Neutral Citation: [2017] IEHC 153

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 81 J.R.]

BETWEEN

ADAM HOWE

APPLICANT

AND

REVENUE COMMISSIONERS AND PATRICK ROCHE

RESPONDENTS

AND

LAURENCE KEANE

NOTICE PARTY

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LAURENCE KEANE

APPLICANT

AND

REVENUE COMMISSIONERS AND PATRICK ROCHE

RESPONDENTS

AND

ADAM HOWE

NOTICE PARTY

JUDGMENT of Mr. Justice White delivered on the 24th day of February, 2017

1. These judicial review applications were heard together. The applicants were granted leave by this Court on 8th February, 2016, on similar grounds. Those grounds are set out in the amended statement required to ground application for judicial review, as follows:-

> (i) The applicant seeks the return of a sum of money seized on behalf of the respondents on 8th August, 2015. This sum was below the prescribed statutory minimum for the application of the provisions of s. 38 of the Criminal Justice Act 1994, as amended by s. 20 of the Proceeds of Crime (Amendment) Act 2005. If this sum can properly be taken together with the sum seized from both parties on the same date and can be taken to be in excess of the prescribed statutory minimum.
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> (ii) The District Court hearing conducted pursuant to s. 38 of the Criminal Justice Act 1994, as amended, was not conducted in accordance with fair procedures or the procedures mandated by section 38.
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> (iii) The learned District Judge erred in law and acted unreasonably by reversing the burden of proof and stating that he was adjourning the matter so that the applicant could attend and give evidence of the origin of the money. Counsel had made the submission that the applicant did not have to attend or say anything in respect of the money concerned. The District Judge appeared to have erred in law in rejecting this submission.
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> (iv) The learned District Judge erred in law and fact by reversing the burden of proof in the context of an application pursuant to section 38. The District Judge did not agree with counsel's submission that he could properly appear in the matter and object to an order being made pursuant to s. 38 on the basis that the proofs required under that section had not been satisfied. The District Judge took the view that counsel could only object to the order being made if his clients were present and in a position to give evidence. In holding this view, the District Judge erred in law and exceeded jurisdiction.
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> (v) The District Judge erred in law by adjourning the case mid-hearing in order for the applicant to be present and to give evidence and by expressing the view that he wished to hear from the applicant with the clear implication that it was incumbent upon the applicant to take part in the proceedings before the District Court in the context of an application pursuant to section 38.
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> (vi) The District Judge did not rule upon counsel's argument that the proofs under s. 38 had not been made out and refused to entertain further arguments in relation to the proofs until the applicant was present. He then adjourned the case for the express purpose of having the applicant present in court to give evidence without ruling on the arguments made by counsel. This course rendered the hearing unfair and not in accordance with section 38. The court effectively refused to permit counsel to make technical arguments against an order being made pursuant to s. 38 when his client was absent from proceedings.
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> (vii) The learned District Judge erred by in essence compelling the applicant to take part in the proceedings reversing the

burden of proof and disallowing technical arguments to advance before the court passed on the express provisions of section 38.

(viii) In adjourning the case, the court did not make an order pursuant to s. 38 and in failing to do so, the previous order lapsed. There is now no order in place permitting the continued retention of the funds pursuant to the Criminal Justice Act 1994, and these funds should be returned to the applicant.

(ix) If indeed any order was made on 5th February, 2016, under s. 38 authorising the continued retention of the money then this order was made ultra vires without hearing argument from counsel that the proofs required under s. 38 had not been satisfied and for an unlawful purpose i.e. compelling the applicant to attend to give evidence in respect of an application by the State.

(x) The adjournment of the case for the express purpose that the applicant attend to give evidence in the context of an application pursuant to s. 38 amounts to a breach of fair procedures and potentially interferes with a person's privilege against self incrimination.

(xi) The seizure sum of money in question should be returned to the applicant as it represents an amount below the statutory minimum amount. The invocation of the s. 38 procedure in respect of the amount of the two sums amounts to an abuse of process.

