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THE HIGH COURT

RECORD NUMBER: 2010 2068 SS

IN THE MATTER OF AN APPLICATION FOR AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND, 1937

BETWEEN:

CHRISTOPHER DOODY SENIOR

APPLICANT

AND

THE MEMBER IN CHARGE STORE STREET GARDA STATION

RESPONDENT

THE HIGH COURT

RECORD NUMBER: 2010 2067 SS

IN THE MATTER OF AN APPLICATION FOR AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND, 1937

BETWEEN:

ANTHONY DOODY

APPLICANT

AND

THE MEMBER IN CHARGE WHITEHALL GARDA STATION

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 10th day of November 2010:

The issues raised on each of these applications are the same, and the essential facts are the same. Therefore both cases can be the subject of a single judgment.

I heard these applications on the 10th November 2010 and gave an ex tempore judgment at the conclusion in which I concluded that each applicant was in custody in accordance with law and refused the relief sought, but indicated at the time that since a significant issue arose, I would set out my reasons in more detail in a written judgment.

Factual Background:

Each applicant was arrested by members of An Garda Siochana on the 8th November 2010. The first named applicant was arrested at 06.35am. The second named applicant, who is the grandson of the first named applicant was arrested at the same address at 06.18am.

The first named applicant was brought to Store Street Garda Station, while the second named applicant was brought to Whitehall Garda Station, whereupon each was detained pursuant to the provisions of section 50 of the Criminal Justice Act, 2007. Each was arrested on suspicion of being involved in drug trafficking and of being involved in the activities of a criminal gang or organisation.

Under powers provided by section 50(3) of the Act of 2007, each applicant was detained for a period of six hours. In due course, this detention was extended as provided by section 50 (3) (b) of the Act of 2007 for a further period not exceeding eighteen hours. At 23.37 hrs in respect of the first named applicant and at 23.31 hrs in respect of the second named applicant, detention in each case was further extended for a period not exceeding twenty four hours pursuant to the provisions of section 50 (3)(c) of that Act.

The directions for further detention for a period not exceeding twenty four hours pursuant to the provisions of section 50 (3) (c) were made orally by Chief Superintendent Leahy who was in overall control of the investigation into the alleged offences in question. The evidence has been that he gave these directions by telephone from his home. In this regard, the provisions of section 50 (3) (d) (e) and (f) of the Act of 2007 are relevant to the submissions made on behalf of the applicants and it is convenient to set them forth as

follows:

> *"50 (3)*
>
> *(d) A direction pursuant to paragraph (b) or (c) may be given orally or in writing and if given orally shall be recorded in writing as soon as practicable.*
>
> *(e) Where a direction has been given pursuant to paragraph (b) or (c), the fact that the direction was given, the date and time when it was given and the name and rank of the member of the Garda Siochána who gave it shall be recorded.*
>
> *(f) The direction or if it was given orally, the written record of it shall be signed by the member of the Garda Siochána giving it and –*
>
> > *(i) shall state the date and time when it was given, the member's name and rank and that he or she had reasonable grounds for believing that such further detention was necessary for the proper investigation of the offence concerned, and*
> >
> > *(ii) shall be attached to and form part of the custody record (within the meaning of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Stations) Regulations 1987 (S.I. No. 119 of 1987) in respect of the person concerned."*

The essential issue arising on the present applications is whether having orally given the directions pursuant to section 50 (3) (c) at 23.37 hrs and 23.31 hrs on the 8th November 2010 for the further detention of each applicant for a further period of twenty four hours, he recorded same in writing in each case "as soon as practicable" as provided in section 50 (3) (d) of the Act of 2007.

