

THE HIGH COURT

[2012 No. 448 J.R.]

BETWEEN:

EZENWATA IZUNDU

APPLICANT

AND

JUDGE MARTIN NOLAN

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr Justice Barrett delivered on the 22nd day of July, 2014.

1. On 13th March, 2012, a confiscation order in the amount of €412,579.82 issued against Mr. Izundu from the Circuit Court. Mr. Izundu has various concerns about this order, both in terms of the amount ordered and the process that preceded its issuance. He has come to this Court seeking (1) an order of *certiorari* by way of judicial review quashing the confiscation order; (2) a declaration that any party applying for a confiscation order or otherwise invoking the jurisdiction of the courts pursuant to s.4 of the Criminal Justice Act 1994 is required, in advance of making such application, to communicate to the party alleged to have benefitted from drug trafficking, the amount sought to be confiscated, and an outline of the basis of calculation of that sum; and (3) various other reliefs.

Background facts

2. Mr. Izundu is a convicted drug dealer. By his own account, his criminal career as a dealer was both short-lived and unsuccessful. On 30th November, 2010, it earned him a four-year sentence of imprisonment pursuant to the Misuse of Drugs Act 1977. In an interview with the gardaí on 16th October, 2009, following his arrest for possession of cocaine, the event that precipitated his eventual imprisonment, Mr. Izundu suggested that he had been dealing in drugs for only three weeks, selling perhaps 5-10g of cocaine each week. However, when arrested, Mr. Izundu was found to be in possession of 160g of cocaine. In addition, the gardaí discovered that in the years prior to Mr. Izundu's arrest an amount in excess of €700,000 was routed through his many bank accounts. This was more than a little odd for someone whose legitimate employment was as a taxi-driver and as the proprietor of a store that had a declared income of about €10,000 per annum. Mr. Izundu claimed, indeed he appears to some extent still to maintain, that certain large amounts that went through his bank accounts were lodged with him to enable the purchase of plant and machinery for various individuals. Perhaps unsurprisingly, the State has taken the view that in fact the enormous sums of money that went through Mr. Izundu's accounts represented the proceeds of drug trafficking. Two features of note arise in this regard. First, it does not appear that Mr. Izundu ever enjoyed the lavish lifestyle that one typically associates with the successful drug dealer. Second, there appears to be no indication that Mr. Izundu remains in possession of any of the very large sums of money that went through his accounts.

Confiscation orders

2. Under the Criminal Justice Act 1994, the Oireachtas has established a process whereby a confiscation order can issue against a person who is convicted of one or more drug trafficking offences. A key purpose of such an order is to ensure that drug dealers do not continue to enjoy the sometimes vast proceeds of their criminal endeavours following conviction for what is a particularly insidious criminal offence that has the potential to destroy entirely the lives of both drug-takers and their families. To any right-thinking person, the confiscation order process is both legitimate and laudable. However, there are clear limits to what a confiscation order can do: it can only enable the confiscation of monies that a convicted drug trafficker in fact possesses. The effect of this is that it is perhaps relatively easy for a trafficker to evade the confiscation order process by ensuring that the proceeds of his trafficking are transferred to someone else pre-conviction. Clearly in the disposal of the cash proceeds of drug trafficking, other offences such as money laundering may arise and can be investigated and prosecuted when and as appropriate. What the State cannot do is seek to use the confiscation order process to attain the unattainable, *i.e.* recoup from a convicted drug trafficker monies that, for whatever reason, he no longer possesses.

Certain arguments raised

4. Mr. Izundu was represented by both senior and junior counsel at the hearing of this matter. Between them they made various allegations in respect of the process that yielded the confiscation order in issue in these proceedings. The court considers these allegations elsewhere below but first it addresses a number of concerns raised by the State, namely (1) whether the issues raised in these judicial review proceedings ought more properly to have been the subject of an appeal brought under s.15 of the Act of 1994; (2) whether it would have been more appropriate for Mr. Izundu to make application under s.16 of the Act of 1994 for a variation of the amount of the confiscation order that issued against him; and (3) whether there was material non-disclosure by Mr. Izundu when seeking leave, on an *ex parte* basis, to bring these judicial review proceedings, resulting in a breach of the requirement on Mr. Izundu, as applicant, and his counsel to observe the utmost good faith in the bringing of such an application.

