

**Suit No 69 of 2001**

**IN THE MATTER** of the Constitution of Saint Lucia contained in the Saint Lucia Constitution Order S.I. No.1901 of 1978

and

**IN THE MATTER** of an Application by the Applicant a person alleging that certain of the provisions of Sections 8(8), and 10(1) of the said Constitution have been, are being or are likely to be contravened in relation to him by the **Domestic Violence (Summary Proceedings) Act** of 1995, and in particular Section 4 thereof and that the Applicant is accordingly entitled to redress by virtue of Section 16(1) of the Constitution.

and

**IN THE MATTER** of Section 13(2) of the Crown Proceedings Ordinance Chapter 13 of the revised Laws of Saint Lucia 1957 whereby the Attorney General is the person against whom proceedings against the State are to be commenced and are hereby commenced.

**BETWEEN**

**MARTINUS FRANCOIS**

Applicant

and

**THE ATTORNEY-GENERAL OF ST.LUCIA**

Respondent

**Appearances**

The applicant in person  
Ms Louise Blenman, Solicitor General with Ms Agnes Actie and Ms Gillian Jules for the Respondent

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2001: February 19, March 7 & 27;  
May 24.  
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**Introductory:**

[1] **BARROW J. (Ag.):** The applicant seeks a number of declarations to the effect that an *ex parte* Interim Protection Order made against him dated 12<sup>th</sup> January 2001 under section 4 of the Domestic Violence (Summary Proceedings) Act No. 7 of 1995 ("the Act") is

unconstitutional. The right to a fair hearing and the right to freedom of speech and expression are the specific constitutional rights that the applicant invokes.

[2] In relation to his right to a fair hearing the applicant seeks a declaration that the granting of the order contravened his right to a fair hearing guaranteed by s. 8 of The Saint Lucia Constitution Order 1978 ("the Constitution") including the right not to be denied the procedural safeguard of the opportunity to be heard before the making of an order which was determinant of the applicant's constitutional rights. The applicant also seeks a declaration that s. 4 (3) of the Act, which permits the making of an *ex parte* order, is unconstitutional in that it is inconsistent with s. 8 of the Constitution because the provision for an *ex parte* order is inconsistent with the procedural safeguards of a fair hearing guaranteed to all persons, in particular the right to be given an opportunity to be heard before a protection order, which is determinant of constitutional rights, can be made.

[3] In relation to his right to freedom of speech and expression the applicant seeks a declaration that the granting of the order contravened this right guaranteed to all persons by s. 10 (1) of the Constitution and that it was not reasonably necessary for one of the purposes set out in s. 10 (2) (a), (b) or (c) and/or it was not reasonably justifiable in a democratic society. The applicant also seeks a declaration that s. 4 of the Act is unconstitutional in that it is inconsistent with s. 10 of the Constitution and is not reasonably required for one of the purposes set out in s. 10 (2) (a), (b) or (c) and/or is not reasonably required in a democratic society.

#### Preliminary

[4] Before the hearing of the amended Motion a number of preliminary orders were made in this suit. On the 19<sup>th</sup> February the applicant's claim for damages "of \$250,000.00" was struck out as an abuse of the process of the court since, as the applicant well knew, the quantification of general damages was exclusively a matter for the determination of the court. On that occasion directions were given for the filing of further affidavits and the delivery of skeleton arguments. On the 7<sup>th</sup> March paragraphs 2 to 13, 19, and 21 to 25 of the applicant's affidavit in support were struck out as irrelevant. On the 27<sup>th</sup> March, the day of the hearing, an application to join another person as applicant was refused for the reason that the Protection Order on which that person sought to ground his application had been made almost two years before and raised no common issues of either fact or law with those which arose on the applicant's case. At that juncture it was also ordered that the first named respondent to this application, the Magistrate, be dismissed as a party since he was not being sued in his personal capacity but as an agent of the state and the Attorney General alone is the proper respondent to such a suit. And finally, an application was granted to add a claim for a fifth declaration: that the applicant is entitled to redress under section 16 (1) of the Constitution. The hearing then proceeded of the amended Motion which the applicant had filed on the 14<sup>th</sup> March.