During evidence heard in the District Court on 9th November 2010 on an application pursuant to the provisions of section 50 (3)(g) of the Act of 2007 for a warrant in each case for the further detention of each applicant for a period not exceeding seventy two hours, each applicant having been brought before the District Court for that purpose at 22.35pm on the 9th November 2010, it emerged from the cross-examination of Chief Superintendent that the oral directions given on the 8th November 2010 at 23.37 hrs and 23.31 hrs respectively in respect of each applicant had not by that time been recorded in writing. Having heard the evidence adduced the District Judge rejected the applicants' submissions that if the mandatory requirement to record the oral directions in writing as soon as practicable was not complied with it meant that the District Judge had no power to make the orders sought, and he made in each case an order pursuant to section 50 (3) (g) (ii) of the Act of 2007 for the further detention of each applicant for a period not exceeding seventy two hours.

Arising from those orders, the applicants came before the High Court during the afternoon of the 10th November 2010 and sought an inquiry into the lawfulness of their detention. I made an order for those inquiries to take place, and for the production of the applicants before this Court at 4.30pm. The applicants were produced at that time, whereupon the applications were adjourned for a short period until 7.30pm on that day for hearing when evidence was heard and legal submissions were made on behalf of the applicants and on behalf of each respondent.

I will set out the evidence which was given before me by Chief Superintendent Leahy, but I should at this stage refer to the fact that in his evidence he stated that at 5am on the 10th November 2010 he recorded in writing the oral directions which he had given in respect of each applicant on the 8th November 2010 at 23.37 hrs and 23.31 hrs respectively – some twenty nine and a half hours thereafter.

The evidence given by Chief Superintendent Leahy:

Given that the central issue in this case is whether or not the oral directions were recorded in writing "as soon as practicable", I considered it relevant and important to allow oral evidence to be provided by Chief Superintendent Leahy given the fact that time had not enabled a comprehensive affidavit to be prepared and sworn by him. Counsel for the applicants raised an objection to this course on the basis that they had been given no prior notice that this was the course being adopted by the respondents. However, given the nature of the issue raised, and the time constraints on these applications, and the relevance, as I saw it, of being appraised of the facts and circumstances and scale of the operation being undertaken by An Garda Siochana on Monday 8th November 2010 and 9th November 2010 I decided that in order to determine the issue raised this evidence should be received.

Chief Superintendent Leahy stated that he was at all relevant times the person who has for the past eighteen months or so been directing and controlling a major investigation into organised crime in this country. He heads up a large team of Gardai who are engaged exclusively and on a full-time basis in this investigation the focus of which is drug trafficking.

That investigation has led to a major operation over four counties by An Garda Siochana on Monday 8th November 2010. This operation commenced at about 3am on that date when Chief Superintendent Leahy briefed an assembly of between 250 and 300 members at Garda Headquarters in relation to the proposed search and arrest operations planned for later that morning. He stated that later that morning some 33 searches took place in Cork, Wexford, Cavan and Dublin, which resulted in eleven arrests being made in Cork and Wexford, and five arrests in Dublin. Among those arrested in Dublin were the applicants herein. All persons arrested were held in different Garda Stations.

The Chief Superintendent was stationed at the operation's command centre located in a conference room at Store Street. He described how a helicopter was used to assist communications in relation to the operation which was taking place over four counties, and that separate communications channel had been set up. He described how during the course of the various searches in Dublin some 160 mobile phones had been seized, as well as SIM cards, cameras, computers, clothing, weapons and drugs paraphernalia. In total there about 1500 exhibits obtained. He stated that in the command room in Store Street there was assembled also a group of 15 telephone experts who were able to assist in obtaining data from the mobile phones which had been seized and the SIM cards. This information was for use at that point in relation to the questioning of the various persons being detained at the different stations in Dublin, as well as in Cork and Wexford.