Exercise of right of appeal

5. Under s. 15(1) of the Act of 1994, an appeal against the making of a confiscation order may be made to the Court of Criminal Appeal. The State has contended that the more appropriate remedy for Mr. Izundu if he is unhappy with the merits of the confiscation order made against him, and he clearly is, is to appeal the impugned order to the Court of Criminal Appeal. However, while judicial review is a discretionary remedy that can be refused where there is an adequate alternative remedy, this Court retains jurisdiction to exercise its discretion so as to achieve a just solution. That this is so is clear from *Stefan v. The Minister for Justice, Equality and Law Reform and Others* [2001] 4 I.R. 203, a case in which the respondents appealed against a decision of the High Court granting an order of *certiorari* in respect of a decision of the respondent Minister and remitting the matter back to the Minister. Per Denham J., as she then was, at p.216:

"It is clear that whilst the presence of an alternative remedy, an appeal process, is a factor, the court retains jurisdiction to exercise its discretion to achieve a just solution."

Notably, in that case not even the existence of a pending appeal, a position that does not pertain in these proceedings, was considered to be a bar to the exercise by the court of the mentioned discretion. In reaching the above conclusion, Denham J. referred, *inter alia*, to the judgment of Walsh J. in *State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381 at p.398 in which Walsh J. emphasised the importance of a court's discretion being employed so as to attain justice. In the present case, it is clear from the decision of the Supreme Court in *Stefan* that the existence of the appeal procedure under s.15 of the Act of 1994 is not a bar to this Court exercising its discretion to adjudicate upon the present application. The court is conscious too that if Mr. Izundu is correct that he was denied a basic fairness of procedures in the manner in which the amount of the confiscation order of 13th March, 2012, was settled upon, this is not just a routine mishap but represents a fundamental flaw in the procedures adopted in the Circuit Court proceedings brought against him. Having regard to all the circumstances of the case, the court considers that the justice of the situation demands that the court exercise its discretion to adjudicate upon the issues raised by Mr. Izundu in this application.

Variation of order

7. Under s.16 of the Act of 1994 if, on application by a defendant or the Director of Public Prosecutions in respect of a confiscation order, the High Court is satisfied that the value of realisable property is inadequate for the payment of any amount remaining to be recovered under the confiscation order it shall substitute for the amount to be recovered such lesser amount as the court thinks just in all the circumstances of the case. During the hearing of the present application, a question arose as to whether Mr. Izundu ought more properly to have sought a variation of the confiscation order that issued against him, rather than electing for the mode of relief that he has in fact sought. However, s.16 appears to contemplate the variation of a valid order; here what is contended is that the process that yielded the confiscation order against Mr. Izundu was itself deficient and that this deficiency taints the validity of the order that issued.

Material non-disclosure

8. The next ground of objection raised by the State to the continuation of the instant proceedings is that there was material non-disclosure by Mr. Izundu when seeking leave, on an *ex parte* basis, to bring these judicial review proceedings, resulting in a breach of the requirement on Mr. Izundu, as applicant, and his counsel to observe the utmost good faith in the bringing of such applications. That there is such a duty is apparent from long-ago cases such as *Brennan v. Lockyer* [1932] I.R. 100 where Kennedy C.J. referred, at p.107, to the duty of *uberrima fides* (utmost good faith) arising for an applicant, through to more recent cases such as *Adams v. D.P.P.* [2001] 1 I.R. 47 and *Gordon v. D.P.P.* [2002] 2 I.R. 369, in the latter of which Fennelly J. refers, at p.375, to the "*need to be able to set aside orders made where there has been a failure by the applicant to observe the principle of utmost good faith*". Perhaps the natural tendency where such a stringent duty arises is for counsel for the opposing party to point to any conceivable failing that may have arisen on the part of an applicant and assert that it was in breach of the duty of utmost good faith. However, that duty arises in an imperfect world where some degree of imperfection is perhaps to be expected, even of counsel, and to some extent tolerated: the standard imposed is one of absolute good faith, not absolute perfection. Thus it is possible that a matter may go undisclosed in an *ex parte* application for leave to bring judicial review proceedings and still no breach of the duty of absolute good faith will arise. The nature and consequence of any alleged breach of the duty will fall to be considered on a case-by-case basis. In the instant case the State has pointed to two 'material' non-disclosures by Mr. Izundu in his application for leave, viz. (1) that he did not disclose that prior to the hearing of 13th March, 2012, no objection had been made by him to the fact that the hearing was proceeding on foot of affidavit evidence; and (2) he only disclosed what occurred on the hearing date of 13th March, 2012, and did not disclose the large number of times that the matter had been mentioned before the Circuit Court prior to that date. The court does not know if these non-disclosures in fact occurred. However, even if they occurred they do not appear of such significance as to justify the leave order being set aside. Nor, as a separate matter, does the court consider that the facts omitted, if omitted, and even if true, have any bearing on the outcome of these proceedings.