#### Factual background

[5] The applicant is a barrister-at-law and represented himself in these proceedings. On 12<sup>th</sup> January 2001 he was served with an *ex parte* order, obtained by his wife, Annette Francois, in the following terms:

"WHEREAS the ex parte Application of **Annette Francois** of Bois d'Orange, against **Martinus Francois** of Bois d'Orange for a Protection Order was determined by the court on the 9<sup>th</sup> of January, 2001.

**It is now therefore ordered** that an Interim Protection Order under Section 4 of the Domestic Violence (Summary Proceedings) Act is this day granted to ANNETTE FRANCOIS, until **17<sup>th</sup> January, 2001** prohibiting the Respondent Martinus Francois from:

- (1) harassing or assaulting the applicant, Annette Francois;
- (2) interfering with the applicant Annette Francois, in any way likely to cause her annoyance or offence

**You are hereby summoned** to appear at the above-mentioned Court on the **17<sup>th</sup> day of January 2001** at 9:00 am in the forenoon to answer the complaint.

If you do not appear in person at the hearing of the application, the Court may:

- (a) deal with the application in your absence; or
- (b) issue a Warrant for your arrest to be brought before the Court.

Dated this 12<sup>th</sup> day of January 2001.

Sgd. Magistrate, Family Court."

- [6] The order was accompanied by the form prescribed by the Act, filled out by or on behalf of the wife, applying for a protection order/interim protection order against her husband. The wife specified details of the conduct of which she complained as follows: "Use of foul language and insults constantly. Last night, the respondent yelled at me and shoved me. He also held my wrists and shoulders and threw me on the bed. He is also emotionally abusive towards me."
- [7] The Magistrate provided notes of the evidence that he took from the wife at the *ex parte* hearing that he held on 9<sup>th</sup> January. The wife testified that there was a disagreement, that she went to use a neighbour's telephone, that she asked the neighbour to accompany her back to her home as she was frightened, that she was unsure whether the husband would allow her back into the house and thought she might need to seek shelter at the neighbour because the husband, on a previous occasion when she had looked for outside help, had said he would throw her out of the house. The wife testified that she reached her front door and sent off the person who accompanied her because she thought she would be alright. The wife then testified that the husband came and pushed her into the house and bolted the door; she tried to get out to seek help as she felt unsafe but he held her by the throat and pushed her some distance into the main bedroom while shouting at the top of his voice. She stated that she went to the door and tried to leave and the husband held her by the arms and forced her back into the bedroom and pushed her on the bed. She testified that she fell heavily on the wooden frame and hurt her shoulder and pelvis and that she was still suffering from pain and had not seen a doctor and that both her wrists were still painful from where the husband had held her. She described how all the while the husband was yelling at her at the top of his voice saying she was a wicked, evil bitch and how the husband would not listen to her attempts at reasoning but strutted "like a deranged animal". The wife also testified as to a past incident of violence by the husband towards a third party. She testified how she fled the house the following morning and

ended by saying that "I am absolutely frightened of the respondent as I see him as a violent person. I ask the Court to grant me a protection order."

- [8] The Magistrate deposed that having heard the evidence of the wife and witnessed her demeanour, he concluded that her "personal safety was at risk and that she would have been caused undue hardship or serious injury if an interim protection order based on the *ex parte* application was not granted to her as a matter of emergency".
- [9] On the date on which the inter partes hearing was scheduled the wife withdrew the application.

