Neutral Citation Number [2009] IEHC 523

THE HIGH COURT

JUDICIAL REVIEW

2009 379 JR

BETWEEN

CLAUDIO POP, FLORINA IONA POP,

ROBERTO DANIEL POP AND JESSICA POP

APPLICANTS

AND

JUDGE BRYAN SMYTH, OFFICE OF THE REVENUE COMMISSIONERS,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Mary Irvine, dated the 25th day of November, 2009

1. This is an application for judicial review of a decision made by the first named respondent in the District Court on 3rd April, 2009. That decision, made under s. 38(2) of the Criminal Justice Act 1994, as amended by the proceeds of Crime Amendment Act 2005 ("the Act"), authorised the second named respondent to detain the cash sum of €38,800 seized from the first named applicant in Dublin Airport on the previous day.

2. By order of the High Court dated 9th April, 2009, the applicants obtained leave to apply for judicial review which they subsequently did by notice of motion dated 20th April, 2009. The reliefs sought by the applicant were:-

> (i) An order of *certiorari* quashing the order of the District Court made on 3rd April, 2009.
>
> (ii) A declaration that the applicants did have *locus standi* to be put on notice of the second named respondent's application pursuant to s. 38(3) of the Act prior to the first named respondent making an order pursuant to that section.
>
> (iii) A declaration that the applicants' rights pursuant to Articles 6 and 8 of the European Convention on Human Rights and the European Convention on Human Rights Act 2003 had been breached.
>
> (iv) A declaration that the provisions of s. 38(3) of the Criminal Justice Act 1994, as amended by s. 20 the Proceeds of Crime (Amendment) Act 2005, were repugnant to the Constitution.
>
> (v) An order of *mandamus* directing a full *de novo* hearing of the second named respondent's application pursuant to s. 38(3) of the Act.
>
> (vi) An interim/ interlocutory injunction directing the release and adequate sum of money to the applicant and his family for their maintenance and support.

3. The relief sought by the applicants at para. (iv) above was abandoned at the hearing before this Court as a result of a preliminary objection made to the court by the respondents. Consequently, the court will not deal with this aspect of the relief sought in its judgment.

4. Further, the relief claimed at para. (vi) above was sought by the applicants in an application for an interim injunction made to Cooke J. on 15th April, 2009. That application was refused on its merits and accordingly, this Court is not entitled to entertain an application for the same relief as that already refused by a court of equivalent jurisdiction.

The facts

5. There is little dispute between the parties to as the relevant facts on this judicial review application and they are as follows. The applicants, a Romanian family, were present at Dublin Airport on Thursday, 2nd April, 2009 as they were intending to travel to Romania that day. Officers of the second named respondent questioned the first named applicant who was found to be carrying a sum of €38,800 in his luggage. The said sum was seized and he was advised that an application would be made the following morning at District Court No. 44 for an order under s. 38(2) of the Act to further detain the sum seized at the airport.

6. The first named applicant contacted Mr. James Sweeney, Solicitor, for the first time on 2nd April, 2009 but only formally retained him sometime after 10.00 a.m. on Friday, 3rd April, 2009. As a result, the second named respondent's application pursuant to s. 38(2) of the Act had been heard and determined by the District Judge by the time a representative from Mr. Sweeney's office arrived at the District Court.

7. At the time the application was made to the District Court, the first named applicant was present in person. The District Judge asked him if he spoke English to which he replied in the affirmative. He then heard the evidence of Ms. Mary Mulholland of the office of the second named respondent, who deposed to those matters set out in her information dated 3rd April, 2009. She set out her grounds for suspecting that the first named applicant was about to export cash which represented the proceeds of crime. Those grounds included the fact that the first named applicant was about to leave the country; that he had given inaccurate information to her as to the precise sum in his possession; that he was unable to name the company for whom he had worked as a truck driver; that whilst he contended he earned €600 a week, the Revenue Commissioners had no history of his employment in the State; that he was

in receipt of social welfare; that his bank statements did not support his contention that the cash was a result of his savings over a number of years and that his most recent employment had been as a driver for a pizza company. Ms. Mulholland advised the court that in her opinion, the movement of cash in the manner proposed by the first named applicant was consistent with criminality as it left no audit trail.

