THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 28 J.R.]

BETWEEN

TIMOTHY CUNNINGHAM

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SIOCHANA

FIRST NAMED RESPONDENT

THE CRIMINAL ASSETS BUREAU

SECOND NAMED RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

DANSKE BANK

NOTICE PARTY

JUDGMENT of Ms. Justice O'Regan delivered on the 14th day of February, 2019

Issues

1. In this judicial review application, brought by way of statement of ground on the 15th January 2018, the applicant is seeking an order of mandamus compelling the first named respondent to provide a detailed and comprehensive report setting out the statutory provisions and all orders of the court under which his monetary property was seized, detained and distributed together with orders relied upon by the first named respondent to search, detain, forfeit and distribute the monies being the documents presented in a pre – action letter of the 4th August 2017. In addition, an order of mandamus compelling the second named respondent to compile a report setting out the statutory provisions under which his monetary property was seized, detained and distributed as set out in a pre – action letter of the 21st July 2017 was sought. At para. 3 an application for a declaration that the applicant's monies were unlawfully seized by the first named respondent is made together with (para. 4) a declaration that the applicant's property rights under Article 40.3 of the Constitution have been infringed. An injunction was sought until the conclusion of the within judicial review proceedings. However, it does not appear that any injunction was made to date and certainly no argument was made before this Court for an injunction. At para. 6, an application is made for further relief including an extension of time if necessary. This is the only reference by the applicant to an extension of time.

Background

2. A brief relevant chronology is as follows: -

(a) On the 16th February 2005, the applicant's home was searched under s. 29 of the Offences Against the State Act 1939 as amended and £STG2.4 million was removed;

(b) On the 27th March 2009, the applicant was convicted under ten counts connected to the colloquially known Northern Bank Robbery;

(c) On the 23rd February 2012, the Supreme Court issued its decision *Damache v. DPP* [2012] 2 IR 266, where it found that a s. 29 warrant to search was repugnant to the constitution;

(d) In April 2013, the applicant was successful in having the order of the 27th March 2009 quashed;

(e) On the 18th February 2014, the applicant pleaded guilty to two counts of the nine remaining counts for which the applicant was retried;

(f) On the 27th February 2014, the applicant was sentenced and an order was made confiscating and/or forfeiting (see discussion below) the monies which are the subject matter of these proceedings;

(g) In a letter of March 2017, the applicant's solicitor was advised that the order of the 27th February 2014 incorporated a forfeiture order in respect of the monies aforesaid under s. 61 of the Criminal Justice Act 1994 and a letter was enclosed bearing date the 30th April 2014 between An Garda Siochána and the State Solicitor for the DPP which confirms the making of the forfeiture order and the fact that no appeal or challenge was made thereto;

(h) A certificate of conviction bearing date the 26th February 2014 (although the order was not made until the 27th February 2014) refers to the relevant monies having been confiscated by order of the 27th February 2014.

(i) The order of forfeiture was drawn up on the 4th March 2018 on behalf of the within respondents and was furnished to the applicant on the 14th May 2018

The applicant's submissions

3. The applicant tendered written submissions to the court and also presented oral submissions at the hearing on the 31st January 2019. In these proceedings the applicant has sworn four affidavits respectively dated the 10th January 2018, the 4th May 2018 (which in my view is not at all relevant to the issues arising), the 23rd July 2018 and the 30th January 2018.

4. The applicant argues: -

(a) The money was taken from his home and this is *prima facie* evidence of his ownership;

(b) The order was not drawn up (and no explanation given) until the 4th March 2018;

(c) The order did not take effect until perfection;

(d) The court is not being asked to make an order determining ownership of the money;

(e) It would be unfair of the respondents to take issue with the time limits provided for by the Rules of Court;

In reply oral submissions the applicant indicated: -

(a) The applicant could not argue that the date of order was from the date of pronouncement as opposed to perfection of the order;

(b) The respondents have not established a lack of candour on the part of the applicant;

(c) The forfeiture order was not referred to until March 2017 and therefore the applicant is not out of time;

(d) Although the interviews between the applicant and An Garda Siochána which occurred in February 2005 are technically admissible, nevertheless they are not sufficient to displace the burden on the applicant to show ownership of the monies which he has discharged by virtue of the fact that the monies were taken from his home in 2005.