(xii) The aggregation of sums seized from two separate individuals so that the aggregate sum exceeds the statutory minimum where otherwise neither sum would be subject to the provisions of s. 38 of the Criminal Justice Act 1994, amounts to an abuse of process and for this reason the sum should be returned.

(xiii) If on 5th February, 2016, the District Judge purported to permit the continued detention of the funds pursuant to s. 38, any such order is invalid having regard to the fact that the court did not complete the hearing pursuant to s. 38 for a continued order having regard to the insertion provided for by the provisions of s. 20(b) of the Proceeds of Crime Act 2005.

(xiv) If any such order was made pursuant to s. 38 on 5th February, 2016, this order was made without evidence to satisfy the court that the proofs under s. 38 had been made out and in those circumstances was made *ultra vires*.

(xv) In the alternative, if no order was made pursuant to the provisions of s. 38 then there is no continuity of orders pursuant to section 38. The order made on 6th November, 2016, has expired, the cash is unlawfully detained and should be returned to the applicant.

2. The order of the District Court of 5th February, 2016, sought to be quashed relates to an application to detain monies taken from both applicants. The undisputed evidence is that on 8th August, 2015, both applicants were interviewed at Dublin Airport by customs and excise officials. They were about to board a flight from Dublin to Ibiza on flight FR9177 and had each checked in a bag. Mr. Adam Howe had €3,900 cash on his person and Mr. Laurence Keane had €4,250 on his person. When their checked baggage was examined, cocaine was discovered in Mr. Howe's baggage concealed in a sock. A quantity of cocaine was also discovered in the checked baggage of Mr. Keane which was concealed in a tub of Brylcreem hair gel which had an estimated street value of €2,100.

3. The applicants did not give any explanation, other than Mr. Howe stating that he received the money from his mother and would spend it during his three days in Ibiza. The cash was seized and detained by custom officers at 9:30am on 8th August, 2015, and the sum of €200 each was returned to the applicants.

4. Later that morning, one of the custom officers, Thomas McDonnell, swore an information before a Judge of the District Court, Judge John O'Neill, seeking a detention order pursuant to s. 38 of the Criminal Justice Act 1994, as amended by s. 20 Proceeds of Crime (Amendment) Act 2005 on the basis that there was reasonable grounds for suspecting that the applicants were exporting or intending to export the cash of unknown origin and that the said cash directly or indirectly represented the proceeds of crime.

5. The grounds upon which the officer sought to retain the cash was set out in the information as follows:-

(a) Mr. Adam Howe and Mr. Laurence Keane were travelling together. From additional inquiries, I found that Mr. Howe and Mr. Keane are known to An Garda Síochána and are part of an organised criminal gang.

(b) Mr. Howe was travelling on a ticket to Ibiza departing on 8th August, 2015, and returning on 11th August, 2015. The ticket was booked the day before departure on 7th August, 2015 and cost €350. Mr. Keane booked one way only on 6th August, 2015 and cost €178. Booking flights at the last minute is a method commonly used by criminals to minimise the timeframe available to law enforcement to apply profiling techniques.

(c) Mr. Howe and Mr. Keane could not provide any documentation to support the claimed source of the cash, and as they were travelling together to the same destination, I formed the suspicion that the two sums of cash had originated from the same source, and/or were intended to be used for the same purpose.

(d) During the course of our discussion, Mr. Howe provided me with conflicting information in relation to his employment history. He stated he had savings from previous employments, however, Revenue records show no employment history. According to Revenue, records Mr. Howe is registered as a taxi driver but has never submitted a tax return.

(e) Both Mr. Howe and Mr. Keane were arrested by An Garda Síochána at Dublin Airport on said date and taken into custody.

(f) In my experience the movement of cash in this manner rather than through recognised banking channels is consistent with criminality as it leaves no audit trail.

6. The learned judge made an order authorising the detention of the monies beyond 48 hours granting detention for a period of three months expiring on 7th November, 2015.