8. Having heard the evidence of Ms. Mulholland, the first named respondent asked the applicant whether he had anything to say and it is agreed that he declined the opportunity to address the court further.

9. The first named respondent made an order that the second named respondent be entitled to detain the cash seized from the first named applicant for a period of three months. The order on its face directs that notice of the making of the order be given to the first named applicant and any other person affected by the order. The order was signed by the District Judge and delivered with immediate effect into the possession of the second named respondent.

10. The applicant's solicitor arrived in court after the order of the District Judge had been made. Contact was made with an official in the office of the Revenue Commissioners who, having taken legal advice, advised the applicant's solicitor that the application disposed of earlier in the day could not be reheard but that it was open to the applicant to bring an application before the court pursuant to s. 38(5) of the Act, if he so wished. A second phone call was made by the applicant's solicitor to the second named respondent indicating that they would proceed to ask the District Judge at 2.00p.m. that day to rehear the application. Mr. Keyes, on behalf of the second named respondent, in his affidavit states that he informed Mr. Sweeney that he could not object to him making his application to the court that afternoon but that Ms. Mulholland, who had given the evidence on behalf of the second named respondent, would not be returning to the court at 2.00p.m. having regard to the earlier legal advice which they had received to the effect that the matter could not be reopened.

11. The first named respondent, in mid-afternoon on 3rd April, 2009, having heard an application on behalf of the first named applicant, re-listed the matter before the court for 6th April, 2009. On that date, the District Judge, having heard the submissions of both parties concluded that the court order made on 3rd April, 2009 could not be revisited.

12. As already stated, leave to apply for judicial review was granted by Edwards J. on 9th April, 2009. Thereafter, on 15th April, 2009, the applicants made an application to the High Court seeking an interim injunction directing the release by the second named respondent of a reasonable and adequate sum of money for the support of the first named applicant and the maintenance of his family. That application was rejected by Cooke J. apparently on the basis that the first named applicant had failed to satisfy the court, having regard to his receipt of social welfare, that there was sufficient evidence to justifying such relief being granted.

13. Given that the within application is intimately concerned with the rights of the parties deriving from s. 38 of the Act, it is perhaps helpful to look briefly at the provisions of ss. 38 to 42 which deal with the powers of search, seizure and detention of cash by a member of An Garda Síochána or an officer of customs and excise.

Overall scheme of section 38 to 42 of the Act

14. Section 38 of the Criminal Justice Act 1994, as amended by the Proceeds of Crime (Amendment) Act 2005, provides as follows:-

> "(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."

15. Section 39 reads:-

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

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

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

16. Section 40 reads as follows:-

"(1) This section applies where an order for the forfeiture of cash (in this section known as 'the section 39 order') is made under section 39 of this Act.

(2) Any party to the proceedings in which the section 39 order is made (other than the Director of Public Prosecutions) may, before the end of the period of 30 days beginning with the date on which it is made, appeal in respect of the order to the High Court.

(3) An appeal under this section shall be by way of a rehearing.

(4) On an application made by the appellant to a judge of the Circuit Court at any time, the judge may order the release of so much of the cash to which the section 39 order relates as he considers appropriate to enable the appellant to meet his legal expenses in connection with the appeal.

(5) When hearing an appeal under this section the High Court may make such order as it considers appropriate.

(6) If it upholds the appeal, the judge may order the release of the cash, or (as the case may be) the remaining cash, together with any accrued interest.

(7) Section 39 (3) of this Act shall apply in relation to a rehearing on an appeal under this section as it applies to proceedings under section 39 of this Act."

17. Section 42 reads:-

"(1) 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."

18. The Rules anticipated by the provisions of s. 42(2) of the Act are accordingly material and I will now briefly refer to these.