#### The relevant section of the Domestic Violence Act.

- [10] The impugned section of the Act enables magistrates to do precisely what the Magistrate did in this case. Section 4 of the Domestic Violence (Summary Proceedings) Act, 1995 reads as follows:

4.(1) Application may be made to the court in accordance with Form 1 of the schedule for a protection order prohibiting the respondent –

- (a) from entering or remaining in the household residence of a specified person;
  - (b) from entering or remaining in a specified area where the household residence of a specified person is located;
  - (c) from entering the place of work or education of a specified person;
  - (d) from entering or remaining in any place where a specified person happens to be;
- or
- (e) from molesting a specified person by –
    - (i) watching or besetting the specified person's household residence, place of work or education;
    - (ii) following or waylaying the specified person in any place; or
    - (iii) making persistent telephone calls to a specified person;
    - (iv) using abusive language or behaving towards a specified person in any other manner which is of such nature and degree as to cause annoyance to, or result in ill-treatment of the specified person.

(2) On hearing an application under subsection (1) the court may make a protection order if it is satisfied that –

- (a) the respondent has used or threatened to use, violence against, or caused physical, mental or emotional injury to a specified person and is likely to do so again; or
- (b) having regard to all the circumstances, the order is necessary for the protection of a specified person;

and the court may, if it thinks fit, attach a power of arrest to the order.

(3) A protection order may be made on an *ex parte* application if the court is satisfied that the delay that would be caused by proceeding on notice would or might entail:

- (a) risk to the personal safety of a specified person; or
  - (b) serious injury or undue hardship.
- (4) Any protection order made on an ex parte application shall be an interim order.
- (5) Where a protection order is granted on ex parte application, the respondent may apply immediately for it to be discharged.

It is useful to set out, as well, Section 5 of the Act, which reads:

5.(1) Where a protection order or an interim protection order is made and –

- (a) it is served personally on the respondent; and
- (b) the respondent contravenes the order in any respect,

the respondent commits an offence and is liable on conviction to a fine not exceeding five thousand dollars or to imprisonment to a term not exceeding six months or to both such fine and imprisonment.

(2) Subject to this section, where a protection order is in force, a police officer may arrest without warrant a person who he has reasonable cause to suspect has committed a breach of the order.

(3) No person shall be arrested under this section unless the police officer believes that the arrest of that person is reasonably necessary for the protection of the applicant.

(4) For the purpose of subsection (2), the police officer shall take into account –

- (a) the seriousness of the act which constituted the alleged breach; and
- (b) the restraining effect of other persons or circumstances on the respondent.

(5) Notwithstanding this section a police officer may in the absence of a protection order take such steps as may be necessary and appropriate including the exercise of the power of arrest for the protection of any member of a household where he knows or has good cause to believe a person is the object of domestic violence and is likely to be further abused.

### The phenomenon of domestic violence

- [11] Domestic violence is a scourge. It is a major source of violence in our societies. It is part of the bedrock on which rests the subjugation and servitude of women. The pervasiveness and social acceptance of violence against women point to the fact that such violence is the norm rather than the aberration in our societies. It has been said to have its origins in the sexist myth that women exist to satisfy the desires of men: see Roberta Clarke, *Violence against Women in the Caribbean*, p.10, UNIFEM Books, 1998. Among the causes which perpetuate this systemic evil are the tendency to treat violence

against women as a private matter, the lack of laws dealing specifically with such violence and socialisation to patterns of violence (op.cit. p.11).

- [12] Among the mass of material that the learned Solicitor General provided was a copy of the very helpful decision of the Constitutional Court of South Africa in *The State v. Godfrey Baloyi* from which it emerges with the utmost clarity that it is the obligation of governments to deal effectively with domestic violence. More than that, it is a constitutional imperative. The state must protect the right of everyone to be free from violence, including domestic violence. This is inherent in the right of every person to those fundamental rights and freedoms declared in section 1 of the Constitution including: "life, liberty, security of the person, equality before the law and the protection of the law".
- [13] The progression in St. Lucia (as well as in other Commonwealth Caribbean countries) from constitutional premise to international treaty obligation to specific legislation and effective enforcement is readily identifiable and marks not just a feminist's or women's rights victory but a significant human rights victory. Human rights activists and advocates have celebrated the progress made in the 1990s. The title of an article by U.W.I. law lecturer Tracy Robinson reflects the advances made: *Changing Conceptions of Violence: The Impact of Domestic Violence Legislation in the Caribbean* (1999, 9(1) Caribbean Law Review 113). The legislation passed by many Commonwealth Caribbean countries in the past decade aims at providing inexpensive and speedy relief in the lower courts for the victims of domestic violence and that writer has called it "the most important family law reform effort in the region in the 1990s". A major element in the new legislation is identified as the protection order which can be granted ex parte to facilitate speedier relief. "The new legislation", it is said (op.cit. p.116) "makes a powerful statement that ... the state has an interest in preventing ... [domestic violence] and protecting those affected."

