Keane CJ, Denham J. and Fennelly J. in the *de Roiste v. Minister for Defence and Others* [2001] 1 I.R. 190 as to the discretion whether time should be extended for judicial review. The conduct of the applicant has had the effect of disentitling him to any relief to which he might have been entitled.

Even by inference this court can conclude on the evidence that the question of the invalidity of the original order was one which was, in fact, canvassed in the District Court by his highly experienced solicitor. The issue was thereby subject to consideration by the District Court Judge. In such circumstances therefore the acquiescence and waiver would debar the applicant from seeking to impugn the original order in the District Court. The applicant opted on advice to deal with the issue in another way.

While the consideration in *Brennan* and *D.K.* are important in the protection and jurisdiction of the rights of the citizen they do not arise in the instant case for the reasons outlined above.

In the circumstances the court will decline this application for judicial review.