

THE HIGH COURT

[2016 No. 65JR]

BETWEEN

JOHN PAUL LEDWIDGE

APPLICANT

– AND –

THE DIRECTOR OF PUBLIC PROSECUTIONS

– AND –

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 15th December, 2016.**I. Background**

1. Mr Ledwidge's house was searched by members of An Garda Síochána on 14th August, 2015. This search was done pursuant to a search warrant that had been issued by a District Judge earlier that day under s.26 of the Misuse of Drugs Act 1977. Many thousands of euro and dollars were found in the house and seized. Later on 14th August, Mr Ledwidge attended at a Garda station where he indicated that the seized monies were the proceeds of betting winnings. He even produced a number of betting slips to the value of in or about a quarter of the money seized. The Gardaí made certain related enquiries but were not satisfied (and, at the date of hearing of the within application, remained dissatisfied) with Mr Ledwidge's explanation as to how he came into possession of the moneys seized.

2. Following the seizure of the moneys, and within the 48-hour time limit contemplated by s.38 of the Criminal Justice Act 1994, as amended by s.20 of the Proceeds of Crime (Amendment) Act, 2005, successful application was made by An Garda Síochána for an order authorising the retention of the money for a period of three months. Thereafter, Mr Ledwidge's solicitor wrote to An Garda Síochána asking that he be given notice of the next succeeding application for retention of the moneys. This correspondence did not meet with a response, though it may be that the lack of response is due to the fact (though it is hard to see that this offers a full explanation for the absence of any reply) that the initial correspondence sent to An Garda Síochána referred in error to Mr Ledwidge's brother (not Mr Ledwidge) and was addressed to the wrong member of An Garda Síochána.

3. On 20th November, 2015, a date in excess of three months from the making of the initial District Court order, Mr Ledwidge's solicitor wrote and sought the return of the seized moneys and/or an explanation for any continuing retention of same. He also adverted to the fact that Mr Ledwidge intended to make application to the courts, pursuant to the Police (Property) Act 1897 seeking the return of the property. The documents relating to this application were served on 6th December, 2015. Mr Ledwidge's solicitor subsequently placed a telephone call to Garda Murray who appears to have charge of the within matter, and has averred on affidavit "that it is my clear recollection of this conversation that [the] Garda...informed me that he would return the money in question to [Mr Ledwidge]". The truth of this averment is denied by Garda Murray.

4. On 18th December, 2015, the police property application came before the District Court for hearing. Satisfied from his understanding of the telephone call with Garda Murray that the seized moneys would be returned without need for court intervention, Mr Ledwidge's solicitor sought an adjournment of the matter to a future hearing-date when it was expected that the matter would trouble the court no more. The learned District Judge acceded to this application and adjourned the hearing of the application to 25th January, 2016. Since that date, there have been subsequent adjournments.

5. It is claimed that Garda Murray advised Mr Ledwidge's solicitor in their phone call that Mr Ledwidge should attend at the local Garda station to collect the seized moneys. When Mr Ledwidge attended at the station, he was told that the key to the safe in which the money was kept could not be found. He was then asked various questions about the provenance of the money. Acting on the advice of his solicitor, Mr Ledwidge declined to answer these questions. A later visit to the Garda station proved equally unsuccessful. Mr Ledwidge's solicitor himself left four telephone messages with the Gardaí in one day alone requesting that he be contacted to discuss matters; it is claimed that none of these calls were returned.

6. On 25th January, 2016, Mr Ledwidge's solicitor appeared before the District Court. Garda Murray also attended and he describes the morning's events, and his description is accepted as by the court as true, in his affidavit evidence as follows:

"I say that I am currently carrying out a money laundering investigation in relation to the money the subject matter of [Mr Ledwidge's]...Police Property Application, and that I explained this to District Judge Dunne on 25 January 2016...."

I say that on being so informed, District Judge Dunne formed the view and stated that he could not make an order in relation to the money whilst it was the subject of a money laundering investigation and proceeded to adjourn the Applicant's application. As appears from the Statement of Opposition, the Respondent refutes that the learned Judge made an order refusing to return the money to the Applicant."

7. As of the date of hearing of the within application, the monies continued to be retained by An Garda Síochána pursuant to s.7 of the Criminal Justice Act 2006 (in relation to an investigation being conducted under s.7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010).