#### The right to a fair hearing

- [14] In stark opposition to this advance stands the direct challenge of the applicant to the provision in the legislation for the making of an *ex parte* order. It is a radical attack that the applicant is making. The applicant is really saying that definitionally an *ex parte* order is inconsistent with the right to a fair hearing. While the motion challenges both the specific order as well as the section of the Act upon which the order was based, in his written and in his oral submissions the applicant made not the slightest reference to any aspect whatsoever of the proceedings in which the order was made but directed himself exclusively to the contention that section 4 (3) of the Act, which permits the making of an *ex parte* order, is inconsistent with the right to a fair hearing. I apprehend that there is no challenge to the merits of the magistrate's decision to make the order; the challenge is to the law which empowered the making of the order.
- [15] Section 8 (8) of the Constitution is in these terms:
- "(8) Any court ... prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be

independent and impartial; and where proceedings for such a determination are instituted by any person before such a court ... the case shall be given a fair hearing within a reasonable time."

[16] The applicant cited a number of decisions of the European Court on violations of Article 6 of the European Convention which, as he pointed out, is the counterpart of s 8 of the Constitution. These decisions identify certain requisites of a fair hearing including the right of an accused to challenge evidence against him and the right to be heard and to see and comment on relevant evidence. The applicant also relied on *McInnes v. Onslow-Fane* [1978] 1 WLR 1520 to assert that he was entitled to the high degree of procedural protection that Megarry VC found to be due in forfeiture cases or where an applicant is facing a serious charge of misconduct for which a penalty may be imposed.

[17] There can be no doubt that the respondent to an application for a protection order is entitled to a fair hearing. Among the essential requisites of a fair hearing is the right to be heard. Definitionally, an *ex parte* order is an anomaly in our system of justice which generally demands service or notice of the proposed proceedings on the opposite party (see *Craig v. Kanseen* [1943] 1 KB 256 at 262). In *Rees v. Crane* [1994] 1 All ER 833, at pages 847 and 848, the Privy Council reminded that it is a centuries old stand taken by the courts that bodies entrusted with legal power could not validly exercise it without first hearing the person who was going to be adversely affected. The Board quoted with approval the following extract from page 570 of Wade, *Administrative Law* (6<sup>th</sup> edn, 1988)

'Natural justice is concerned with the exercise of power, that is to say, with acts or orders which produce results and in some way alter someone's legal position to his disadvantage. But preliminary steps, which in themselves may not involve immediate legal consequences, may lead to acts or orders which do so. In this case the protection of fair procedure may be needed throughout, and the successive steps must be considered not only separately but also as a whole. The question must always be whether, looking at the statutory procedure as a whole, each step is fair to the persons affected'.

[18] The applicant argued that s 5 (1) (b) of the Act established a criminal sanction for the breach of the order and that he was therefore at risk of fine and imprisonment as a consequence of the making of the order. This, according to the applicant's argument, strengthened the requirement that he should have been heard before the order was made against him.