As I have said, Chief Superintendent Leahy was in overall command and control of this operation, as well as the conduct of the investigation and questioning of persons arrested. He was in direct communication at all times, through the special communications channels which had been provided, and in this way he was able to coordinate the questioning, based on information being obtained on an ongoing basis from an examination of the telephones and SIMs seized. He stated that before questioning persons it was of vital

importance to consider each piece of evidence and that the questioning of those detained by structured carefully. It was he who at all times was controlling the sequence of questioning. He described it as 'choreographing'. He made reference to the relatively short window of opportunity for questioning those detained under the provisions of section 50 of the Act of 2007, and the need to ensure therefore, for the purpose of extension to that detention that the investigation be at all times carried out diligently and expeditiously. He described the investigation and the operation generally as proceeding at a very fast pace throughout, and that it was in his long experience a unique investigation in terms of its scale and planning. It was important to him that the entire operation be managed carefully and clinically over the time available, and this was uppermost on his mind, and, accordingly, it was necessary at all times to prioritise tasks required to be done throughout the available time while the arrested persons were detained. He does not agree that with the applicants' contention that the recording in writing of the oral directions was not done as soon as practicable as required by the Act of 2007, when one takes into account the scale of the investigation and the number of tasks that had to be coordinated and carried out during the detention of these applicants.

Chief Superintendent Leahy produced to the Court a copy of the Custody Record in respect of each of the applicants herein, and it is clear from those records that the fact that an oral direction had been given by him for the further detention of the applicants was given on that date and at the time he stated that he gave those directions. Each entry in the custody record was made immediately after the oral direction was communicated by him over the telephone from his home.

Legal submissions:

Michál P. O'Higgins SC for the respondent submits that the orders made by the District Judge at 12.51am and 3am respectively on the 10th November 2010 were properly made within jurisdiction and contain no error on their face. He submits that the District Judge was entitled, having heard the evidence of Chief Superintendent Leahy, to reach the conclusion that the provisions of section 50 (3) (g)(i) of the Act of 2007 were satisfied, and also to arrive at the conclusion, which he appears to have done, that he was not satisfied that the fact that at that time the oral direction had not been recorded in writing precluded him from making the order sought for further detention. He emphasises that there is no issue raised that the oral directions themselves were given other than lawfully, and that it is only the subsequent recording of that fact, as prescribed, which is raised as an issue on these applications.

Without prejudice to his submission that on the facts and in the circumstances of this investigation the oral directions were recorded in writing "as soon as practicable" thereafter, Mr O'Higgins submits that in fact the entry in the custody records of each applicant constitutes a recording in writing of the oral direction in question and in that way the provisions of section 50 (3) (d) are satisfied since those entries were made within minutes of the oral direction being communicated by telephone. In that regard he points to the provisions of that section and to the fact that paragraph (d) does not prescribe by whom the record in writing must be made, and the custody record appears to fulfil the temporal requirement that it be recorded in writing "as soon as practicable". He refers to the fact that in so far as paragraph (e) provides also for the fact that an oral direction shall be recorded, that paragraph does not provide for any particular time by which that must be done.

Turning to his primary submission that in fact the Chief Superintendent made the record in writing as soon as practicable. Mr O'Higgins makes reference to a number of judgments where a distinction is made between the expression "as soon as practicable" and other phrases such as "as soon as possible" and "forthwith", and submits that the phrase "as soon as practicable" permits of some flexibility to take account of some circumstances which may result in the action not being done immediately, forthwith or as soon as possible in a literal sense. For example he refers to the judgment of Fennelly J. in *O'Brien v. Special Criminal Court* [2008] 4 I.R. 514 where at page 535 the learned judge states:

> "While, of course, an enactment of 1998 must be interpreted as it read at that time, it is interesting to note the clear distinction between the two expressions. It confirms, to my mind, that "forthwith" imposes a more stringent requirement than "as soon as practicable".
>
> *"I agree with counsel for the applicant on the meaning that "forthwith". That word may, as the 2006 amendment demonstrates, be contrasted with the expression, "as soon as practicable", which is also employed in s. 15 (2) of the Criminal Justice Act 1951, as amended. The latter expression allows some latitude to cater for practical problems such as travel or contacting judges and assembling courts……".*