Criminal Justice Act 1994

9. Having concluded that these judicial review proceedings have properly been brought and that the issues raised ought to and can be adjudicated upon by this Court, the court turns now to consider a number of provisions in the Act of 1994 that arise for consideration. These are recited below and some pertinent matters highlighted.

10. Under s.4 of the Act of 1994:

"(1) Where a person has been sentenced or otherwise dealt with by a court in respect of one or more drug trafficking offences of which he has been convicted on indictment, the court shall, subject to subsections (2) and (3), determine whether the person has benefited from drug trafficking. [subsections (2) and (3) are not relevant to this case]...

(4) If the court determines that the person in question has benefited from drug trafficking, the court shall determine in accordance with section 6 of this Act the amount to be recovered in his case by virtue of this section and shall make a confiscation order under this section requiring the person concerned to pay that amount.

(5) For the purposes of this Act, a person who has at any time (whether before or after the commencement of this section) received any payment or other reward in connection with drug trafficking carried on by him or another has benefited from drug trafficking.

(6) The standard of proof required to determine any question arising under this Act

as to—

(a) whether a person has benefited from drug trafficking, or

(b) the amount to be recovered in his case by virtue of this section,

shall be that applicable in civil proceedings...".

Of particular note is the application of the civil burden of proof by s.4(6).

11. Under s.6 of the Act:

"(1) Subject to subsection (2) of this section, where a confiscation order has been made under section 4 of this Act, the amount to be recovered under the order shall be equal to the amount assessed by the court to be the value of the defendant's proceeds of drug trafficking.

(2) If the court is satisfied that the amount that might be realised at the time the confiscation order is made is less than the amount the court assesses to be the value of his proceeds of drug trafficking, the amount to be recovered in the defendant's case under the confiscation order shall be the amount appearing to the court to be the amount that might be so realised."

12. In essence, a two-step process falls to be applied under s.6. Section 6(1) deals to some extent with the ideal, s. 6(2) with the real. Thus s. 6(1) requires that a confiscation order be in the amount assessed by the court to be the total value of a defendant's proceeds of drug trafficking. Section 6(2) provides that if the court is satisfied that the amount that might be realised at the time the order is less than the amount settled upon pursuant to s.6(1), then the amount of the order must be reduced to the amount that the court considers might be realised. A key element of Mr. Izundu's various complaints is that the Circuit Court in effect failed properly to undertake this two-step analysis of his circumstances.

13. One might perhaps be tempted to ask whether there is any practical significance to the Circuit Court getting matters wrong when it comes to the scale of a confiscation order that it might impose. As it happens a very real practical significance arises for Mr. Izundu by virtue of s.19 of the Act of 1994. Under s. 19(1) a confiscation order falls to be enforced by the D.P.P. as if it were a judgment of the High Court for the payment to the State of the amount specified in the order. Under s.19(2), if the amount ordered goes unpaid, then upon report to this effect being made to the High Court by the D.P.P., the affected individual may be imprisoned by the High Court according to a sliding scale in which the greater the outstanding amount under the confiscation order, the greater the period of imprisonment the individual faces. Section 19(3) requires that an affected individual be given a reasonable opportunity to be heard before an order for imprisonment is made. Section 19(4) provides for a reduction of the term of imprisonment in proportion to any sum(s) that may be paid or recovered from time to time under the confiscation order. The effect of s.19, combined with ss. 4 and 6 of the Act of 1994 is the establishment of a carefully calibrated regime in which a proper application of s.6 is the necessary linchpin to ensuring that the scales of justice are appropriately weighted as regards both the State and the convicted person. If the court making a confiscation order faithfully discharges its obligations under s.6, then a convicted drug trafficker should be deprived of such of his illicit proceeds as might be realised but no more. If the court under-estimates the amount that may be realised, so be it. However, if the court over-estimates the amount that may be realised, there is the potential for injustice under s.19. A key contention of Mr. Izundu in these proceedings is that the Circuit Court in its order of 13th March, 2012, grossly over-estimated the amount that may be realised in his case and so created the potential for a serious injustice that could result in his facing up to five years' imprisonment on top of the time that he has already served for his primary offence of drug trafficking. So for Mr. Izundu there is a very practical significance to the Circuit Court having gotten matters wrong, if it got matters wrong, when it came to the scale of the confiscation order that it imposed on him. There is also a real significance for the State if it has done some injustice to Mr. Izundu through any failure to observe required and fair procedures in the confiscation order proceedings against him. After all, as Plato writes in *Gorgias*, doing injustice is a very great wrong; a state with the concern for individual rights which our State so correctly and consistently evinces in its actions would naturally want to see any such wrong remedied if on the facts of a particular case it is found to pertain.