District Court (Criminal Justice Act 1994, Section 38) Rules 2006

19. S.I. No. 47 of 2006 amended the District Court Rules of 1997 (S.I. No. 93 of 1997) by the substitution for Rules 4 – 8 inclusive of O. 38 of the following:-

"Detention of Cash under section 38 of the Criminal Justice Act 1994 (as amended)

4 In rules 5 to 8 inclusive following, 'the Act' means the Criminal Justice Act 1994 , as amended by section 20 of the Proceeds of Crime (Amendment) Act 2005 .

5(1) An application to the Court by a member of the Garda Síochána or an officer of Customs and Excise under sub-section (2) of section 38 of the Act for an order authorising the detention beyond forty-eight hours of cash seized by virtue of section 38 of the Act shall be made by the information on oath and in writing of the applicant, in the Form 38.4, Schedule B. Such application shall be made to a Judge of the District Court assigned to the District Court district wherein the cash was seized. Where the Judge is satisfied that the urgency of the case so requires, such application may be heard and determined on the evidence viva voce and on oath of the applicant. In such case, a written note of the evidence given shall be prepared by the applicant and signed by the Judge.

(2) An order of the Court made on such application authorising the detention beyond forty-eight hours of cash seized by virtue of section 38 shall be in the Form 38.5, Schedule B. The applicant shall cause a copy of the said order to be served upon the person from whom the cash was being seized and upon any person by or on whose behalf the cash was being imported or exported.

6(1) An application to the Court by a member of the Garda Síochána or an officer of Customs and Excise under sub-section (3) of section 38 of the Act for an order authorising the further detention in accordance with sub-section (3) of section 38 of the Act of cash seized by virtue of section 38 of the Act shall be made to a Judge of the District Court assigned to the District Court district in which the cash was seized. Such application shall be preceded by the issue, and service upon the person from whom the cash was seized and upon any other person directly affected by the order previously made under sub-section (2) of section 38 in respect of the cash, of copy of a notice of application, in the Form 38.6, Schedule B.

(2) Notice of such application shall be served at least seven days before the date fixed for the hearing of the application. Such notice may be served in the manner provided by Order 10 of these Rules. The original notice of application together with a statutory declaration as to the service of copy of such notice shall be lodged with the Clerk at least forty eight hours before the date of the hearing.

(3) An order of the Court granting the application shall be in the Form 38.7, Schedule B. The applicant shall cause a copy of any such order to be served upon the person from whom the cash was seized and upon any person by or on whose behalf the cash was being imported or exported.

7(1) An application to the Court under sub-section (5) of section 38 of the Act for an order releasing cash seized by virtue of section 38 of the Act shall be made to a Judge of the District Court assigned to the District Court district in which the cash was seized. Such application shall be preceded by the issue, and service upon the member(s) of the Garda Síochána or officer(s) of Customs and Excise who applied for any order previously made under sub-section (2) or sub-section (3) of section 38 of the Act in respect of the cash, of copy of a notice of application, in the Form 38.8, Schedule B.

(2) Notice of such application shall be served at least seven days before the date fixed for the hearing of the application. Such notice may be served in the manner provided by Order 10 of these Rules. The original notice of application shall be lodged with the Clerk at least forty eight hours before the date of hearing.

(3) The order of the Court on the application shall be in the Form 38.9, Schedule B.

8(1) Applications to the Court under the Act may be brought, heard and determined before a Judge of the District Court assigned to the District Court district wherein the cash was seized at any sitting of the Court within such Judge's district.

(2) Where it seems appropriate to the Court to so direct, in any application under sub-section (3) or sub-section (5) of section 38 of the Act, the Court may direct that any person who had not been application."

***Audi alteram partem*, natural justice and fair procedures**

20. The first named applicant contends that the proceedings before the District Court on 3rd April, 2009 did not accord with the principles of natural justice and fair procedures and he claims that he was not afforded what is commonly described as the right of *audi alteram partem*. He submits that the first named respondent was mandated to inquire as to whether or not he was legally represented and to ensure that the proceedings were not disposed of in the absence of his legal representative. The first named applicant contends that he was denied legal representation and the fact that he was a non-national underscores the lack of fair procedures. He further submits that the respondents, by relying upon the facts of what occurred on the 3rd of April 2009, have effectively acknowledged the right of the first named applicant to be heard in the course of an application under Section 38(2).