7. The investigating case officer, Mr. Patrick Roche, wrote to both applicants on 25th August, 2015, seeking a detailed explanation of the source and intended use of the cash and also asking for any available documentary proof in support of the claim to be furnished

to him. No reply was received to those letters.

8. On 28th October, 2015, Officer Roche wrote to the applicants, putting them on notice that he intended to seek a further detention order at a hearing on 6th November, 2015. Counsel on behalf of the applicants opposed the application on the basis that the sums seized from each individual were below the statutory threshold, and thus the suspicion was inadequate. The officer outlined the basis of his suspicions and his belief that smurfing was involved whereby money from the same source is broken down to avoid detection. Having considered all matters Judge Halpin was satisfied to authorise the further detention of the monies for another three months to 5th February 2016. Both applicants were present at this hearing.

9. On 9th November, 2015, Mr. Roche wrote to Niall O'Connor, Solicitor, on behalf of the applicants enclosing a copy of the detention order issued from the Dublin District Court on 6th November, 2015, authorising the continued detention of the seized cash until 5th February, 2016.

10. Mr. Roche requested that in order to progress his investigation he sought a full and detailed explanation of the source and intended use of the cash and any documentary evidence in support of the claim for the cash. No reply was received to that letter. On 28th January, 2016, Mr. Roche wrote to Mr. O'Connor, Solicitor, indicating that he would be applying at Dublin District Court on 5th February, 2016, and reminding him again that he was seeking full and detailed explanation of the source of the cash and any documentary evidence. Mr. Roche furnished a copy of the notice of application.

11. The subject matter of the leave orders relates to the conduct of the hearing in the Dublin District Court on 5th February, 2016. It is because of the conduct of the hearing by the judge presiding that the applicants seek the order quashing the order made on 5th February, 2016. The applicants query if an order was made by the judge.

12. An order was made and perfected which directed the further detention of the monies seized and detained by the applicant by virtue of s. 38 of the above mentioned Act for a period of months not exceeding three months from the date of the order of 5th February, 2016, up to 23rd March, 2016. A copy of this order was furnished by letter of 9th February, 2016, to Niall O'Connor, Solicitor.

13. There is available to this Court a transcript of the hearing before Judge Faughnan on 5th February, 2016, and the court can rely on this rather than the deposed evidence.

14. As the order in dispute expired on 23rd March, 2016, the subsequent progress of the application is relevant in determining this application. On 15th March, Mr. Roche notified the parties that he intended to make the relevant s. 38 application in District Court 18 on 23rd March, 2016 and wrote to the solicitor for the applicants on 15th March, 2016, enclosing a copy of the application and making a request to let him know if he intended to contest the aforementioned application. Judge Ryan on that occasion having heard evidence made an order extending the detention of the cash to 22nd June, 2016. Counsel for the applicants at that hearing indicated that other than to seek an adjournment until after the hearing of these judicial review proceedings he had no further instructions and after a further inquiry it was indicated that there was no objection to the s. 38 order being made. An order was made on 23rd March, 2016, further detaining the cash for another period of three months up to 22nd June, 2016. At the hearing of the judicial review, the court was informed that further orders were granted on 22nd June, 2016, until 21st September, 2016, and on 21st September, 2016 until 20th December, 2016 and that an application pursuant to s. 39 of the Act has been made to the Circuit Court seeking a forfeiture order. The applicants have complained that this information is not deposed. The court can rely on same as it relates to court applications and orders which can be easily verified.

15. At the hearing on 5th February, 2016, the judge was informed that there was a renewal of an application for detention of monies. The investigating officer of the customs and excise Mr. Roche gave sworn evidence and informed the court as follows:-

> "Judge,
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> My application today is for an order authorising the further detention of cash in the amount of €8,150 bearing an amount not less than the sum prescribed by the Minister for Justice, Equality and Law Reform for the purpose of the said Act the prescribed sum being €6,348.67. This was seized and retained on 8th August, 2015, at Dublin Airport from Laurence Keane and Alan Howe. The cash was seized as it was suspected to be the proceeds of crime or for use in criminal conduct. There's two previous orders in this case, the last one being from 6th November, 2015, to 5th February, 2016. Investigations are currently ongoing in this case and we are currently awaiting various mutual assistance requests. I have also sent letters to the respondent's counsel asking for a full and detailed explanation as to the source and intended use of the cash to which I have received no reply."