Assumptions

14. Certain rebuttable assumptions arise under s.5 of the Act of 1994 which provides as follows:

"(1) For the purposes of this Act—

(a) any payments or other rewards received by a person at any time (whether before or after the commencement of section 4 of this Act) in connection with drug trafficking carried on by him or another are his proceeds of drug trafficking, and

(b) the value of his proceeds of drug trafficking is the aggregate of the values of the payments or other rewards.

(2) The court shall, for the purpose of determining whether the defendant has benefited from drug trafficking and, if he has, of assessing the value of his proceeds of drug trafficking, make the assumptions set out in subsection (4) of this subsection except that the court shall not make any of the said assumptions if –

(a) the assumption is shown to be incorrect in the case of the defendant, or

(b) it is satisfied that there would be a serious risk of injustice in his case if the assumption were to be made.

(3) Where the court does not apply one or more of the assumptions set out in subsection (4) of this section it shall state its reasons.

(4) The assumptions referred to in subsection (2) of this section are –

(a) that any property appearing to the court –

(i) to have been held by the defendant at any time since his conviction, or

(ii) to have been transferred to him at any time since the beginning of the period of 6 years ending when the proceedings were instituted against him, was received by him, at the earliest time at which he appears to the court to have held it, as a payment or reward in connection with drug trafficking carried on by him,

(b) that any expenditure of his since the beginning of that period was met out of payments received by him in connection with drug trafficking carried on by him, and

(c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a reward, he received the property free of any other interests in it.

(5) For the purpose of assessing the value of the defendant's proceeds of drug trafficking in a case where a confiscation order has previously been made against him, the court shall not take into account any of his proceeds of drug trafficking that are shown to the court to have been taken into account in determining the amount to be

recovered under that order."

15. What is notable about s.5 is that there is no assumption that a person who has received or held the proceeds of drug trafficking retains them for all time thereafter. Indeed it is difficult to conceive that any rational statute would make such an assumption.

Matters preliminary to the Circuit Court proceedings

16. Among the contentions made by counsel for Mr. Izundu was that the Director of Public Prosecutions, consequent upon a request by Mr. Izundu's legal team so to do, ought to have indicated in advance of the Circuit Court proceedings the precise amount that the State sought to have confiscated and also the basis whereby it had calculated that amount. Counsel for the Director of Public Prosecutions indicated that, firstly, there is no requirement in s.4 of the Act of 1994 for the D.P.P. so to do and, secondly, s.4 establishes a Court-led inquiry into the issues specified by that section and thus, in effect, that the fairness of procedures applied was a matter for the trial court.

