Neutral Citation Number: [2008] IEHC 461

THE HIGH COURT
JUDICIAL REVIEW

2007 1442 JR

BETWEEN

J. G. R.

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS
AND
THE COLLECTOR GENERAL OF THE INLAND REVENUE
AND
JUDGE DONNACHA Ó BUACHALLA

RESPONDENTS

Judgment of Ms. Justice Maureen H. Clark delivered on the 31st day of July, 2008.

Background
1. On the 5th November, 2007, the applicant obtained leave from the High Court to apply for judicial review in relation to the following matters:-

> (1) An injunction prohibiting the first named respondent from making any application in purported reliance of s. 39 of the Criminal Justice Act 1994, as amended by s. 20 of the Proceeds of Crime Act 2005, now pending before Circuit Court Judge of the South Eastern Circuit.
>
> (2) An order returning a sum of €100,604.66 seized by the second respondent.
>
> (3) An order of *certiorari* quashing the order made by the third respondent on the 21st July, 2005, on grounds that it failed to show jurisdiction on its face.

The third ground was abandoned at the hearing on the 21st April, 2008. This is the judgment relating to the substantive hearing.

Facts giving rise to the application
2. The applicant's Northern registered car was stopped by customs and excise officers and officers of the Revenue Commissioners as it was about to enter a car ferry travelling to France on the 19th July, 2005. 3. The car was searched and the sum of £69,880.00 Sterling was found concealed in multiple packages under the back seat of the car. This money was seized pursuant to s. 38(1) of the Criminal Justice Act 1994, as amended by s. 20 of the Proceeds of Crime Act 2005 on suspicion that the money was the proceeds of criminal activity.

4. On the 21st July, 2005, an application was made to Judge Ó Buachalla at Rathdrum District Court in the county of Wicklow for the detention of the said monies seized pursuant to s. 38(2) of the Criminal Justice Act 1994 pending enquiries as to the source of the cash. Judge Ó Buachalla made an order pursuant to s. 38(2) of the Criminal Justice Act 1994, whereby the said monies were detained for a period which under the statute was for a period of no longer than three months.

5. Thereafter, applications were made by the state authorities for the detention of the money at regular three month intervals, the last period of detention expiring on the 18th July, 2007.

6. At no stage did the applicant seek the return of the money seized as was open to him under s. 38(5) of the Criminal Justice Act 2005 on the basis that there were no longer any grounds for the continued detention of the money.

7. On the 17th July, 2007, the Director of Public Prosecutions issued a notice of motion pursuant to s. 39 of the Criminal Justice Act 1994 seeking the forfeiture of £69,888.00 Sterling seized from the applicant on the 19th July, 2005. The motion was in compliance with S.I. 448/04 made pursuant to order 69 of the Circuit Court Rules which provides for procedure to be followed when seeking an order from the Circuit Court directing that any sum seized be forfeit to the Exchequer. The motion was returnable to the 2nd October, 2007.

8. There is no issue made as to service of this Notice of Motion. The defendant sought an adjournment of the return date which was refused and he was represented in court on the 2nd October, 2007 when the motion was listed for hearing. He served notice of intention to cross examine on the affidavits filed. Ultimately, due to volume of work in the court that day, the case was not reached.

9. On 5th November, 2007 the applicant sought judicial review and an injunction in the terms recited above. He now disputes the legality of the continued detention of the money seized arguing that the respondents are out of time for seeking an order of forfeiture from the Circuit Court and he asserts that the statute requires an application *to be made* while the money in question is being detained meaning that the application can only be made when the applicant actually stands up in court and makes the request for the order. He claims that as the maximum period allowed for under s. 38 of the Criminal Justice Act is 2 years from the making of the first detention order and the application has not yet been made, the money must be returned.

Applicant's arguments
10. The applicant accepts that the cash was seized and detained in a lawful manner up to the 18th July, 2007 and that s. 39 of the Criminal Justice Act 1994 provides a procedure whereby the monies detained could, within 2 years of the initial detention order, on application be forfeited to the Exchequer once the judge of the Circuit Court was satisfied on the balance of probabilities that the money represented proceeds of crime or was intended for criminal activity. He fully accepts that the amendment effected by s. 20 of the Proceeds of Crime Act 2005 was that, once an application for forfeiture was made, the 2 year time limit was suspended and the money seized would be retained until the Circuit Court hearing and any appeal were completed and there is no dispute that the notice of motion was served within the 2 years period.