21. In reply the second and third named respondents contend, on the facts, that the first named applicant was afforded natural justice and fair procedures. They submit that the first named applicant did have legal representation, albeit that his solicitor did not arrive in time for the hearing and that he was afforded an opportunity to engage in the proceedings, which offer he declined. As the first named applicant has sworn two affidavits in the present proceedings without the assistance of an interpreter it is submitted that there is no basis for contending that fair procedures required the first named applicant to be treated differently from any other litigant. In these circumstances the respondents submit that it is unnecessary for the court to determine whether the procedure provided for in s. 38(2) is one which is required to be on notice to the party from whom cash has been seized.

22. Notwithstanding the respondent's last mentioned submission, I believe it is important to briefly consider the overall scheme of s. 38 of the Act and the right, if any, of the applicants to notice of an application under s. 38(2), particularly in light of the relief sought at para. (d)(ii) of the statement required to ground the application for judicial review, namely:-

> "A declaration that the applicant herein did and does have *locus standi* to be heard and to be put on notice of the application pursuant to s. 38(3) of the Criminal Justice Act 1994 as amended, prior to the learned District Court granting the order continuing the detention of the applicant's property namely the cash sum of €38,800"

23. The Act itself is silent as to whether or not an application under s. 38(2) is to be on notice to the party from whom cash has

been seized. The applicants submit that as the legislation does not expressly provide that the application can be made *ex parte* that I should conclude that it was the intention of the legislature that it would be made on notice to the affected party. Accordingly, the first named applicant submits that the District Judge was obliged to insure that the application was not heard in the absence of his legal adviser. Thereafter he contends that he was entitled to be afforded, in the course of the s.38 (2) application, the full panoply of what are commonly described as *In Re Haughey Rights*.

24. To interpret the section in the manner contended for by the applicants would, I believe, defy common sense having regard to the overall scheme provided for in ss. 38 to 42 of the Act. The absence of any reference to the words *ex parte* in this section may simply be due to the fact that logic would dictate that the application is one that is to be made *ex parte,* particularly having regard to the time limit contained in that section. My belief that the legislature intended relief under s. 38(2) to be available *ex parte* appears to be borne out both by the Act itself and the relevant supporting rules of the District Court.

25. The first matter of significance is the fact that any order made under s. 38(2) is not a final order and further does not involve any finding of wrongdoing on the part of the owner of the cash seized. In addition, the District Court does not have the power to forfeit the cash seized and any such application must be made by the Director of Public Prosecutions to the Circuit Court pursuant to s. 39 of the Act on notice to those affected by the intended application. An Order under s. 38(2) provides, to my mind, something akin to an interim type of relief which allows the status quo to be maintained whilst the relevant authority investigates the origin of the cash seized and whether or not any criminal proceedings are justified whilst the party affected by that order has an immediate right under s. 38(5) to apply to have the monies detained released on the ground that there is no justification for their continued detention.

26. Section 42(1) of the Act, requires that the order obtained under s. 38(2) must be notified to those persons affected by it. This provision sits comfortably with a determination that an application under s. 38(2) is one to be dealt with *ex parte*. Clearly, if a party is not present when a court order is made which concerns them they need to be notified of its terms in early course. Once notified of the order, the relevant party may, as already advised, apply to the court under s. 38(5) for the release of the monies so detained.

27. Order 38 of the Rules of the District Court specifies a number of applications which must be made on notice under the Act. These include an application under s. 38(3), authorising the further detention of monies seized beyond the period of three months permitted by the provisions of s. 38(2), and also an application under s. 38(5) for the release of monies seized or detained under that section. The only mention in O. 38 of the procedure to be adopted in respect of an application under s. 38(2) is in O. 38, r. 5(2) which requires that an order made under that section be served on the person from whom the cash was seized.

28. O. 38, r. 5(1), provides that where the urgency of the case so requires an application under s. 38(2) "may be heard and determined on the evidence *viva voce* and on oath of the applicant". If this rule were operated in any given case there would be no advance notice of the grounds of suspicion to be relied upon by the relevant authority in support of their application. Accordingly, this rule appears to be inconsistent with the right of the party from whom cash has been seized to be present at or participate in a hearing under Section 38(2).