16. When Mr. Roche at an early stage of the hearing asked the judge if he wished him to outline the factors of the case at the time when they were stopped the judge intervened to stop his evidence and to see what counsel for the respondents had to say.

17. Counsel indicated that it was being opposed. The judge asked on what basis. Counsel suggested that the officer give his evidence first but the judge insisted on the reasons for opposition, stating that two previous orders had already been made. Counsel then outlined his argument that each individual amount is less than the prescribed statutory amount required. He went on to state that it was an abuse of process where the two amounts are added together the officer intervened and stated:-

> "I am aware of the arguments but judge you might be aware of a term called smurfing in the financial industry. It's whereby cash originate from the source or for the same account and use, its broken down into smaller amounts as to avoid detection as we believed that was the matter in this case. These two individuals were travelling together and I believe that this cash from both amounts arrived from the same source or for the same intended use."

He went on to state:-

> "Just also to add at the time that Mr. Howe and Mr. Keane were stopped, a quantity of white powder was discovered and sealed in both respondent's baggage. Mr. Howe was discovered with approximately 30g of cocaine with a value of €2,100 in his baggage. Mr. Keane was also discovered with approximately 30g of cocaine with a value of €2,100 hidden in a tin of Brylcreem in his baggage. For this both individuals were arrested at the time of the offence. Mr. Howe is registered for self assessed income tax but to date has never submitted a tax return. Mr. Keane does have employment and again there has been no documentation produced in this case as to the source or intended use of this cash."

The judge then repeated " There are two previous orders, this is a continuation"

Counsel replied "Yes Judge, or what I should say Judge is that just because an order has been made in the past, it doesn't follow.

Judge: "no no."

Mr. Spencer: "automatically that this Court will rubber stamp it."

Judge "no"

Mr. Spencer "the evidence has to be given".

Judge: Nor is that what I have in mind. I am simply trying to get the thing moved on.

Mr. Spencer: Yes Judge,

Judge "there is a big list."

18. The judge did go on to say I want to hear from your clients are they here and that we need to hear from the clients. The judge went on to state:-

"You can't come in one hand even two hands tied behind your back. Your clients need to be here. They need to deal with it. They need to be examined. If they want this dealt with and they want it dealt with as to the origins of the money, if it was 50/50 or whatever breakdown it was, have them in court and let's deal with it. Put it in for hearing."

The officer requested an order in the case and the judge replied "oh yes of course it will have to" and counsel for the applicants replied" just to hold on to it".

19. Mr Roche also pointed out that the detention is simply just to investigate the source of the cash that they were not making a determination whether an application would be made to the Circuit Court for forfeiture at this point.

20. Having ascertained how long the case would take if adjourned, he allowed 45 minutes for it and the next available date was 23rd March in Court 18 and the judge went on say 45 minutes on 23rd, Court 18 and detention in the meantime. Proper and full hearing.

Statutory Provisions

"[(1) A member of the Garda Síochána or an officer of customs and excise may search a person if the member or officer has reasonable grounds for suspecting that—

(a) the person is importing or exporting, or intends or is about to import or export, an amount of cash which is not less than the prescribed sum, and

(b) the cash directly or indirectly represents the proceeds of crime or is intended by any person for use in connection with any criminal conduct.]

(1A) A member of the Garda Síochána or an officer of the Revenue Commissioners may seize and in accordance with this section detain any cash (including cash found during a search under subsection (1)) if—

(a) its amount is not less than the prescribed sum, and

(b) he or she has reasonable grounds for suspecting that it directly or indirectly represents the proceeds of crime or is intended by any person for use in any criminal conduct.]