5. In written submissions, the applicant states: -

(i) The forfeiture order could not have been lawfully made (paras. 38 – 45). S. 29 of the 1939 Act is unconstitutional and therefore the money belongs to the applicant and his rights are guaranteed by the Constitution under Articles 43 and 40.3.2.

(ii) The perfected order was the first notice of the making of the forfeiture order (para. 46).

(iii) The confiscation order is prima facie unlawful (para. 48 – 54).

(iv) There was no waiver of the interest of the applicant in the funds (paras. 55 – 65) the applicant has locus standi as leave was granted;

(v) Any application made herein is not time barred;

(vi) The applicant is entitled to a proper accounting under the Constitution.

Submissions on behalf of the respondents

6.

(i) The applicant was aware of the forfeiture order at the latest and taking his position at its height, from March 2017 when he was furnished with a copy of a letter of the 30th April 2014 from An Garda Siochána identifying the making of the forfeiture order on the 27th February 2014;

(ii) The information sought at paras. 1 and 2 of the statement of grounds has already been given or is otherwise within the means of knowledge of the applicant;

(iii) The applicant has stated in affidavit that he was not represented in court on the 27th February 2014, however has been challenged on this and has subsequently accepted that he was represented;

(iv) The applicant says he has no recollection of the making of the forfeiture order however this is not relevant to the efficacy of the order;

(v) The respondents rely on the interviews between the applicant and An Garda Siochána in February 2005 which are replete with acknowledgments that the money taken from his house was understood by him to be the proceeds of the Northern Bank robbery.

(vi) Para. 4 of the affidavit of Frank Nyhan State Solicitor of the 9th July 2018 confirms that he was present in court on the 27th February 2014 as was the applicant and counsel when a forfeiture order was made under s. 61 of the Criminal Justice Act 1994;

(vii) The issue as to ownership of the monies being a matter at issue between the parties herein, cannot be resolved in the applicant's favour in judicial review proceedings.

(viii) The applicant has not adhered to the time limits expressed in O. 84 of the Rules of the Superior Courts;

(ix) The forfeiture order extinguished any prior entitlement of the applicant to the monies, if any;

(x) The within proceedings are an effective collateral attack on the order of the 27th February 2014;

(xi) The judicial review application involves the making of a discretionary and remedy and as alternate relief was available should not be granted to the applicant;

(xiii) The Circuit Court order was effective from the date of pronouncement;

(xiv) The applicant did not make any application for the Digital Audio Recording (DAR) to confirm his position as to what occurred on the 27th February 2014;

(xv) The content of the applicant's interviews exhibited on behalf of the respondents has not been denied by the applicant;

(xvi) The law has advanced since the case of Damache;

(xvii) There is no evidence before the court to ground an extension of time;

(xviii) Mandamus in the instant circumstances would be futile;

(xix) There is not now nor has there been an application to appeal the order of the 27th February 2014 or otherwise quash same;

(xx) The applicant has not explained the provenance of the relevant monies although this matter has been put in issue by virtue of the various affidavits;

(xxi) The details now sought by way of mandamus have been sought since 2014;

(xxii) Even if the applicant is correct, which he is not, that the order of the 27th February 2014 was not effective until perfection, nevertheless the applicant is now out of time in respect of any challenge thereto;

(xxiii) Proceedings which have in fact a collateral purpose will be classified as an abuse of process.

Consideration

Extension of time
7. O. 84, r. 21 (1) of the Rules of the Superior Courts provides that an application for leave for judicial review shall be made within three months from the date when grounds for the application first arose.

8. Under sub – rule 3 it is provided that an extension of time may be made but the court shall only extend such periods if it satisfied if there is good and sufficient reason for doing so and the circumstances that resulted in the failure to make the application within the time period prescribed were outside of the control of, or could not reasonably have been anticipated by the applicant. Under sub – rule 5, such an application for an extension is to be grounded upon an affidavit sworn by the applicant which sets out the reasons for the applicant's failure to make an application within the prescribed time and verifying any facts relied upon in support of such reasons.