29. As a matter of practicality, any application for relief under s. 38(2) not only needs to be before the court within 48 hours of the seizure but must also be determined within that period, in default of which the cash seized must be released. If the submission made on behalf of the first named applicant was correct, namely that he was entitled to be on notice of the application and that the hearing could not proceed unless his legal representative had the opportunity to meaningfully challenge the evidence given by the relevant authority on that date, it would to my mind be impossible for the District Judge to make his determination within the 48 hours provided for by Section 38(2). For example, the application could never be adjourned or postponed to allow for the proper briefing of a legal team to challenge the sworn information as in default of an order being made under s. 38(2) within 48 hours of the seizure of the cash, the same would have to be released.

30. For the aforementioned reasons, I have concluded that the applicant is not entitled to a declaration that he did have *locus standi* to be heard on the application pursuant to s. 38(2) of the Act. Accordingly, the fact that the District Judge engaged with the first named applicant on the hearing of the s. 38(2) application or agreed that he would have heard the applicant's legal advisers had the parties to the application and the order of the court been available to him on the afternoon of 3rd April, 2009, can afford no basis to the first named applicant to quash the order made.

On the facts, has the applicant established any lack of natural justice or fair procedures?
31. Even if I am wrong, as a matter of law, and the first named applicant was entitled to be heard on the application of the second named respondent for an order pursuant to s. 38(2) of the Act, the applicant has failed to satisfy this Court as a matter of fact that the first named respondent failed to afford him and/or his legal advisers an opportunity to be heard in the course of the application. Neither, has the first named applicant established that the respondents or any of them conducted themselves so as to deprive him of legal representation, as alleged.

32. The facts are that the first named applicant sought legal advice the day before the hearing, i.e. 2nd April, 2009. For some reason he decided not to formally engage Mr. Sweeney's firm to represent him until the morning of 3rd April, 2009, thus leaving insufficient time for a solicitor from Mr. Sweeney's office to get to the District Court in advance of the application under Section 38(2). There is nothing in the affidavits which indicate that the first named applicant's solicitors advised him to tell the court that he had engaged a solicitor. Accordingly, the first named respondent acted without knowledge of the fact that the first named applicant had retained legal representation. Neither does it appear that the first named applicant was advised to ask the District Judge to postpone the application until such time as his solicitor arrived and that he/she would be there imminently. It is difficult to see in these circumstances how the first named respondent can be faulted in any way.

33. The District Judge, on noting the presence of the first named applicant before the proceedings commenced asked him if he could understand English to which query he replied in the affirmative. The District Judge having satisfied himself that the applicant could understand the proceedings, heard the evidence from the officer of the second named respondent after which he asked the first named applicant if he had anything to say. The applicant did not choose to challenge any of the evidence given by Ms. Mulholland. Neither did he advise the court that he had retained a solicitor or request the court to postpone reaching any decision until such time as his lawyer arrived.

34. Based on the evidence contained in the affidavits, the court must conclude that the first named applicant was not deprived of legal representation by any omission on the part of any of the respondents. He had legal representation but due to his own default or that of his legal advisers, his legal representative was not present at the time the hearing took place. He was afforded an opportunity to engage in the process before the court and he declined. I simply cannot accept an argument that an order made by a District Judge can be quashed when that order was made in the presence of the party against whom the relief was sought, who stated that he understood the proceedings, declined an offer to make any submissions, failed to tell the court that he had engaged a lawyer and

failed to ask the judge to postpone the hearing. If a litigant in such circumstances was entitled to have an order of the court quashed, the legal process would end up in complete disarray.