(2) Cash seized by virtue of this section shall not be detained for more than forty-eight hours unless its detention beyond forty-eight hours is authorised by an order made by a judge of the District Court and no such order shall be made unless the judge is satisfied—

(a) that there are reasonable grounds for the suspicion mentioned in subsection (1) of this section, and

(b) that detention of the cash beyond forty-eight hours is justified while its origin or derivation is further investigated or consideration is given to the institution (whether in the State or elsewhere) of criminal proceedings against any person for an offence with which the cash is connected.

(3) Any order under subsection (2) of this section shall authorise the continued detention of the cash to which it relates for such period, not exceeding three months beginning with the date of the order, as may be specified in the order, and a judge of the District Court, if satisfied as to the matters mentioned in that subsection, may thereafter from time to time by order authorise the further detention of the cash but so that—

(a) no period of detention specified in such an order, shall exceed three months beginning with the date of the order; and

(b) the total period of detention shall not exceed two years from the date of the order under subsection (2) of this section.

[(3A) Where an application is made under s.39(1) for an order for the forfeiture of cash detained under this section, the

cash shall, notwithstanding subsection (3), continue to be so detained until the application is finally determined.]

(4) Any application for an order under subsection (2) or (3) of this section may be made by a member of the Garda Síochána or an officer of customs and excise.

(5) At any time while cash is detained by virtue of the foregoing provisions of this section a judge of the District Court may direct its release if satisfied—

(a) on an application made by the person from whom it was seized or a person by or on whose behalf it was being imported or exported, that there are no, or are no longer, any such grounds for its detention as are mentioned in subsection (2) of this section, or

(b) on an application made by any other person, that detention of the cash is not for that or any other reason justified.

(6) If at a time when any cash is being detained by virtue of the foregoing provisions of this section—

(a) an application for its forfeiture is made under section 39 of this Act; or

(b) proceedings are instituted (whether in the State or elsewhere) against any person for an offence with which the cash is connected,

the cash shall not be released until any proceedings pursuant to the application or, as the case may be, the proceedings for that offence have been concluded."

21. Section 39 states as follows:-

"(1) A judge of the Circuit Court may order the forfeiture of any cash which has been seized under section 38 of this Act if satisfied, on an application made while the cash is detained under that section, that the cash directly or indirectly represents [the proceeds of crime or is intended by any person for use in connection with any criminal conduct].

(2) Any application under this section shall be made, or caused to be made, by the Director of Public Prosecutions.

(3) The standard of proof in proceedings on an application under this section shall be that applicable to civil proceedings; and an order may be made under this section whether or not proceedings are brought against any person for an offence with which the cash in question is connected."

22. The applicant seeks to quash the impugned order made by District Judge Faughnan on 5th February, 2016, on a number of grounds namely:-

(i) The sum involved is not amenable to the provisions of s. 38 of the Criminal Justice Act 1984, as amended by s. 20 of the Proceeds of Crime (Amendment) Act 2005, being below the threshold level required by the Act. The concept of smurfing is not provided for in this legislation.

(ii) Denial of fair procedures.

(iii) The District Judge did not treat the matter as a hearing of the issue in any sense of the word and viewed the application as a rubber stamping exercise.

(iv) The learned District Judge erred in law and applied an incorrect test to the proceedings before him.

(v) The learned District Judge in adjourning the matter in order for the respondents to be present erred in law and reversed the burden of proof.

(vi) The learned District Judge did not allow the respondents to challenge the case on the basis that the applicants had not give evidence of the necessary proofs.

(vii) The court did not complete the hearing of the issue pursuant to s. 38 nor could the court have been satisfied on the evidence of the matters necessary for such an order to be made.

Aggregate of two sums of money to meet the threshold – smurfing

23. The respondent argued that the submission in aggregation was made to Judge Halpin at the hearing of 6th November, 2015 and rejected by him, and that order was not challenged.

24. The Respondent argues that in the course of the hearing on 5th February, 2016, Mr. Roche had dealt with the issue by pointing out to Judge Faughnan his belief that smurfing was involved, a practice whereby cash that originates from the same source or is destined for the same use is broken down in to smaller amount below the prescribed limit in an effort to avoid detection.

