28/09; [2009] VSC 477

SUPREME COURT OF VICTORIA

ZION-SHALOM v MAGISTRATES' COURT OF VICTORIA & ORS (No 2)

Harper J

19, 20 October 2009

FAMILY VIOLENCE PROTECTION - JUDICIAL REVIEW - APPLICATIONS FOR *CERTIORARI* AND MANDAMUS - INTERIM ORDER GRANTED - NOTICE APPROPRIATELY ISSUED BY POLICE OFFICER - WHETHER MAGISTRATE HAD JURISDICTION TO HEAR APPLICATION - DEFENDANT'S COUNSEL ALLOWED TO ADDRESS MAGISTRATE ON EVIDENCE WHICH WAS INTENDED TO BE CALLED - DEFENDANT NOT ALLOWED TO GIVE EVIDENCE - WHETHER MAGISTRATE ACCORDED DEFENDANT PROCEDURAL FAIRNESS - WHETHER THE INTERIM ORDER SHOULD BE STAYED PENDING DETERMINATION OF THE APPLICATIONS - APPLICATION FOR *CERTIORARI* AND MANDAMUS REFUSED: *FAMILY VIOLENCE PROTECTION ACT* 2008, SS8, 9, 26, 31, 51, 53.

1. Where pursuant to s26 of the *Family Violence Protection Act* ('Act'), a family violence safety notice was appropriately issued by a senior member of Victoria Police, by s31 of the Act, such a notice was taken to be an application by the police for a family violence intervention order for the alleged victim against the alleged perpetrator of violence. It is also by that section taken to be a summons for the latter to appear in the Magistrates' Court on a date stated in the notice. Once those preconditions have been fulfilled, the Magistrates' Court has jurisdiction to determine the application.

2. The Act explicitly provides, by s54, that an interim order may be made whether or not the alleged perpetrator has been served with a copy of the application for a family violence intervention order and whether or not that person is present when the interim order is made. It follows that an interim order may be made without hearing that person. It is clear that on an application for an interim order a full hearing is not necessary. In this case, the plaintiff was given a hearing of sorts, albeit not one which would satisfy the criteria as laid down by the authorities for a fair trial. But – and the distinction is vital – an application for an interim intervention order is not a trial.

3. The legislation does not require, before an interim intervention order may be made, that any alleged family violence be proved. In this case, once the magistrate was satisfied that the appropriate family violence safety notice had been issued for a person the subject of an application for a family violence intervention order to protect that person, the Magistrate only had to be satisfied of one other thing; namely, that there were no circumstances that would justify discontinuing the protection which the notice gave to that person. In this case, the Magistrate was so satisfied, albeit on material that would not allow her, were she hearing a proceeding for a final order, to be satisfied to the requisite standard that the plaintiff had committed family violence against the alleged victim.

HARPER J:

1. The plaintiff claims that an interim intervention order has been made against him by a magistrate (her Honour D M O'Reilly) who had not established her jurisdictional basis for doing so, and who failed to accord him natural justice. Among the orders he seeks are orders: (a) that he is not a "Family member" or "Domestic partner" as defined by s8 and 9 of the *Family Violence Protection Act* 2008; (b) in the nature of *certiorari* that the interim intervention order be quashed; and (c) in the nature of mandamus compelling the Magistrates' Court at Heidelberg to dismiss the application for an intervention order.

2. The expression "Family member" is defined in s8 of the Act as including, among others, a person who is or has been the alleged perpetrator's spouse or domestic partner; a person who has or has had an intimate personal relationship with the alleged victim; or any other person whom the alleged victim reasonably regards or regarded as a family member because (for example) they lived or related together in a home environment.

3. The section also provides that a relationship may be an intimate personal relationship whether or not it is sexual in nature.

4. The magistrate had before her evidence from the alleged victim (the third defendant) that the plaintiff moved in to her (the third defendant's) apartment in St Kilda West in 2006. The relationship, according to the alleged victim, instantly became sexual, although this lasted for only a few months. In June 2008 they became owners as tenants in common of premises in the Eltham area. They lived in and worked from that house thereafter, although she is a naturopath and he is a psychic consultant. As I understand it they do not share clients and operate their businesses as separate entities.