17. It seems to the court that the second of the D.P.P.'s contentions fully answers the complaint levelled by counsel for Mr. Izundu in this regard. As the confiscation order process established under s.4 of the Act of 1994 is one that is incumbent on the trial court to undertake, it is for that court to ensure that a basic fairness of procedures applies. There are a number of ways in which such fairness of procedure can be attained. Clearly a Star Chamber-style process in which an individual has no advance knowledge of what is to be put to him in confiscation order proceedings would not be permissible under the Constitution. However, it does not appear to the court that the only permissible manner of proceeding is for the trial court to ensure that a defendant is provided in all instances with the type of information that Mr. Izundu's legal team sought of the D.P.P. On the contrary, it is entirely open to the trial court to be satisfied that a basic fairness of procedures pertains, notwithstanding that, for example, the information sought by Mr. Izundu's counsel in this case was not provided to them. In this case the confiscation order was made nearly 18 months after Mr. Izundu was convicted. There were two adjournments of proceedings to allow Mr. Izundu time to give answers to the prosecution as to the origins of the monies that washed through his many bank accounts. His counsel were well able to read the Act of 1994 and so knew exactly what would be required of the State at the ensuing proceedings and indeed what would be required of Mr. Izundu to defend himself. It was open to the Circuit Court to find, and it would seem implicit in the fact that it allowed the confiscation order proceedings against Mr. Izundu to continue that it did in fact consider that the proceedings against Mr. Izundu accorded with constitutional requirements as to basic fairness of procedures.

18. For the reasons stated, the court rejects the contention that: (1) consequent upon a request by Mr. Izundu's legal team so to do, the D.P.P. ought to have indicated in advance of the Circuit Court proceedings the precise amount that the State sought to have confiscated and the basis whereby it had calculated that amount; (2) the State in any guise is required, whether to ensure conformity with constitutional requirements as to fairness of procedures or otherwise, to ensure that pre-trial information of the type sought by Mr. Izundu in these proceedings is made available to a defendant in confiscation order proceedings. It was for the trial judge to ensure that a basic fairness of procedures pertained in the confiscation order proceedings affecting Mr. Izundu; there is nothing to suggest that he did not and neither is there some manifest or inherent deficiency in the procedures operated by the Circuit Court that placed those proceedings in contravention of the Constitution in this regard.

The Circuit Court proceedings

19. The hearing of the s.4 application that was brought against Mr. Izundu took place on 13th March, 2012. The trial judge heard all the evidence and the manifold reasons given by Mr. Izundu as to the numerous and large amounts of money that had passed through his twelve bank accounts. Mr. Izundu did not give evidence himself but had replied to questions put to him by the prosecution pursuant to a court order of 20th December, 2011. He offered the vague explanation that many of the monies routed through his various accounts had been given to him on the basis that he would supply agricultural machinery to other people who hail from his country of origin. As regards some of the monies, he seemed unable to recall their source. Other sums were attributed by Mr. Izundu to his income as a taxi-driver, to the income that he earned from his shop, and to various benefits that he received from the State for his children. The Circuit Court judge took the view that Mr. Izundu's explanations were "*grossly unsatisfactory*" and that he did not believe them. He then made a confiscation order which, in its final form, was for €412,579.82.

20. It is only in this last regard, *i.e.* the scale of the confiscation order finally imposed, that the court considers a difficulty to arise with the Circuit Court proceedings. In every other respect the Circuit Court judge appears to have got matters entirely right. However, with regard to the scale of the sum ordered, it does not appear that the requirements of s.6 were wholly complied with. Nor does it appear that they were even substantively complied with. It is worth quoting from the transcript of the Circuit Court proceedings to show how the amount eventually settled upon in the confiscation order was arrived at by the trial judge:

"JUDGE: So basically, you've gone into a bank account and you've found that over time there's been a sum of €800,000 lodged and dissipated?"

MR. COFFEY

[for the State]: Yes, Judge.

JUDGE: [B]asically, you want then for me, on the basis of your evidence, to make an order, a confiscation order for a certain sum?"

MR. COFFEY: Yes, Judge."

21. The proceedings continued with a consideration of Mr. Izundu's finances and what the judge eventually found to be the "*grossly unsatisfactory*" explanations offered by Mr. Izundu as to where the monies came from. The transcript continues:

"JUDGE: ...I'm driven back to the strong probability that the funds going through the accounts were the proceeds of the general drug trade. And what I'm going to do as best I can I'm going to take the view that in all probability the confiscatory order I should order is in the amount of €500,000 taking everything into account – totally unsatisfactory, totally unscientific but looking through the accounts it's the best I can do."