35. Even if the first named applicant was entitled to notice of the second named respondent's application under s. 38(2), I reject his submission that the first named respondent could be stated to have failed to vindicate the constitutional rights of the first named applicant by failing to ensure that he was legally represented at that hearing. In this respect, the applicant's reliance upon the decision in *Director of Public Prosecutions v. Healy* [1990] 2 I.R. 73, is, in my view, misplaced. That decision related to the right of a person detained in garda custody to have access to a solicitor. In the application under s. 38(2) it is firstly the case that the first named applicant had sought and obtained legal advice on the day prior to that application. For whatever reason the first named applicant chose not to retain that legal advice until the morning of the application thus giving his solicitor insufficient time to arrive in time for the hearing. Secondly, the applicant's liberty was not in issue. Thirdly, proceedings under s. 38(2) of the Act are civil in nature and the order sought was one permitting the second named respondent to continue to detain the sum of money seized at Dublin Airport the previous day for a period of three months so as to permit its origin or derivation to be further investigated and to provide time for the consideration as to whether or not criminal proceedings should be instituted.

36. For the purposes of the present proceedings, it is important to note that the provisions of s. 38 of the Act have been held by the court to be civil in nature. Clark J. in *Reilly v. Director of Public Prosecutions & Ors* (Unreported, High Court, 31st July, 2008) in considering, *inter alia*, s. 38 of the Act held, as follows:-

> "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 therefore find that s. 38, 39 and 42 are not provisions of a penal statute."

37. Apart from the procedure under s. 38(2) being civil in nature, it is also clear that the court when engaged in that procedure is not invited to make any finding of wrongdoing against the party from whom the cash has been seized. Neither is the court involved in determining the ownership of, or any right on the part of the relevant authority to forfeit, such monies.

38. I accept that an order made under s. 38(2) does interfere with the right of the party from whom cash has been seized to access to that money for potentially a significant period of time. However, having regard to the overall scheme of the Act, the rules of natural justice do not, I believe, require the party from whom money has been seized to be put on notice and have a right to contest the evidence at every stage of the s. 38 process. I accept the submissions made on behalf of counsel for the second and third named respondents that the overall scheme provided for in s. 38 of the Act, strikes a careful balance between the rights of the individual and the rights of the State. The powers of search and seizure are closely controlled and subject to strict statutory conditions. The cash, once seized, can only be detained for a period of 48 hours unless a further application is made to the District Court. The District Judge must then be satisfied that there are reasonable grounds for detaining the cash for a further period and this order will only last for a period of three months at which stage a further application will be required with the maximum period of detention not exceeding two years.

39. At any time it was open to the applicant and his legal advisers to apply to the court under s. 38(5) of the Act to have the case seized released. For whatever reason, the first named applicant has chosen not to make such an application notwithstanding the fact that he has submitted that he would have been in a position to challenge the information sworn by Mary Mulholland and/or give evidence himself before the District Court, had he been so permitted on 3rd October, 2009.

Prejudice

40. The first named applicant submits that the order of the District Judge made on 3rd April, 2009 must be quashed in circumstances where the relief available to him under s. 38(5) does not mitigate the prejudice to him which arises from the making of the order under Section 38(2). He contends that under s. 38(2), the onus of proof is on the second named respondent to satisfy the District Court as to the valid suspicions set out in the sworn information and that these might have been successfully challenged by him, had his legal representative been in attendance. In contrast, he refers to the onus of proof on a party seeking to avail of the provisions of Section 38(5). It must be inferred from this argument that the first named applicant is submitting that if he had been in attendance with his legal advisers that the District Judge would not have made the order which he did on 3rd April, 2009, pursuant to Section 38(2).

41. In relation to the aforementioned argument, the first named applicant has not satisfied this Court that he was prejudiced in the manner alleged. I do not accept as a matter of fact that even if he was entitled to challenge the evidence given by the second named respondent that he was in a position to do anything that would have resulted in the court failing to make an order permitting the further detention of the monies under Section 38(2). In this regard the affidavits supporting the present application state that had the first named applicant's lawyers been present, an application would have been made for full disclosure of all notes taken by the second named respondent and their officers at the time of the search and questioning of the first named applicant. Even if such an order could be made by the District Judge, and I am not at all certain that he had jurisdiction to make such an order, he could not have adjourned the application to allow the documents to be furnished and considered by the applicant's advisers as if he did not proceed to make the order under s. 38(2) within the requisite 48 hours timeframe, the cash would have to have been release. It therefore seems to me that any application for an order for disclosure can only be seen as relevant to the potential ability of the first named applicant to seek relief under s. 38(5) of the Act or for the purpose of seeking to dispute any further application by the second named respondent for the continued detention of the monies under Section 38(3).