11. The only issue is whether the money is still lawfully detained if service of a notice of motion is merely notice of an intention to apply for an order and as such is not enough to stop the two year period from running. The applicant's case is that for the application to be made to the Circuit Court, the DPP or his representative must actually stand up in Court and make the request. Anything less does not amount to an application. As no application has been made to the court within the two year time period, the said monies are unlawfully held and must be returned.

12. In interpreting the words "*application is made*" in s. 31(a) he urges reliance on the dicta of Henchy J. in *Inspector of Taxes v. Patrick Kiernan* [1981] I.R. 117 in relation to the three basic rules of statutory interpretation:-

> *"A word or expression in a given statue must be given meaning and scope according to its immediate context, in line with the scheme and purpose of the particular statutory pattern as a whole, and to an extent that will truly effectuate the particular legislation or a particular definition therein."….*
>
> *"If the statutory provision is one directed to the public at large, rather than to a particular class who may be expected to use the word or expression in question in either a narrowed or an extended connotation, or as a term of art, then in the absence of internal evidence suggesting the contrary, the word or expression should be given its ordinary or colloquial meaning."*
>
> He particularly relies on the dictum of Lord Escher MR in *Unwin v. Hanson* adopted by Henchy J.-
>
> *"if the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everyone conversant with that trade, business or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."*
>
> *"If a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language."*

13. He describes the Criminal Law Act as a penal statute and argues that any ambiguity should be exercised in favour of the citizen and that a narrow interpretation should be accorded to the wording "where an application is made."

State arguments

14. Ms. Sunniva McDonagh SC on behalf of the Director of Public Prosecutions argued that the law is replete with examples where a notice of motion prevents time from running and commences proceedings and that there is no authority anywhere for the concept of a statutory period being calculated from when an applicant stands up in Court or when proceedings are commenced by an application to the Court in person.

15. By way of example she cites the judicial review process where time stops when the originating notice of motion is served. She argues that an originating motion is a suitable process for an issue such as forfeiture where no pleadings are necessary and the matter proceeds on affidavit.

16. She argues that the Criminal Law Act 1994 as amended is not a penal statute as the entire purpose of the statute is to enable the authorities to seize money and determine who owns money which is seized. While she accepts that if the applicant loses the action, the result may well be detrimental to him that this is no different from what happens to a litigant under the Civil Liability Act and that such result does not create a penal statute. The act creates no crime and imposes no sanctions as such and the particular section the applicant seeks to have strictly construed is a procedural section giving rise to Circuit Court rules.

17. She reminded the Court that the applicant does not plead any prejudice in the motion procedure and does not challenge the legality of the rules which prescribe the process for the bringing of the application for forfeiture. The applicant was provided with a statutory alternate remedy to apply under 38(5) to the District Court for return of the cash seized on the basis that there were no longer any such grounds for the detention of the money and that the detention of the money was not justified. He elected not to utilise this procedure. She advocated the common sense interpretation of the words of the 1994 Criminal Justice Act as amended.

Decision

18. As the application involves an interpretation of s. 39(1) of the Criminal Justice Act 1994, as amended by the Proceeds of Crime (Amendment) Act 2005 I believe that it is appropriate to quote s. 38 and s. 39 and the Rules of the Circuit Court in full to see the section in context.

> Section 38:-
>
> *"(1) A member of the Garda Síochána or any 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 the judge of the District Court, if satisfied as to 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."

Section 39:-

(1) A judge of the Circuit Court may order forfeiture of any cash which has been seized under section 38 of this Act if satisfied, on an application made while the cash is being detained under that section, that the cash directly or indirectly represents any person's proceeds of, 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 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.