22. The court considers the process to this point to be entirely fair and that the amount of €500,000 settled upon by the judge represented, to quote s.6(1) of the Act of 1994 "*the amount assessed by the court to be the value of the defendant's proceeds of drug trafficking.*" The reference by the judge to the process as "*totally unsatisfactory, totally unscientific*", this Court considers merely to be a frank admission as to the profound difficulty that any court would face in arriving, even on the balance of probabilities, at a proper assessment of the value of a defendant's proceeds in the face of explanations from a defendant whose evidence the Circuit Court judge expressly found to be "*unbelievable*". Indeed, given the strong incentive for defendants to dissemble at

confiscation order proceedings, this Court suspects that many if not all confiscation order proceedings are likely to some extent, perhaps even a large extent, to prove very challenging for the relevant trial judge. In any event, the figure of €500,000 was the amount assessed by the Circuit Court judge for the purposes of s. 6(1) and there does not appear to this Court to be any unfairness of procedure arising in how this was calculated, albeit that the amount settled upon by the trial judge was a very considerable distance from the €800,000 referred to by counsel. Notably, and it reflects well on both the State and the trial judge, the State indicated at a later point in proceedings that the judge had in fact erred on the high side in his calculations and that a further examination of the figures proffered by the State suggested that a lower confiscation order would be appropriate. The prosecution then led the judge through the relevant figures and suggested that an order in the amount of €412,579.83 would be appropriate. The trial judge listened to what the State had to say and then revised his initial order downwards to reflect this amount. Again, the fact that the amount settled upon is so distant from the €800,000 originally cited is notable, though again there does not appear to this Court to be any unfairness of procedure arising as regards the calculation of the value of Mr. Izundu's proceeds of drug trafficking.

23. Shortly after the revised figure of €412,579.83 was settled upon, the Circuit Court adjourned. It is at this point that one can look backwards and see that at no stage in the Circuit Court proceedings did the Circuit Court undertake a proper s.6(2) analysis. It will be recalled that under s.6(2) of the Act of 1994, if a court to which application for a confiscation order is made:

"is satisfied that the amount that might be realised at the time the confiscation order is made is less than the amount the court assesses to be the value of his proceeds of drug trafficking, the amount to be recovered in the defendant's case under the confiscation order shall be the amount appearing to the court to be the amount that might be so realised."

24. The entire focus of the Circuit Court in this case appears to have been on the assessment of the value of Mr. Izundu's proceeds of drug trafficking. It is of course possible that the Circuit Court considered that the value of Mr. Izundu's proceeds of drug trafficking and the amount that might be realised of him were equivalent amounts. However, a reading of the transcript does not suggest this was the case. Any fair reading of the transcript leads to the conclusion that the Circuit Court judge, and indeed the State's counsel, were focused on the assessment of the value of Mr. Izundu's proceeds of drug trafficking and the making of a confiscation order in that amount, without proper regard to the constraints imposed by s.6(2). The opening comments of the State's counsel and certain later comments of the trial judge suffice to show that this was so. Thus towards the beginning of the proceedings one finds the following exchange:

"JUDGE: So what are you looking for?"

MR. COFFEY: Well, I'm looking for the Court to assess what are the proceeds of crime, what are the monies that were lodged by the accused and dissipated by the accused...

JUDGE: Now, basically, you then want for me, on the basis of your evidence, to make an order, a confiscation order for a certain sum?

MR. COFFEY: Yes, Judge...

JUDGE: - for a sum that I must estimate as the amount that he has made from drugs?

MR. COFFEY: That has gone through his accounts which we say are from the proceeds of crime.

JUDGE: Is related to drug activities?

MR. COFFEY: That's correct."

25. It does not appear to the court that what was described to the trial judge at the above-quoted stage of the proceedings was entirely correct. What was described to the trial judge was the s.6(1) process. What was not made clear, and it is understandable how this could inadvertently occur in the white heat of trial proceedings, were the obligations that arose for the judge under s.6(2) of the Act of 1994.

26. At a later stage, the trial judge summarises his conclusions and, perhaps as a result of the exchange he had with counsel in the earlier part of proceedings, he is clearly concerned in his summary with identifying the amount assessed by the court to be the value of Mr. Izundu's proceeds of drug trafficking, i.e. the task arising for the court under s. 6(1), and not the amount that might be realised of Mr. Izundu pursuant to any confiscation order made, i.e. the task arising for the court under s.6(2). Thus, per the trial judge:

"JUDGE: ...This matter is unusual: basically speaking, this man was arrested. He was found with drugs and he was sentenced to prison for his involvement with these drugs. On further investigation of his finances the State, in the guise of the guards, found many, many accounts. They found many accounts that where large sums of money going through them. And Mr. Coffey on behalf of the State asks me to come to the conclusion that all the sums of money going through these accounts were essentially the proceeds of the drug trade. Now, the way it seems to me these statutory provisions work is that, as it were, the State raised the issues and asked for clarification from the defence. And then the clarification - the raised issues in the form of the affidavits are to be put before the Court and the clarifications and the responses and the explanations in the form of affidavits from the defendant are also put before the Court. And the Court has to decide on the basis of all the evidence before it whether the amounts involved, in this case the amounts going through the accounts, are the proceeds of drug trades."