42. The next matter deposed to by the applicant is that he would have sought to have the sum detained reduced to afford him additional monies to assist him with maintaining his family and providing for ongoing living expenses. The High Court has already determined that, having regard to the fact that the applicant was in receipt of social welfare at the time, such an application was without merit.

43. Finally, the first named applicant has submitted that he would have challenged the suspicions of Ms. Mulholland which are deposed to in her information. However, he has given no indication to this Court as to the facts he would have relied upon, in this regard, neither has he set out on affidavit the evidence he would have been in a position to give to the court had he been attended by his legal advisers and permitted to give evidence.

44. Accordingly, even if the first named applicant was entitled to be on notice of the application under s. 38(2) and the court was of the view that the first named applicant was denied a hearing which was in accordance with natural justice and fair procedures, he still has not satisfied this Court that any breach of these rights has caused him any prejudice having regard to the evidence before this Court as to what would have been done on his behalf on 3rd April, 2009 had his lawyers arrived in time for the hearing. I therefore conclude that as the right of the second named respondent to detain the cash seized would have expired within 48 hours that any representations that might have been made on the first named applicant's behalf on 3rd April, 2009 would not have caused

the District Court to refuse the relief sought particularly in circumstances where there are simply no facts deposed to by the applicant to demonstrate how he proposed to undermine the evidence of Ms. Mulholland contained in her information.

45. In coming to its conclusion that it should not entertain the applicant's claim for the relief sought, the court has also taken into account the fact that the applicant had available to him the relief provided for in s. 38(5) of which he has not availed, a fact which the court believes fortifies its view that he was not in a position to substantially undermine the evidence of Ms. Mulholland given on 3rd April, 2009.

Articles 6 and 8 of the European Convention on Human Rights

46. Insofar as the applicants contend that the order of the first named respondent made on 3rd April, 2009 should be quashed by reason of the provisions of Article 6 of the European Convention on Human Rights ("the Convention") is concerned, I reject such an argument. The applicants were not denied any right of access to the court. Further, the court when hearing the application made on behalf of the second named respondent pursuant to s. 38(2) of the Act was not determining the rights of the applicants to the cash so seized. Neither was the court engaged in determining any potential wrongdoing on the part of the applicants. The court was making an order as to afford time to the second named respondent to continue its investigations into the origin of the cash seized and to decide whether any criminal prosecution was warranted. At all times the applicants had the right to apply to the court to discharge that order on the basis that there were no grounds justifying its continued detention. Further, even if Article 6 of the Convention did fall to be considered on the facts, I am in any event satisfied that the applicants did obtain from the first named respondent in the course of the application made under s. 38(2) a fair and public hearing. Finally, the provisions of Article 6 of the Convention lent no support, on the facts of the present case, to the contention that there was an onus on the first named respondent to ensure that the first named applicant had legal representation present to assist him at the time the s. 38(2) application.

47. Insofar as reliance is place on Article 8 of the Convention, the court similarly rejects the submission made by the applicants that the hearing conducted on 3rd April, 2009 in any way breached the applicants' rights to their private and family life. Cooke J. made an Order on 15th April, 2009, refusing an application by the first named applicant for a reduction in the cash sum detained. He did so on the basis that, in circumstances where the first named applicant was in receipt of social welfare, he was not in a position to establish that any particular hardship would be inflicted upon himself or his family if some of the monies were not released to meet living expenses. Accordingly, it is difficult to see how the applicants can contend that what occurred in the District Court on 3rd April, 2009 could have interfered with any of their rights as provided for in Article 8 of the Convention.

48. For all of the aforementioned reasons I must conclude that the respondents at all relevant times acted within jurisdiction and that the applications have failed to demonstrate that there are any reasonable, arguable or weighty grounds that would justify granting any of the reliefs claimed.