5. The plaintiff seeks to challenge some of this evidence. In particular, his affidavit evidence is to the effect that there never was an intimate, let alone sexual, relationship between himself and the alleged victim, and accordingly when the two moved to Eltham they occupied separate bedrooms and cooked and ate separately. On this basis, it is submitted, he was never a family member of hers – and so the Magistrates' Court has no jurisdiction to deal with the present dispute under the family violence legislation. Because she has no jurisdiction, the magistrate ought to have declined to make an interim invention order; and this court should make an order in the nature of *certiorari* quashing that order. (I interpolate to say that the application for mandamus was but tentatively pressed.)

6. I do not agree that her Honour, sitting at the Magistrates' Court at Heidelberg – which exercises the family violence jurisdiction conferred by s4H of the *Magistrates' Court Act* – did lack jurisdiction. It is not in contention that, pursuant to s26 of the *Family Violence Protection Act*, a family violence safety notice was issued by an appropriately senior member of Victoria Police. By s31, such a notice is taken to be an application by the police for a family violence intervention order for the alleged victim against the alleged perpetrator of violence. It is also by that section taken to be a summons for the latter to appear in the Magistrates' Court on a date stated in the notice. Once those preconditions have been fulfilled, the Magistrates' Court has jurisdiction to determine the application. Indeed, it is provided by s51(1)(c) of the Act that the court may make an interim intervention order if a family violence safety notice has been issued for an affected family member and the court is satisfied, on the balance of probabilities, that there are no circumstances that would justify discontinuing the protection of that person until a final decision about the application. The court does not have to ask itself whether the person for whom the notice is issued is properly within the category of an affected family member, because by s4 of the Act one of the definitions of such a person is "a person the subject of an application for a family violence intervention order to protect the person or the person's property".

7. In this case it is not contested that the alleged victim was a person the subject of such an application. The conditions for jurisdiction were therefore made out. Accordingly, the magistrate had jurisdiction to make an interim order, and indeed had no option but to deal with the application. This ground for my making an order in the nature of *certiorari* must therefore fail.

8. It is next submitted on behalf of the plaintiff that he was not accorded procedural fairness or, to adopt the now almost discarded description, natural justice. His counsel, acting as his mouthpiece, was permitted to put orally to the magistrate the evidence which it was anticipated he would give were he to be called; but he was not allowed to be called himself, and his counsel was not allowed to cross-examine the alleged victim. The magistrate explained her position by saying that she did not have time to follow that course. The plaintiff does not suggest that her Honour's explanation was inaccurate.

9. The Act explicitly provides, by s54, that an interim order may be made whether or not the respondent (that is, the alleged perpetrator) has been served with a copy of the application for a family violence intervention order and whether or not the respondent is present when the interim order is made. It follows that an interim order may be made without hearing the respondent.

10. The plaintiff nevertheless submits that if he is present he must be heard. This submission encounters an immediate problem. It is clear that on an application for an interim order a full hearing is not necessary. Indeed, it may not be possible or even appropriate. Where, then, is the line to be drawn? In this case, a magistrate allowed some five minutes for counsel to obtain instructions from the plaintiff. Counsel then put to the magistrate what, on those instructions, the plaintiff would have said in evidence in chief had he given evidence. It follows that the plaintiff was given a hearing of sorts, albeit not one which would satisfy the criteria as laid down by the authorities

for a fair trial. But – and the distinction is vital – an application for an interim intervention order is not a trial.

11. The importance of the distinction is reflected in the legislation itself. A final order may only be made if the court is satisfied on the balance of probabilities that the alleged perpetrator has committed family violence against the affected family member and is likely to do so again: s74(1). By contrast, s53 provides for a number of circumstances in which an interim order may be made, including those set out in s53(1)(c). As I have already noted, this provides that the court may make an interim order if a family violence safety notice has been issued for an affected family member and the court is satisfied on the balance of probabilities that there are no circumstances which would justify discontinuing the protection of the person until a final decision about the application. Again, there is no obligation upon the affected family member (that is, the alleged victim) to give evidence before the interim order is made: s55(2). In addition a registrar of the court must give both the alleged perpetrator and the alleged victim a written explanation of the interim order: s57(1). That explanation must cover a number of matters, including the means by which the interim order may be varied or extended and the process for deciding the final order. If an interim order is made, the court must ensure that the hearing is listed for a decision about the final order as soon as practicable: s59. Finally, by contrast to the position on the hearing of an application for an interim order, a contested application for a final order may be heard on a mention date, but only if: (a) the court is satisfied that all the parties to the proceeding have had an opportunity to seek legal advice and legal representation, and have consented to the hearing of the contested application on the mention date; and (b) it is fair and just to all parties to hear the application on that date: s61(1).

