NOTE: PURSUANT TO S 437A OF THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE SUPREME COURT OF NEW ZEALAND

SC 156/2016
[2017] NZSC 35

BETWEEN	W (SC156/2016) Applicant
AND	THE FAMILY COURT AT NORTH SHORE First Respondent
	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Second Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: Applicant in person
H M Carrad for First Respondent
J C Holden and L M Jackson for Second Respondent

Judgment: 17 March 2017

JUDGMENT OF THE COURT

A The application for an extension of time to appeal is dismissed.

B Costs of $2,500 are awarded to the second respondent.

REASONS

Background

[1] On 20 November 2012 the Family Court granted an interim restraining order against a man (Mr M) who was then living with Mr W's former wife and their children.

[2] On 30 January 2013[1] the Family Court made a declaration that the children were in need of care and protection. An order was also made directing the Child Youth and Family Service (CYFS) to provide support and assistance.

[3] On 10 April 2014 CYFS told the Family Court that it agreed with a recommendation from the lawyer for the children that the restraining order against Mr M be discharged. Judge Druce, by minute of 16 April 2014, pointed out that the restraining order was an interim order pending determination of the declaration application. It had therefore already lapsed.

[4] In June 2014 Mr W learnt of the minute and applied for judicial review of Judge Druce's decision. The application was dismissed by Brewer J on 9 October 2014.[2]

[5] Mr W now applies for leave to appeal against Brewer J's decision directly to this Court. His application is over two years out of time.

Grounds for application

[6] Mr W contends that a restraining order can only be cancelled or varied by an application under ss 127 and 128 of the Children, Young Persons and Their Families Act 1989 (the CYF Act). He submits that, while s 88 of that Act allows the making of an interim restraining order pending the determination of an application for a declaration, the making of that declaration does not discharge the interim order and it continues "alive and in force".

---

1 An application had been made on 2 November 2012 by the second respondent.

2 *W v Family Court at North Shore* [2014] NZHC 2483.

[7] Mr W's second ground is that he was not served with the documents relating to the discharge of the order and there was thus a failure of natural justice.

[8] Mr W attributes the delay in filing this application to ill health and mental exhaustion. In January he says that he heard that Mr M was again living in the children's home. This led to him filing the current application.

Brewer J's decision

[9] Brewer J considered that Judge Druce's decision involved no error of law.[3] The phrase "pending the determination of the application" in s 88 of the CYF Act bore its ordinary meaning, "to last until the determination". Further, no breach of natural justice occurred. Judge Druce made a procedural determination as to jurisdiction on the papers. Even if Mr W's right to natural justice had been breached, the decision in any event merely declared an existing state of affairs and so did not affect Mr W's rights such that any remedy would follow.[4]

[10] Mr W also argued that he had a legitimate expectation that the safety and general welfare of his children would be maintained. Brewer J held that this expectation was as to a substantive outcome and could not be sustained under New Zealand law. In any event, the asserted connection between Judge Druce's order and any expectation was misconceived. The application by CYFS led to a hearing which addressed the safety and welfare needs of Mr W's children.[5]

Second respondent's submissions[6]

[11] The Chief Executive opposes Mr W's application for an extension of time. It also supports Brewer J's interpretation of s 88 of the CYF Act. Further, it is submitted that the law is well settled in this area and no point of general or public importance arises. Nor are there any exceptional circumstances justifying a direct appeal to this Court.

---

3 *W v Family Court at North Shore* , above n 2, at [32].
4 At [33]–[35].
5 At [35].
6 The first respondent abides the decision of the Court.

[12] As the natural justice point, it is submitted that the Ministry's "application" that the interim order be discharged was in fact a review report submitted to the Family Court as required by s 134 of the CYF Act. Mr W had no right to be heard on it.[7] In this case the matter was jurisdictional and not one that could have been affected by the parties' submissions and the decision did not affect Mr W's substantive rights.

Discussion

[13] No adequate explanation for the delay in filing this application for leave to appeal has been provided. Even accepting Mr W has been ill at times, this does not explain the length of the delay. This means the application for an extension of time to apply for leave to appeal must be dismissed.

[14] We also accept the submission that, in any event, nothing has been put forward to suggest there are exceptional circumstances to justify a direct appeal to this Court. It is inappropriate for us to comment on the grounds raised. As the second respondent points out, it is still open to Mr W to make an application for an extension of time to appeal to the Court of Appeal.

Result

[15] The application for an extension of time to appeal is dismissed. As the second respondent was obliged to file full submissions, costs of $2,500 are awarded to it.

Solicitors:
Crown Law Office, Wellington for First and Second Respondents

---

[7] Section 137(1A) of the CYF Act provides "[w]hen considering the report and revised plan, the court may, but need not, give to any person the opportunity to be heard".