27. This is a good description of the s. 6(1) process. But neither here nor elsewhere in the proceedings does the judge appear to address his mind properly to the s.6(2) requirements. Instead he determines the value of Mr. Izundu's proceeds of drug trafficking and makes a confiscation order in this amount without ever, certainly without ever expressly, addressing his mind to how much in truth might be realised of Mr. Izundu.

28. One might perhaps ask where was Mr. Izundu's counsel in all of this? Did he not think to raise s. 6(2) of the Act of 1994 as a concern? In fact, Mr. Izundu's counsel expressly raised the issue of s. 6(2) with the trial judge, after which the trial judge remarked as follows:

"[W]hat you should be trying to satisfy me is that your client is a person of no means and therefore it would be almost a nullity to make an order against him".

29. This does not appear to this Court to be a proper summary of s.6(2). Under s.6(2), the court, if satisfied that the amount that might be realised at the time the confiscation order is made is less than the amount the court assesses to be the value of a defendant's proceeds of drug trafficking, it must reduce the amount of the confiscation order to the amount that might be realised. It is difficult in this case to see how the trial court could have concluded that there was not a significant disparity between the value of Mr. Izundu's proceeds of drug trafficking and the amount that might be realised of him pursuant to a confiscation order. During the hearings before the Circuit Court, counsel for the State accepted as true that, to quote the trial judge, the relevant funds had been "*lodged and dissipated*". If the funds were dissipated then it cannot be that Mr. Izundu retains them now or did so at the date of the Circuit Court proceedings. Indeed it is not clear how assiduously it has ever been asserted by the State that Mr. Izundu retains any of the monies that went through his account. As counsel for the State said before the Circuit Court of these monies:

"[T]hese are the proceeds of crime and we don't know whether the accused continues to hold them in another jurisdiction or elsewhere or not."

30. The State has contended that if there was any error by the first-named respondent in these proceedings in making the confiscation order of 13th March, 2012, the error made was one that arises within jurisdiction and does not give rise to relief by way of judicial review. However, it is of course important that errors of law do not go uncorrected. In the present case the court considers that an error of law with the most serious consequences for Mr. Izundu has arisen, namely that the Circuit Court in settling upon the level of the confiscation order made on 13th March, 2012, had regard solely to s. 6(1) of the Act of 1994 and did not have proper regard to s.6(2) of that Act. This error appears to the court to have been such as to deny Mr. Izundu the benefit of the process contemplated by s.6 and the basic fairness of procedures to which he is entitled under the Constitution. Moreover, the lasting consequences of such an order for Mr. Izundu are such that its issuance and continuance have respectively engendered an instant and lasting injustice to him. What happened in the Circuit Court appears to this Court not to be some sort of routine mishap but a fundamental deficiency in the Circuit Court proceedings that cannot be allowed to stand uncorrected.

Conclusion

31. For the reasons stated above, the court:

- being satisfied as to the procedures and process employed by the Circuit Court in determining, for the purposes of s.6(1) of the Act of 1994, the amount assessed by that court to be the value of Mr. Izundu's proceeds of drug trafficking, remits to the Circuit Court for consideration only those issues that arise for consideration under s.6(2) of the Act of 1994, in particular whether the amount of the confiscation order issued by the Circuit Court on 13th March, 2012, pursuant to s.4 of the Act of 1994, requiring Mr. Izundu to pay the sum of €412,579.82, ought to be reduced, having regard to the terms of s.6(2);
- declines to grant the declaration requested by Mr. Izundu that any party applying for a confiscation order or otherwise invoking the jurisdiction of the courts pursuant to s.4 of the Act of 1994, is subject to a requirement in advance of any such application to communicate to the party alleged to have benefited from drug trafficking the amount that it is sought to confiscate and the basis for the calculation of such sum.