12. An important conclusion, which I think necessarily follows, is that the legislation does not require, before an interim intervention order may be made, that any alleged family violence be proved. In this case, once the magistrate was satisfied that the appropriate family violence safety notice had been issued for a person the subject of an application for a family violence intervention order to protect that person, she only had to be satisfied of one other thing; namely, that there were no circumstances that would justify discontinuing the protection which the notice gave to that person. In this case, her Honour was so satisfied, albeit on material that would not allow her, were she hearing a proceeding for a final order, to be satisfied to the requisite standard that the plaintiff had committed family violence against the alleged victim.

13. Since it is clear that the legislation contemplates a magistrate reaching the required state of satisfaction on an ex-parte application for an interim order, and without even hearing any evidence from the alleged victim, there is an obvious difficulty in arguing that the magistrate failed to accord the plaintiff procedural fairness when she indicated that she did not have time to allow him to give evidence or, through his counsel, to cross-examine the alleged victim.

14. This is especially so since her Honour did allow the plaintiff's counsel to outline the evidence he proposed to give. That, at least, gave her Honour a basis for making a judgment about whether there might be circumstances that would justify discontinuing the protection of the alleged victim which was accorded to her by the family violence safety notice.

15. The position which parliament took in relation to the legislation, as that position was outlined by the Attorney-General on 26 June 2008 in his second reading speech, accords I think with the construction of the Act which I have adopted. The Attorney then said:

> There are two types of family violence intervention orders – interim orders and final orders. Interim intervention orders are designed to provide short term, speedy protection to victims of family violence until the court can hear all the evidence and make a final determination. An interim intervention order can be made to ensure the safety of the affected family member to preserve the affected family member's property or to protect a child who has been subjected to family violence committed by the respondent ... Final orders are designed to provide longer term protection to victims of family violence. Such an order can be made if the court is satisfied on the balance of probabilities that the respondent has committed family violence against the affected family member and is likely to do so again.[1]

The Attorney continued:

> The bill makes a number of changes to the existing law to enable victims of family violence who wish to remain in the home and have the violent person excluded. The Victorian Law Reform Commission

> saw this as a very important change, finding that, "Various Australian studies have found that women and children are severely economically, educationally and socially disadvantaged if they need to leave their homes due to family violence and that there is a high risk they will become homeless". The bill requires the court to consider whether an adult respondent should be excluded from the victim's residence, having regard to a number of factors.[2]

It is not for the court to prescribe, as conditions necessary if procedural fairness is to be accorded, conditions which are inconsistent with those prescribed by parliament. It seems to me that, were I to accede to the plaintiff's application for *certiorari*, I would fall into that trap.

16. The question of the *Charter of Human Rights and Responsibilities* was raised, albeit by one party only (the plaintiff) and then only in passing. There has been no referral pursuant to Division 3 of the *Charter*, and I consider that the relevant provisions of the *Family Violence Protection Act* 2008 can be interpreted consistently with a human right. No question of a declaration of inconsistent interpretation therefore arises. For the reasons I have endeavoured to set out, the application for *certiorari* and the application for mandamus must be refused.

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[1] Victoria, *Hansard*, Legislative Assembly, 26 June 2008, 2646 (Robert Hulls).
[2] *Ibid*, at 2647.

APPEARANCES: For the plaintiff Zion-Shalom: Ms L Steiner, counsel. Raynal & Associates, solicitors. For the second defendant Elizabeth Skinner: Mr A Caleo SC with Ms E James, counsel. Victorian Government Solicitor. For the third defendant Ann Karn: Mr C Fairfield, counsel. West Heidelberg Community Legal Service.