II. Some Statutory Provisions of Relevance

8. It is perhaps helpful to set out the text of s.38 of the Criminal Justice Act, 1994, as amended, and also the text of s.7 of the Criminal Justice Act 2006.

a. Section 38

9. Section 38 of the Criminal Justice Act 1994, as amended by s.20 of the Proceeds of Crime (Amendment) Act, 2005, reads as follows

“38. — (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 section 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.”

10. Section 7 of the Criminal Justice Act 2006 provides as follows:

"7. — (1) Where a member of the Garda Síochána who is in —

(a) a public place, or

(b) any other place under a power of entry authorised by law or to which or in which he or she was expressly or impliedly invited to be,

finds or comes into possession of any thing, and he or she has reasonable grounds for believing that it is evidence of, or relating to, the commission of an arrestable offence, he or she may seize and retain the thing for use as evidence in any criminal proceedings for such period from the date of seizure as is reasonable or, if proceedings are commenced in which the thing so seized is required for use in evidence, until the conclusion of the proceedings, and thereafter the Police (Property) Act 1897 shall apply to the thing so seized in the same manner as that Act applies to property which has come into the possession of the Garda Síochána in the circumstances mentioned in the Act.

(2) If it is represented or appears to a member of the Garda Síochána proposing to seize or retain a document under this section that the document was, or may have been, made for the purpose of obtaining, giving or communicating legal advice from or by a barrister or solicitor, the member shall not seize or retain the document unless he or she suspects with reasonable cause that the document was not made, or is not intended, solely for any of the purposes aforesaid.

(3) The power under this section to seize and retain evidence is without prejudice to any other power conferred by statute or otherwise exercisable by a member of the Garda Síochána to seize and retain evidence of, or relating to, the commission or attempted commission of an offence."

III. Reliefs Sought

11. By notice of motion of 3rd February, 2016, Mr Ledwidge has sought, *inter alia*, the following reliefs: (1) an order of *mandamus* compelling the respondents to return to Mr Ledwidge the money that was the subject-matter of the application pursuant to s.38 of the Criminal Justice Act 1994; and (2) an order of *certiorari* of the order made by the learned District Judge on 25th January, 2016, refusing to return the money that was the subject of the police property application by Mr Ledwidge. At hearing, the application for *mandamus* was dropped and the entire focus of the application was on whether or not an order of *certiorari* should issue.

12. One point to note from the outset, and it was for this reason that the court was careful to quote the relevant averments of Garda Murray above, is that on 25th January, 2016, the learned District Judge merely "*proceeded to adjourn the Applicant's application*" and "*made [no]...order refusing to return the money to [Mr Ledwidge]*". No copy of the order that Mr Ledwidge contends to have been made – the purported order refusing to return the seized money – was produced before this Court, a fact which buttresses the court's sense that it is right to accept Garda Murray's quoted evidence as true. It goes without mention, though it is perhaps worth mentioning anyway, that the court cannot quash an order that was never made.

IV. Appropriate Way to Proceed was By Way of Appeal?

13. The respondents have suggested that the within application is in some ways unusual, even premature, given that the monies which are at the centre of all that has occurred are currently the subject of a continuing police property application before the District Court, which application has been instituted by Mr Ledwidge himself. But Mr Ledwidge's complaint, in essence, is that the repeated adjournment of his police property application has had the substantive result that there is no certainty as to when his police property application will be heard, given that future adjournments may yet occur. That complaint can be answered in at least two ways. First, although it would be far from commonplace (in truth it would be rare) to bring an appeal against a 'mere' decision to adjourn a hearing, counsel for Mr Ledwidge acknowledged that such an appeal is possible (especially where, as here, it is claimed that there is a real, substantive effect to the repeated adjournments arising). Second, as an avenue of appeal lies open to Mr Ledwidge, the within judicial review proceedings are vulnerable to criticism as having been brought when such an avenue of appeal lies open, it being a general principle of administrative law that judicial review is not appropriate in circumstances where an appeal may be brought, provided the assailed proceedings are not so fundamentally flawed that such error as is contended to arise cannot be cured on appeal. (See, for example, the observations of Kearns J. in this regard in *Doyle v. Connellan* [2010] IEHC 287). If mishap there has been in the District Court's handling of matters thus far, and the court has no view on whether any such mishap has arisen, it seems a mishap that can be cured, and is best cured, on appeal.

V. Conclusion

14. For the reasons identified above, the court respectfully declines to grant any of the reliefs sought in Mr Ledwidge's notice of motion.