19. The procedure for an application under s. 39 of the Criminal Justice Act 1994 is determined by S.I. 448 of 2004 new rules under Order 69 of the Rules of the Circuit Court. Order 69, Rule 3 to 5 states:-

"An application pursuant to this Order shall be made by originating Motion on Notice in accordance with the form annexed hereto. The Affidavit grounding such application shall contain the following information:

(a) details of the seizure and detention of cash the subject-matter of the application;

(b) details of the amount and currency of the cash seized;

(c) the date and time of the seizure and detention concerned;

(d) details of any person who claims an interest in the cash;

(e) the grounds on which an order for forfeiture of the cash in pursuance of section 39 of the Act is sought and

(f) any other information relevant to the application;

and shall exhibit the order or orders of a judge of the District Court made in pursuance of section 38 of the Act authorising the continued detention of the cash."

Rule 4:-

"The application shall be made to a Judge of the Circuit Court for the circuit in which the seizure was made or in accordance with Order 2 (g) of the Rules of the Circuit Court 2001."

Rule 5:-

> *"The application shall be made on notice to any person from whom the cash was seized and to any person who claims an interest in the cash. The Court may direct that notice of the application be served on such other person or persons, in addition to the respondent(s), as it shall think fit."*

A specimen notice of motion is appended to the Order.

20. Having considered the applicant's arguments, I find that I cannot agree with several of the applicant's submissions. While it is settled law that "*a word or expression of legislation which creates a penal or taxation liability should be construed strictly if there is looseness or ambiguity attaching to it* (my emphasis) the purpose of this strict interpretation in such a situation is to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language. There are several preconditions therefore to this strict interpretation. First, the statute in question must be a penal statute and the particular section sought to be interpreted must be capable of creating a fresh liability. Next the ambiguity must without a different interpretation be capable of creating an additional adverse outcome or liability on the party affected. The first question therefore is whether the statute, or the section sought to be interpreted is penal in nature. Murdock's *Dictionary of Irish Law* (4th Edition) defines a penal statute as "*legislation creating offences or providing for the recovery of penalties in civil proceedings*". A perusal of the statute and in particular this section, will reveal that while extensive new powers are given to the garda and revenue authorities in relation to the proceeds of crime and suspect cash, no offences or penalties are actually created. I find therefore that ss. 38, 39 and 42 are not provisions of a penal statute.

21. Section 39(1) of the Criminal Justice Act 1994 which authorises the forfeiture of money seized pursuant to s. 38(1) is an enabling provision where the forfeiture procedure comes at the end of an investigative process into the origins of the money seized and held under court order. The purpose of the investigation is to determine whether a criminal prosecution will follow or whether forfeiture to the exchequer will be sought or indeed whether the money will be returned to its owner. At any time during that period, the owner of the money or the person from whom it was seized has the right to seek the return of the money, if it can be established that there are no grounds for its detention. The forfeiture procedure is provided for in s. 42 which states that:

> *"An order under section 38(2) of this Act shall provide for notice to be given to persons affected by the order.*
>
> *(2) Provision may be made by rules of court with respect to applications or appeals to any court under this Part of this Act, for the giving of notice of such applications or appeals to persons affected, for the joinder of such persons as parties and generally with respect to the procedure under this Part of this Act before any court."*

The statute refers specifically to rules of court which provide for the procedure to be used in such applications. The applicant has never sought to attack the legality of these provisions.

22. While the Criminal Justice Act of 1994 and the Proceeds of Crime Act 2005 are far reaching and extensive in purpose, I do not believe that the particular procedural section in question calls for the narrow and strict interpretation of the wording "*where an application is made*" sought by the applicant. The applicant is in effect asking the court to give a literal interpretation which would fail to reflect the plain intention of the Oireachtas in relation to the two year time period during which the application had to be made. It would be quite extraordinary in the context of that time limit to introduce a procedure whose lawfulness and compliance could only be assessed when the court is actually addressed by the applicant. Such an interpretation would introduce uncertainty or vagueness in the assessment of those stated time limits which would be neither desirable nor necessary and serve no useful purpose. Such an assessment of a time limit would be imprecise and subject to the vicissitudes and vagaries of Court calendars and work loads and cannot have been intended by s. 39(1).

23. If the applicant's arguments were accepted, it would mean that the DPP could be put into a position where he could apply for forfeiture several months before a Circuit Court hearing but would still have to apply to the District Court to extend the period of detention of the money to ensure that the application for forfeiture was made during the period while the case was being detained pursuant to s. 38 which would be unworkable. In addition, such an assessment of time limits would run contrary to all previous methods of assessment and would be contrary to the general rules of construction provided in s. 18(h) of the Interpretation Act 2005 or any previous Interpretation Acts.