9. In *Shell E&P Ireland Ltd. v. McGrath* [2013] 1 IR 247, the Supreme Court acknowledging the rules to be secondary legislation stated they still have full force of law, the court indicating that if time limits are introduced for bringing judicial review and same is *intra vires,* then this amounts to a legal barrier to the bringing of such proceedings save in respect of the provision for extension of time.

10. In *De Róiste v. Minister for Defence* [2001] 1 IR 190 Denham J., as she then was, held that:-

> *"Time is more of the essence, more urgent, in judicial review proceedings. Indeed, in some areas of judicial review, by statutory requirement, an application must be made within weeks. Thus, the case law relating to dismissing proceedings for lack of prosecution has some, but not great, relevance to applications for judicial review. Such cases may be helpful in analysing the reason for delay to see if it is a good reason and to achieve a just decision."*

11. In *A. v. Governor of Arbour Hill Prison* [2006] 4 IR 88 Murray C.J. refers to the aversion of the law from giving a hearing to those who have slept on their rights even in the short term. In *O'Connor v. The Residential Tenancies Board* [2008] IEHC 205 Hedigan J. was of the view that the obligation of the court to enforce time limits is very important. He noted that time limits are there for a good reason. In *O.S. v. The Residential Institutions Redress Board* [2018] IESC 61 the Supreme Court (Finlay Geoghegan J.) noted that an extension of time requires the applicant to furnish good reasons which should explain and objectively justify the failure to make the application within the time limits provided.

Forfeiture of Order
12. By virtue of s. 61 (4) of the Criminal Justice Act 1994, a forfeiture order operates to:-

> *"deprive the offender of his rights, if any, in the property to which it relates, and the property shall (if not already in their possession) be taken into the possession of the Garda Síochána."*

13. The judgment in Damache aforesaid must be read in the light of the subsequent decision of the Supreme Court in *DPP v. J.C.* [2017] 1 IR 417 which was a judgment delivered on the 15th April 2015. In *J.C.* the court was satisfied that evidence can be admitted when the prosecution establishes that the evidence was obtained in circumstances where any breach of rights was due to inadvertence or derives from subsequent legal developments. In this case the seizure of assets occurred in 2005 and s. 29 of the 1939 Act was not struck down until February 2012.

14. The date upon which an oral order takes effect was the subject matter of a Supreme Court judgment in *Kavanagh v. Healy* [2015] IESC 37. Clarke J. (as he then was) indicated that an order made orally by a judge is an order of the court and it does not require to be in writing to be valid and binding. The written document is simply a means of recording in a very formal way what the court order said. The court order is what the judge says in court. In addition, it was stated that the absence of the written order is purely an administrative matter and does not deprive anyone of any right or entitlement to appeal. In the circumstances, the court was satisfied that an order is effective as soon as it is made.

15. The fact that a particular individual may not have been aware of the nature of the order made does not have an impact on the judicial review time limits. In I*rish Skydiving Club Ltd. v. An Bord Pleanala* [2016] IEHC 448 Baker J. indicated that the time limits were linked to the making of the decision so to be impugned as opposed to the applicant's awareness of same.

Discretionary remedy
16. As Denham J states in *De Róiste v. Minister for Defence* there is no absolute right to an order for judicial review. It is a discretionary decision for the court.

17. In *Flanaghan v. Judge Martin Nolan* [2014] IEHC 627 McDermott J. ultimately determined that based on alternative reliefs such as the rehearing available on appeal, judicial review would not be appropriate. In that matter, the court observed that to secure a forfeiture order it had to be established on the balance of probability that the relevant cash was the proceeds of crime, or intended for criminal conduct and if this was not established a full appeal would be available. The court followed the judgment of Clarke J. in *EMI Records Ltd. v. The Data Protection Commissioner* [2013] IESC 34.

18. In *Governey v. Financial Services Ombudsman* [2017] 3 IR 144 Laffoy J. indicated that an alternative and satisfactory means of redress which could have been pursued is a significant factor in or about the consideration of whether or not the court's discretion should be exercised.