#### What is fair?

[19] In *Wiseman v. Borneman* [1969] 3 All ER 275 the House of Lords accepted that there is no difference in principle so far as observance of the rules of natural justice is concerned between decisions which are final and those which are not. What is required in all cases is that the procedure adopted be fair. That case was itself one in which the question arose whether the appellants were entitled as a matter of natural justice to be given the opportunity to see material that was to be put before a tribunal which had to decide whether there was a prima facie case for proceeding further against the appellants. It was

decided that natural justice, which was only “fair play in action”, did not require that the appellants should have an opportunity, at that stage, to see the material because there was no unfairness to the appellants in view of the opportunity that they would have to respond to the material, if there were the further proceedings.

- [20] What emerges from the cases is that what is fair depends on all the circumstances in each case. *Ansah v. Ansah* [1977] 2 All ER 638 was a case where an ex parte injunction was granted to the husband against the wife. The English Court of Appeal identified the exceptional nature of such a mode of proceeding and the great consideration that must be given to so proceeding if fairness is to be maintained:

“ ... the power of the court to intervene immediately and without notice in proper cases is essential to the administration of justice. But this power must be used with great caution and only in circumstances in which it is really necessary to act immediately. Such circumstances do undoubtedly tend to occur more frequently in family disputes than in other types of litigation because the parties are often still in close contact with one another and, particularly when a marriage is breaking up, in a state of high emotional tension; but even in such cases the court should only act ex parte in an emergency when the interests of justice or the protection of the applicant or a child demands immediate intervention by the court. Such cases should be extremely rare, since any urgent application can be heard inter partes on two days’ notice to the other side ... Circumstances, of course, may arise when prior notice cannot be given to the other side; cases where ... a spouse, usually the wife, is so frightened of the other spouse that some protection must be provided against a violent response to service of proceedings, but the court must be fully satisfied that such protection is necessary.

“The evidence produced by the husband in the present case obviously falls far short of justifying the making of an ex parte injunction. ...

“The order that was made in this case is quite unacceptable for another reason. If an order is to be made ex parte, it must be strictly limited in time if the risk of causing serious injustice is to be avoided. The time is to be measured in days, ie the shortest period which must elapse before a preliminary hearing inter partes can be arranged, and the order must specify the date on which it expires. ...”

- [21] This treatment, it seems to me, makes clear that the making of an ex parte order is not necessarily a breach of natural justice or the denial of the right to a fair hearing. Everything depends on whether there is overall fairness. Thus, in *Wiseman v. Borneman* it was observed that what preserved fairness in the granting of ex parte orders is that the procedure invariably exists, and is where necessary invoked, for the affected party to seek to discharge or alter the order made against him (per Lord Wilberforce at p 286). In *Rees v. Crane* the Board considered a number of English and Commonwealth decisions in which it had been held that natural justice did not require that a person must be told of complaints made against him and be given a chance to answer them at the particular stage in question. There were found to be certain essential features, in those cases, which led the courts to that conclusion, including the fact that the investigation at that point was purely preliminary, that there would be a full chance to deal with the complaint adequately at a later stage, that the urgency of the situation justified the one sided

procedure and that no penalty or serious damage to reputation would be suffered by proceeding to the next stage after only *ex parte* proceedings.

- [22] In *Rees* it was held that the affected party, a High Court judge who was suspended from performing his functions pending the referral of the question of his removal from office, ought first to have been given an opportunity to respond to the allegations against him, even at this preliminary stage. The reason for this decision was because there was no urgency to act to suspend him and it would have been a simple matter, not necessarily to give him a hearing but, to inform him of the allegations and allow him to respond in writing. The damage to his reputation arising from the great publicity given to his suspension, it was found, was incapable of being undone even if he was later cleared of all charges and fairness demanded that he should have been given at least the opportunity to respond in writing. It is to be observed that this was a decision based very closely on the facts of the particular case. The decision was not that the applicant was entitled to a hearing at the particular stage and it was clearly recognized that whether or not a hearing was required at a particular stage was incapable of being stated prescriptively but depended on the specific circumstances of each case.
- [23] If the making of an *ex parte* order is not necessarily a breach of natural justice or the right to a fair hearing then it follows, equally, that a statute which provides for the making of such an order is not necessarily inconsistent with the right to a fair hearing. Whether or not the statutory provision should be held to be inconsistent depends on whether the overall procedure that the statute establishes is fair in the circumstances of the case in which the provision is to operate. It was the gravamen of the submissions of the learned Solicitor General that the procedure established by the Act is fair.