25. The judge at the hearing asked if the argument in respect of the aggregation of the two amounts had been put in writing. Counsel for the applicants stated that the argument was made on the last occasion and that the officer was well aware of the argument.

26. The relevant section protects any person from whom cash has been seized in that the total period of detention cannot exceed two years from the date of the original order and in addition has to be renewed every three months to monitor the progress of the investigation.

27. This is not a valid ground to quash the order of 5th February, 2016. The issue had already been determined by Judge Halpin on

6th November, 2016. Judge Faughnan did not determine the issue again, and that is the subject of a separate submission to this court.

28. It would be inappropriate for this Court to make a final determination on that issue in these proceedings as the applicants are entitled to make that argument in the s. 39 application before the Circuit Court.

Rubber stamping exercise

29. The learned judge acknowledged that it did not follow that because an order had been made in the past that it should be continued and stated that this is not what he had in mind but that he was simply trying to get the thing moved on. There was ample evidence before the court from the sworn testimony of Officer Roche to pass the threshold contained in the section that there were reasonable grounds for suspicion that the monies directly or indirectly represented the proceeds crime. To suggest that the court hearing was a rubber stamping exercise only is incorrect as the District Judge from the evidence already tendered by Officer Roche had ample evidence ultimately to make the determination and, in fact, did make an order that the monies be detained until 23rd March, 2016. Consideration has also to be given to the Courts determination to allocate sufficient time for an ample hearing and to adjourn the application to the next available date, when adequate time would be available. The registrar of the court indicated that the next available hearing date in the hearing courts was the 23rd March in court 18, and the application was adjourned to that date.

Reversal of the Burden of Proof and requirement that the Respondents attend court

Denial of Fair Procedures

Not completing the hearing and refusing to entertain further arguments until the respondents were present

30. I will deal with these issues together as they are closely related. The learned judge at the hearing on 5th February 2016, misunderstood the burden of proof and the onus on the custom and excise to justify the continuing detention. In the court's view all the other points raised by the applicants flow from this difficulty. He was in error on procedure as the Act does not require on a mandatory basis an explanation from a person from whom monies have been seized nor does the section or s. 39 envisage that a person from whom cash is seized is obliged to give sworn evidence. The then respondents the present applicants were not present at the hearing.

31. If an appropriate explanation on the source of the monies is not given at a forfeiture hearing that would prove difficult for the applicants in respect of the success of their application to have the monies returned. As pointed out by the respondents both Feeney J and Fullam J. commenting in respective decisions, *DPP v. Giovanna Filice* (13/02/12 extempore) and *DPP v. Bieloauskas* (Unreported, 7th July 2016 High Court), noted that the best person to give an account of large quantities of cash is the person in whose possession the cash is found alternatively the person who claims ownership of it.

32. Counsel for the respondents at the hearing on 5th February, 2016, stated that the evidence was deficient in that the garda did not give evidence as to how the origin and derivation of the funds was being further investigated. Officer Roche did state that investigations were currently ongoing in this case and that they were awaiting various mutual assistance requests. It would have been open to counsel for the applicants to question the investigating officer on that issue.

33. The learned Judge did misunderstand some of his responsibilities in respect of the procedure, by insisting he had to hear from the respondents, and thus restricted counsels cross examination on that date. He did, however, genuinely want to give the hearing some time. It was a big court list, and he had put it to the end of the list to facilitate counsel. The judge wanted to put it back to another date to give it a more amplified hearing.

The order is spent, and thus moot, and order of certiorari would be futile

34. The respondent has raised this legal issue which was not dealt with in the applicants' initial written submissions but which was addressed by way of rebuttal.

35. At paras. 25, 26, 27 and 28 of the written submissions, and in his oral submissions to the court the respondent has argued that as the order of the District Court sought to be quashed is now spent an order of *certiorari* would be futile and that the within application is therefore moot and misconceived.