24. The term "application is made" is familiar court language with a specific meaning and not a phrase which requires to be construed for being obscure or ambiguous or where a literal interpretation would be absurd or where it would fail to reflect the plain intention of the Oireachtas. The meaning of an application to the Court is well understood to mean a formal request of the Court for orders, directions or reliefs and subject to rules of procedure which determine how the application is to be made and the notice which must be given to the Court or the respondent and the time limits in which the application is to be made. The particular procedure used in this case was made in accordance with O. 69 of the Circuit Court Rules pursuant to s. 42(2) of the Criminal Justice Act 1994. The rule was complied with regarding notice to the Court and to the applicant. It would be extraordinary if the validity of such a motion for forfeiture could only be assessed at the time the application was moved.

25. The procedure in the statute consists of two steps, the application and the proceedings. The application must be brought within 2 years of the first detention order and the proceedings follow the application. The Rules of Court provided for an application under s. 39(1) to be made by originating motion on notice which is a well recognised method for initiating proceedings without pleadings and generally supported by affidavit.

26. A similar issue to that which is argued by the applicant in this case was considered by the Supreme Court in *McK. v. F. and Others* [2005] 2 I.R. 163 where it was held that proceedings will be deemed to have been brought when the originating notice of motion has issued out of the Central Office. Included in the many issues considered in that case was whether the application pursuant to the Proceeds of Crime Act 1996, s. 3 had been brought within the period of twenty one days from the making of the order pursuant to s. 2 of the Act and whether the issue of a motion was enough to stop the period of time or whether there was a distinction between the words *made* and *brought*. Section 2(5) of the Proceeds of Crime Act 1996 provides:-

> *"Subject to subsections (3) and (4), an interim order shall continue in force until the expiration of the period of 21 days from the date of its making and shall then lapse unless an application for the making of an interlocutory order in respect of any of the property concerned is brought during that period…"*

Geoghegan J said as follows:

> *"I am quite satisfied that the application for the making of the Section 3 Order was "brought" during the statutory twenty-one day period. I do not think that there is any significant difference between this case and the case of* ***KSK Enterprises Limited v. An Bord Pleanála*** *[1994] 2 I.R. 128 where Flood J. rejected an argument that the word "made" involved the actual moving of a judicial review application. Dr. Forde tries to make a relevant distinction between the word "made" and the word "brought" but I believe that no such distinction can be made. Given the uncertainties of the availability of courts and judges at any given time and the systems of listing, a statute which creates a time limit for the bringing or making of an application or uses any such cognate words should be interpreted as meaning the date of issuing if the proceedings require a summons or filing or possibly in some cases filing and serving if what is involved is a motion but unless there are express words in the statute that require it, it should not be interpreted as meaning the actual moving of the application in open court."*

Previously in *McK. & H.*, Finnegan P. held that the time period of twenty one days during which an application had to be made pursuant to s. 2(5) of the Proceeds of Crime Act 1996, was deemed to have been made once the motion had been issued:-

> *"It is well settled that the statute of limitations applies not just to proceedings commenced by summons but equally to proceedings commenced by motion, Moore v. Gad [1997] T.L.R. 80 or Petition v. Camas Property Company Limited [1989] DCLC 340. In every case once the initiating process is issued time ceases to run and it is never necessary that service be affected within the limitation period".*

These decisions reinforce my view that the meaning of the phrase "application is made" includes the issue of a notice of motion and does not require that an actual oral demand be made to a judge as urged by the applicant. I also rely on the hallowed dictum of Lord Esher relied on by the applicant.

> *"If a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language."*

As I do not see any looseness or ambiguity here attaching to the word or expression *application is made* even if I am wrong and the Statute is a penal statute, the strict interpretation rule only comes into play only in the event of oblique or slack language and only to prevent a fresh imposition of liability. None of those situations prevail in the wording of this particular section of the statute. In the circumstances the applicants challenge fails and the case must return to be determined in the Circuit Court. The application is refused.