#### The scheme of the section

- [24] Section 4 of the Act provides for the making of an *inter partes* order. That is the type of order that the section contemplates will generally be made. Before even an *inter partes* order can be made the court must first be satisfied that the respondent has threatened or used violence or has caused physical, mental or emotional injury *and* is likely to do so again. So, there is a threshold requirement for the normal *inter partes* order. It is only where the court is satisfied that the threshold requirement has been crossed *and* that the delay that would be caused by proceeding on notice would or might entail risk to personal safety or serious injury or undue hardship that the court is permitted to make a protection order on an *ex parte* application. Any *ex parte* order can only be an interim order. And a respondent is specifically empowered to apply immediately for its discharge.
- [25] The scheme and language of the section contain all the safeguards that the decision in *Ansah v Ansah* declared essential to the making of an *ex parte* injunction. The high standard of proof set for the court as to the necessity for proceeding without hearing a respondent, and the nature and the degree of risk to an applicant that must be found to exist, bespeak the requirement of a genuine and serious emergency. The provision for procuring the immediate discharge of what can be no more than an interim order is an important safeguard. More fundamental than all of this, however, is the critical fact that what the statute does is to confer a judicial discretion and define the framework for its

exercise. The discretion is conferred not on an administrative or quasi-judicial tribunal but on an established court of law. It is worth emphasizing that a judicial discretion must be exercised judicially. There is incorporated in this truism a large and settled body of principles as to what it means to exercise a discretion judicially (see the cases cited in *Vol.1(1) Halsbury's Laws of England*, 4<sup>th</sup> ed. reissue, at note 2 to paragraph 75). The framework legislated for the exercise of the discretion, therefore, is nothing less than the distillation of the collective wisdom of decades if not centuries of judicial pronouncements on the requisites of fairness.

- [26] The Act, therefore, does not deny the applicant his right to a hearing at this stage. It makes provision for a court of law to decide whether, as a matter of fairness to both an applicant for a protection order and a respondent, in light of the circumstances which exist, it is necessary, as a matter of emergency, to make an interim order without first having heard the respondent.
- [27] The applicant contends that the ex parte order of the Magistrate was determinant of his rights. Undoubtedly the order affected the applicant's rights and obligations because it prohibited the applicant from doing certain things. I need not discuss whether he ever had any right to do any of those prohibited things. The order was the result of the determination of the wife's application for a protection order. But it was a preliminary determination. The order summoned the applicant to attend on a stated day to answer the complaint. The order itself recognized that the complaint needed to be answered and then determined. Hence the interim nature of the order which was to last for no more than five days from the date of its issue.
- [28] I do not, therefore, accept that the applicant's rights and obligations were determined by the order. His common law and constitutional right to a fair hearing did not confer an absolute right to be heard at this stage. Fairness was served by the procedure and safeguards established by section 4, including his right to an immediate hearing to discharge the order. I find no violation of the applicant's constitutional right to a fair hearing and refuse the two declarations sought in relation to section 8 of the Constitution.

### Freedom of Expression

- [29] The applicant also mounts a challenge based on section 10 of the Constitution which, he says, is in fact the major part of his case. Section 10 states:
- "10.(1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence."
- [30] The applicant attacks the order which prohibits the applicant from "harassing or assaulting the ...[wife]; [or] interfering with the ...[wife] in anyway likely to cause her

annoyance or offence." The applicant impugned the order and the Act on two bases. First, he says the section fails the test of proportionality; the legislation is not proportional to the needs of the situation it addresses – it goes too far. Thus, he asks, what is harassment? Anything can be harassment, he submits, including a sexual advance by a man to his wife. Similarly, he argues, what is annoying? Trying to "make up" can be annoying, he says. The second basis of attack is that the legislation fails the *Wednesbury* test of reasonableness (*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223). The Act, the applicant submits, is simply unreasonable; it is too vague and he repeats: what is harassing? What is annoying?