Mr O'Higgins referred also to the judgment of Keane J. (as he then was) in *McC v. The Eastern Health Board* [1996] 2 I.R. 296 wherein at page 309 thereof the learned judge referred to and quoted from a judgment of the Supreme Court in *Application of Butler* [1970] I.R. 45 where at page 54 thereof it was stated:

> *"regard must be had to the context in which the words are used and the surrounding circumstances."*

Keane J. (as he then was) then referred to other authority, namely a judgment of the Court of Appeal in Northern Ireland in *The Minister for Agriculture v. Kelly* [1953] N.I. 151 which again addressed the distinction between the words "practicable" and "possible". In that regard the Court of Appeal per McDermott L.C.J. stated:

> *"In this context it must, I think, be taken to signify what is reasonable in the circumstances and appropriate to the requirements of the situation".*

Giollaíosa Ó Lideadha SC for the applicants submits at the outset that the Act of 2007 is a penal statute and as such must be strictly construed. He has referred to the averment by the applicants' solicitor at paragraph 7 of the grounding affidavits where it is stated that when giving his evidence before the District Judge on the application for a further extension of 72 hours, the Chief Superintendent had stated that as leader of the investigation he was dealing with the matter in a 'hands-on fashion' and that he had responded to questioning by stating that "*nothing had happened to prevent him from fulfilling his role at a very high level*". Mr Ó Lideadha submits that this means that there was nothing occurring during the relevant time during the investigation which would have prevented the Chief Superintendent from recording his oral direction in a more timely fashion and, therefore, "as soon as practicable" after the oral direction was given by telephone.

He has referred to the judgment of O'Neill J. in *Finnegan v. Member in Charge (Santry Garda Station)* [2007] 4 I.R. 62. That was a case in which the applicant had been arrested and detained pursuant to section 30 of the Offences Against the State Act, 1939, and even though an application to the District Court had commenced within the permitted period of detention (48 hours), by the time the District Judge actually made the order extending detention further that period had been exceeded by about thirty minutes. Following an application for his release, an order was made for his release on the basis that at the time the order was made the District Judge no longer had jurisdiction to make the order in question. O'Neill J. held that neither the commencement of the application for an extension of detention nor the order made by the District Judge could have prevented the expiry of the period of detention. He

concluded:

> *"It is a necessary prerequisite for the exercise by the District Court of its jurisdiction to grant an extension pursuant to s. 30 (4) (a) that there is a continuing lawful detention pursuant to s. 30 (3). If that is not there then the suspect is or ought to be at liberty and cannot in any way be said to be amenable to the jurisdiction of the District Court. That being so, the District Court lacked any jurisdiction to make any order in relation to him and specifically the jurisdiction to extend detention pursuant to s. 30 (4) (a). Because of this jurisdictional void the illegality of the detention after 10.55 p.m. yesterday evening could not be cured by the order of the District Court at 11. 20 p.m. and hence, the continuing detention of the applicant remains unlawful and I must order his release".*

Accordingly, it is submitted on the present applications that the District Court had no jurisdiction to make the order for the further extension of detention where the record in writing of the oral direction of the Chief Superintendent was not made " as soon as practicable" after that oral direction was given.

He submits also that it could not be the case, when section 50 is read as a whole, that the completion of the custody record by reference to the oral direction constitutes a fulfilment of the requirement to record the oral direction in writing "as soon as practicable". He submits that it is clear from the provisions of paragraphs (e) and (f) of the section that something further is required to be done beyond the entry in the custody record. He observes that in any event the custody record entry does not contain all the matters required by paragraph (f) to be contained in the record in writing required under paragraph (e).