36. At Paras 26 and 27 of its legal submissions the respondent stated.

> "In *Barry –v- Fitzpatrick* [1996] 1 I.L.R.M. 512 the Supreme Court held that orders of certiorari do not lie, in such circumstances, even if (unlike here) the orders concerned were made in excess of jurisdiction. Although in *Howard –v- Early* [2000] IESC 34 the Supreme Court granted the declaration sought, it did so in the very particular circumstances that pertained there, i.e. a 'bad' remand in custody where a fine was the maximum penalty that could be imposed upon conviction.
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> In *Joyce –v- Watkin* [2007] 3 I.R. 510 Clarke J. considered both of these cases and noted that it was the remand in custody in *Howard* as opposed to the remand on bail in *Barry* that was the significant distinguishing feature between them, although there were other complicating factors in *Howard* that led to the grant of the declaration sought. In the end Clarke J. ruled, that because the orders were spent, the *certiorari* and declaration sought should not be granted, notwithstanding that the impugned orders in that case, (and unlike here), had been made in excess of jurisdiction."

37. The rebuttal by the applicants is that if the order of 5th February, 2016, is quashed the chain of evidence is broken and thus there is a likelihood that the forfeiture application pursuant to s. 39 of the Act will accordingly fail.

38. The Applicants relied on the judgement of *Finnegan v. Member in Charge (Santry Garda Station)* [2007] 4 I.R. The head note states Held by the High Court (O Neill J.), in ordering the release of the applicant that it was a prerequisite for the exercise by the District Court of its jurisdiction to grant an extension for detention pursuant to s. 30(4)(a) of the Act of 1939 that there was a continuing lawful detention pursuant to s. 30(3) and neither the commencement of the court proceedings nor the subsequent order of the District Court could have prevented the expiry of the period of detention during the hearing, as s. 4(8A) of the Criminal Justice Act 1984 did not apply to the detention of the applicant and therefore the necessary jurisdictional basis for the granting of the warrant for a further period of detention had gone.

39. In the judgment of *Howard v. Early* a judgment of the Supreme Court of 4th July, 2000, where a remand order of in excess of two weeks without the accused's consent was made. Denham J. stated:-

> "there is jurisprudence that an order which is spent and has no practical effect should not be the subject of an order of *certiorari*. It depends on the circumstances of the case. If it would be futile it may well not be appropriate to make such an order. However certiorari is a shield for the citizen against authority which acts in excess of legal authority or contrary to duty."

40. The applicants have argued that they need only raise the possibility that there is utility in the quashing of the order to aid their defence of the forfeiture application.

41. If the court accedes to the applicants' application, it is quashing a spent order which no longer has any legal effect as it was replaced with an order made on 23rd March, 2016.

42. The decision to grant an order of *certiorari* is a discretionary remedy of the court particularly if there are alternative legal remedies. The order of 5th February, 2016, did not prejudice the applicants in the final determination of the forfeiture application. It related to a temporary detention order pending investigation. The evidence is that the money was lodged in an interest bearing account.

43. In addition, the court has already concluded that the point identified by the applicants' counsel on 5th February, 2016, in respect of the aggregation of the monies was, in effect, *res judicata* in those hearings to detain the monies temporarily pending decision on a forfeiture application, as Judge Halpin had already determined the issue as against the applicants and in this Court's view correctly as the threshold in the Act for temporary detention is quite low, that is "reasonable grounds for suspicion"

44. The order was not bad on its face, and was not made in excess of jurisdiction. There was sufficient evidence available to the court to make the order. It was made for a short period of time on the clear understanding there would be time allocated on the next available date to conduct a comprehensive hearing. The learned Judge's misunderstanding of the evidential burden, and the restriction on cross examination, is not sufficient to ground a decision by this Court to grant an order of *certiorari* of an order which is spent and which is moot apart from consequences further on in the process. The respondents were not prejudiced by the order which made no finding against them, other than to ratify the detention of the monies for a further six weeks.

45. If this was a final order rather than a temporary detention order, the applicants' contention that the judge acted *ultra vires* in terms of the conduct of the hearing on 5th February, 2016, would be compelling.

46. I refuse the application accordingly.