### The Terms of the Order

- [31] In the course of the hearing a certain divergence manifested itself which did not seem to have occurred to either side nor to concern them. This was the divergence between the language of section 4 and the language of the order. Shortly put, the prohibitions contained in the order employ language that is simply not found in the section. Section 4 says that the Court may make a protection order prohibiting the respondent from entering or remaining in any of a number of specified or described places or from molesting a specified person by doing certain things which are listed ending with "using abusive language or behaving towards a specified person in any other manner which is of such a nature and degree as to cause annoyance to or result in ill-treatment of the specified person."
- [32] I am satisfied that the power of the Magistrate Court to make any protection order, in the absence of this legislation, does not exist. An order, therefore, must be purely a creature of statute. To a significant extent some of the actions which the section empowers the court to prohibit are actions that a respondent would otherwise have the right to perform - a fundamental right, as the applicant argues. I would think that a court can only impose those prohibitions that the Act specifically empowers it to impose. The Act does not empower the court to prohibit harassing but it is harassing that the order prohibits. It was said to me that this is a synonym for molesting. This hardly makes a difference – the Act empowers the court to prohibit a respondent from molesting by doing certain specifically or contextually identified things. It therefore circumscribes what may be considered as molesting and therefore what may be prohibited. Section 4 does not allow a prohibition against molesting or harassing generally.
- [33] The order in this case prohibits the husband from assaulting his wife. This is a criminal offence and no need exists for the Act to prohibit it; it is an illegal action and is by that very fact prohibited. No doubt for that reason the Act does not include this action as one that a protection order may issue to prohibit. Nonetheless, the order purports to prohibit it. Perhaps nothing turns on this specific prohibition and the applicant did not seem to have any complaint about it.
- [34] The formulation of the prohibition in the order against interfering with the wife in any way likely to cause her annoyance or offence may well justify the applicant's complaint of unreasonableness and vagueness. The language of the Act from which this presumably derives is of a different quality altogether. The permitted prohibition is against molesting

by doing any of a number of specified actions and finally from using abusive language or behaving in any other manner which is of such nature and degree as to cause annoyance. Even a cursory comparison of the difference in language should show the difference in intelligibility and legality. There is every difference between prohibiting conduct which, objectively, by reference to its nature and degree, is such as to produce a certain result and prohibiting conduct which is "in any way" likely to produce that result. The latter prohibition seems completely lacking in limitation and seems to encompass conduct which, on a subjective, but not on an objective basis, causes annoyance or offence.

#### **Ultra Vires the Act**

- [35] Ineluctably, I am driven to the conclusion that the order of the Magistrate was ultra vires the Act. The order made does not rest on the authority of section 4 of the Act. It does not draw section 4 into any issue as to its consistency with section 10 of the Constitution. Notwithstanding that the Magistrate undoubtedly thought that he was acting pursuant to section 4, the reality is that the impugned order was not made pursuant to and derives no support from that section.
- [36] The invitation to treat the order as coming within section 4 must be declined. Having reached that point it seems to me that must be the end of the matter. I do not believe that it would be proper for me to notionally substitute for the Magistrate's order some order that I believe he could and should have made, if any, and then proceed to examine the constitutionality of the notional order to see if it notionally violated the applicant's freedom of expression. The desire of counsel to have this point determined must await a case in which the issue properly arises on the order made and on the merits.
- [37] In the result I refuse the two declarations sought in relation to section 10 of the Constitution. From this it follows that the applicant is not entitled to any redress under section 16 of the Constitution, which was the substance of the fifth declaration that he sought. Consistent with what I am told is the practice in this jurisdiction as regards Constitutional law litigation I make no order as to costs.

**Denys A Barrow**  
High Court Judge (Ag.)