

1986 December 27

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 155.4 OF THE
CONSTITUTION AND S. 3 OF THE COURTS OF JUSTICE
(MISCELLANEOUS PROVISIONS) LAW, OF 1964,

a n d

IN THE MATTER OF AN APPLICATION BY: MARIA
GEORGHIOU PHILIPPOU OF LIMASSOL FOR THE
ISSUE OF AN ORDER OF CERTIORARI

a n d

IN THE MATTER OF THE ORDER/JUDGMENT DATED
16th AUGUST 1986, BY THE DISTRICT COURT OF
LIMASSOL AND HIS HONOUR JUDGE S. STAVRINIDES
IN APPLICATION No. 36/76.

(Civil Application No. 68/86).

*Interim Order—Failure to make it returnable on a date—
Error of Law—The Civil Procedure Law, Cap. 6—Sub-
section (3) of section 9—Its essential elements—Order
should be of specified duration—At the end of such period
the order ceases to be in force, unless the Court, upon
hearing of the parties, shall otherwise direct.*

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*Prerogative orders—Certiorari—Error of Law apparent on the
face of the record—Interim order—Failure to make it
returnable—The Civil Procedure Law, Cap. 6, section
9(3)—Order of certiorari issued.*

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On the 16.8.86 an interim order was granted in a
custody application upon the ex-parte application of the
the applicant in the said application, namely the
father of the minor Constantina, restraining Con-
stantina's mother, the applicant in present appli-
cation, from taking the minor outside Cyprus and
providing that the name of the minor be put on the stop
list of persons, whose exit from Cyprus is prohibited.

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No provision was made in the said order making it returnable.

As a result the mother of Constantina, having obtained the necessary leave, filed the present application for an order of certiorari, quashing the said order.

Held, granting the application: (1) The essential elements of section 9(3) of Cap. 6 are that an interim order:

(a) Shall not remain in force for a longer period than is necessary for service of notice of it on all persons affected thereby and this is to enable them to appear before the Court and object to it, thus affording to them the opportunity to be heard. This means that the order has to be made for a specified duration by fixing a date upon which those affected may appear and object to it. In practice this period has been eight days, but this is not a hard and fast rule. (b) At the end of the period aforesaid the order ceases to be in force unless the Court upon hearing the parties or any of them shall otherwise direct.

(2) No doubt there is jurisdiction to restrain one of the parents by way of interim injunction from taking a child out of the jurisdiction (*Harris v. Harris* [1980] 63 L.T. 262). This authority, however, bears out the approach that such an injunction should be of limited duration, so that the opportunity will be afforded to the person affected to appear for a hearing in the ordinary course.

(3) In the light of the above and the primary facts, as the same appear on the record, there has been an error of law apparent on the face of the record warranting the intervention by this Court by certiorari.

Application granted. Costs in favour of applicant

Cases referred to:

Attorney-General and Another (No. 2) v. Savvides (1979)
1 C.L.R. 349;

Harris v. Harris [1980] 63 L. T. 262;

Re HadjiSoteriou and Another (1986) 1 C.L.R. 429.

Application.

Application for an order of Certiorari for the purpose of quashing an order of a Judge of the District Court of Limassol (Stavrinides, D. J.) in Appl. No. 36/76, dated 16th August, 1986 whereby applicant was prohibited from taking her infant child Constantina, outside Cyprus and the name of the said infant was placed on the stop list of persons whose exit from Cyprus is prohibited. 5
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S. M. Patsalides, for the applicant.

A. Yiorkadjis, for the respondent.

Cur. adv. vult.

A. LOIZOU J. read the following decision of the Court. By the present application the applicant seeks an order of certiorari for the purpose of quashing an order of a Judge of the District Court of Limassol, dated 16th August 1986, by which the applicant was (a) prohibited to take her infant child Constantina outside Cyprus, and (b) that the name of the said infant Constantina be put on the stop list of persons to which exit from Cyprus is prohibited. 15
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The aforesaid subject interim order was granted in a custody application pending before the learned Judge and fixed for hearing on the 19th September, 1986, upon the ex parte application of the applicant in that application, namely the father of the minor Constantina. 25

In the said order, copy of which is attached to the applicant's present application, there was no provision made, making it returnable on a date, so affording the opportunity to the respondent mother to appear before the Court and contest same if she wished. 30

As no such opportunity was given to the applicant by the said order, an application for leave to apply for an order of certiorari was made which I granted on the 6th September 1986, as there was made out a prima facie 35

case sufficient to justify same on the ground of an error of Law on the face of the record inasmuch as there appeared not to have been a compliance with the provisions of Section 9, subsection 3 of the Civil Procedure Law, Cap. 6. The necessary directions were given and the present application was filed and heard by me.