Collateral Attack
19. In *Sweetman v. An Bord Pleanala & Ors* [2018] IESC 1 Clarke C.J. identified the rationale underlining the collateral attack jurisprudence when he said it was clear and a party who have the benefit of an administrative decision which is not challenged within any legal mandated timeframe should not be exposed to the risk of having the validity of that decision subsequently challenged in later proceedings.

20. In *A. v. Governor of Arbour Hill Prison* [2006] 4 IR 88 Murray C.J. indicated that a collateral attack arises where a party outside the ambit of the original proceedings seeks to set aside the decision in a case which has already been finally decided, or legal avenues, including appeal, having been exhausted.

Decision
21. Having regard to the foregoing statutory provisions and jurisprudence I am satisfied: -

> (a) It is critical to the applicant successfully obtaining an order on any of the grounds sought to establish ownership of the monies – in fact in the applicant's written submissions of the 23rd January 1999 (page 2) this is identified as the first issue to be determined. In addition, of course the wording of each of the first four reliefs claimed clearly demonstrate a claim of ownership as being the basis for the relief sought by the applicant.
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> (b) In written submissions, the applicant does in fact seek to attack the forfeiture order or possible confiscation order in the order of the Circuit Court of the 27th February 2014. He suggests that effectively same was not binding on the him until he had notice of same in May 2018, when the perfected order was produced. Nevertheless, it is the case that the order of the Circuit Court has not been appealed nor has same been judicially reviewed nor indeed is the forfeiture order referred to as part of the relief claimed in the within judicial review proceedings.
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> (c) Confusingly, Counsel states in oral submissions that ownership of the monies is not a matter for this Court. However, the only basis for claiming that that the monies belong to the applicant is that they were located in the applicant's home in 2005. The applicant appears to be of the view that this is dispositive of his ownership.
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> (d) If one takes the applicant's position at its height, namely that the forfeiture order only became operable against him in May 2018 on production of the perfected order, nevertheless by January 2019 (the date of the within hearing) the court has not been advised of any appeal or application for judicial review of such order and therefore any such application is now well out of time. In reality, however, the order was effective upon pronouncement regardless of the applicant's asserted understanding in particular having regard to the fact that the applicant was indeed present in court with counsel when the order was pronounced (see the affidavit of Frank Nyhan solicitor of the 9th of July 2018, at para. 4).

22. The applicant had first sought the information the subject matter of reliefs 1 and 2 in 2014 and this is confirmed in para. 9 of his written submissions. In *Finnerty v. Western Health Board* [1998] IEHC 143 Carroll J. stated that a decision which is a reiteration of a previous decision is not a new decision. Time therefore begins to run when the final decision is first made. Similarly, in my view, a request for information which is reiterated is not a new request and time for any mandamus application began to run when there was some form of asserted delay in response to the 2014 requests for information.

23. It is trite law that the court cannot resolve conflicts of fact in favour of a party upon whom the burden of proof lies in judicial review applications (Collins and O'Reilly, *Civil Proceedings and the State*, 2nd Ed., 2004, at paras. 5 – 86.)

24. Clearly the affidavit evidence before the court puts at issue the ownership of the subject matter of the forfeiture order and indeed the only argument presented by the applicant is that the money was removed from his home which at best may have provided him with an interest in the money up until the expiry of the time limits to appeal or apply for judicial review proceedings in respect of the order of the Circuit Court of February 2014.

25. The within proceedings having regard to the applicant's submissions as aforesaid, are demonstrably seeking to mount a collateral attack on the Circuit Court order of February 2014.

26. Insofar as time limits are concerned, there has been no engagement by the applicant with respect to the content of O. 84 of the Rules of the Superior Courts save for a brief mention thereof in para. 72 of the written submissions which merely records that time begins to run when grounds for the application first arose. There is no attempt to explain or justify the delay in accordance with the provisions of O. 84 save to state that it was unfair of the respondents to raise the issue of time.

Conclusion
27. The applicant has failed to establish any basis to secure an enlargement of time to maintain the within judicial review proceedings and indeed no formal application has been made to the court. In addition, the applicant has failed to discharge the onus on him to establish that the relevant monies belonged to him - in particular post the making of the forfeiture order, and in the circumstances, all of the reliefs claimed by the applicant are refused.