The said section 9, subsection 3 provides:

“(3) No such order made without notice shall remain in force for a longer period than is necessary for service of notice of it on all persons affected by it and enabling them to appear before the Court and object to it; and every such order shall at the end of that period cease to be in force, unless the Court, upon hearing the parties or any of them, shall otherwise direct; and every such order shall be dealt with in the action as the Court thinks just.”

The essential elements of this statutory provision are that the order:

(a) Shall not remain in force for a longer period than is necessary for service of notice of it on all persons affected by it and this is to enable them to appear before the Court and object to it, thus affording them the opportunity to be heard. This means that the order has to be made for a specified duration by fixing a date upon which the person affected may appear and object to it. In practice normally this period has been eight days, but that is not a hard and fast rule. There may be instances where on account of the subject matter affected by the order the period may be shorter, so long as it is of such a length as to make service of notice thereof on the persons affected possible. In recent years, particularly in cases of hire purchase agreement which as of the nature of the chattel to be seized moving around longer periods are prescribed some times up to one month as that length of time is considered necessary to effect the service thereof.

Whilst on this point reference may be made to the case of *Attorney-General of the Republic and Another (No. 2) v. George Savvides* (1979) 1 C.L.R. 349, in which Triani-

tafyllides, P., held in certiorari proceedings that there was no excess of jurisdiction or contravention of subsection 3 of section 9, of Cap. 6, resulting in an error of law on the face of the relevant record due to the fact that the interim order in that case was made on the 3rd April 1979 and the 17th April 1979, was fixed as the date on which cause could have been shown why it should not be allowed to remain in force. He concluded that it could not be held that the period between the 3rd April to the 17th April was in the circumstances of that case a longer period than was "necessary for service" of notice of the interim order in the sense of subsection 3 of section 9 and he dismissed the contention made in that respect. I find this approach helpful to me on the question also raised in this application that the fixing of a date for the persons affected to appear and object to the interim order granted ex parte is essential and an omission to do so amounts to an error of Law on the face of the record.

(b) The second essential element is that at the end of that period so fixed by the Court when making the order the interim order ceases to be in force unless the Court upon hearing the parties or any of them shall otherwise direct.

This also strengthens my approach on the matter, as it indicates how delicate the matter is when Courts grant orders ex parte that affect other persons without being heard.

Learned counsel for the respondent referred me to the case of *Harris v. Harris* [1890] 63 L.T. 262 as an authority for the proposition that a Court has jurisdiction to restrain by means of an interim injunction one of the parents from removing the child, whose custody was in issue before it, out of the jurisdiction.

No doubt this is so and noone can argue anything to the contrary. But this authority bears out also the approach, just expounded, for the necessity of making such an injunction issued on an ex parte application of a limited duration so that the opportunity will be afforded to the person affected to appear before it for a hearing in the

ordinary course. In the concluding part of the brief judgment of Sir James Hannen it is said that "it will continue in force for fourteen days by which time the usual notice on motion can be served and brought on for hearing in
5 the ordinary course."

In the light of all the above, and, as the primary facts appear on the record, an error of the kind complained of is sufficiently apparent for it to be regarded as an error of Law on the face of the record, namely contravention of
10 the aforementioned section 9(3), such as to warrant the intervention of this Court by certiorari. It is an error of substance as it affects the right of a party to be heard. This approach is consistent with my approach in *Re Julia HadjiSoteriou and Another* (Civil Application 34/85,
15 judgment delivered on 17th October 1986, as yet unreported).*

For all the above reasons there is granted an order of certiorari quashing the order of the 16th August 1986, with costs in favour of the applicant.

20 *Order of certiorari granted with costs in favour of the applicant.*

* Reported in (1986) 1 C.L.R. 429.