Mr Ó Lideadha submits that the interpretation put forward by the respondents is to the effect that in fact there is no real temporal obligation upon the Chief Superintendent if it is concluded that the record in writing of the oral direction can be done whenever it is convenient for him to do it, and that it renders the provision meaningless. He urges this Court to give a meaning to the phrase "as soon as practicable". He submits that the completion of the record in writing is not a time-consuming or arduous task given the limited amount of information to be inserted in the printed form available for completion in that regard. He submitted also that if some other officer was to complete the relevant information in the form in question, all the Chief Superintendent needed to do was sign the form. In such circumstances, it is submitted that the scale and intensity of the investigation and the work described by the Chief Superintendent in his evidence cannot be seen as a justified reason for not having completed the record in writing until 5am on the 10th September 2010, having given the oral direction at about 23.30hrs on the 8th November 2010, particularly in view of the effect of the direction, namely the continued detention of the applicants for a further period of twenty four hours.

Conclusions:

Firstly, I am satisfied that the completion of the custody record to reflect the receipt of an oral direction from Chief Superintendent Leahy is not a record in writing of that oral direction as contemplated by and provided for by section 50 (3) (d) of the Act of 2007. The custody record is required to completed in any event, regardless of the provisions of that statutory provision, and to conclude that the custody record was a compliance with that requirement would make the provisions of section 50 (3) (d) otiose. Section 50 must be read in its entirety and construed accordingly. Paragraph (d) must be construed by reference to the following two paragraphs (e) and (f) which sets out precisely what information must be contained in the written record, and it is clear that some record in writing must be made over and above what may be inserted in the custody record.

These applications must be decided by reference to the question of fact, namely whether the records in writing of the oral directions given were made in the circumstances of this case "as soon as practicable".

It is quite clear from the authorities to which the Court has been referred that the phrase "as soon as practicable" is more flexible than other phrases such as "forthwith" or "as soon as possible", and allows the Court to take into account particular facts and circumstances in any particular case which may reasonably explain why something was not done sooner than in fact occurred.

It was appropriate for this Court to hear evidence from Chief Superintendent Leahy in order to be appraised of the size and scale of this investigation in terms of manpower, complexity and time involved. I have set forth that evidence as accurately as possible. The Court ought not to be confined to the account of the evidence given by him in the District Court as set forth in the applicants' grounding affidavits, even where no real issue was taken with that account by Chief Superintendent Leahy when questioned about it under cross-examination.

I am satisfied from his evidence that the size and scale of the operation in which he was engaged on the 8th November 2010 and the investigation and questioning of the arrested persons which was ongoing following the arrest of the applicants and others was exceptional in scale. One cannot but be impressed by the evidence given as to the work involved by not only Chief Superintendent Leahy but by all involved in so far as he referred to it in his evidence.

It is beyond doubt that the prioritising of activities and the planning of how the questioning of the arrested persons would be pursued was an intricate and complex matter, involving the co-ordination of information being obtained from other arrested persons in different Garda Stations in Cork and Wexford, including the examination of telephone records.

One cannot but be impressed also by time spent by Chief Superintendent Leahy over the 8th, 9th and 10th November 2010 at the command centre at Store Street Garda Station. I have set out his evidence in that regard. There is no doubt that he was working under intense pressure, and was conscious at all times of the need to carry out as much questioning and investigation as possible within the strict and limited periods of detention applicable. It is understandable in such circumstances that tasks would be prioritised and that committing a lawful oral direction as to further detention to writing as required would be lower down on the list of priorities than some other matters. That must be the context in which the Court considers whether or not in those circumstances the record was made "as soon as practicable".

I am satisfied that to do something " as soon as practicable" can be taken as meaning something to the effect that the action is to be taken as soon as reasonably possible taking into account all the facts and circumstances of a particular case". It is less onerous an obligation that to do that task either 'forthwith' or 'as soon as possible. The latter two phrases connote an urgency which is absent from the phrase "as soon as practicable". There would of course come a point when so much time, particularly in the absence of any explanation for the passage of time in question, when a Court would have to conclude that in spite of an inherent flexibility in the phrase "as soon as practicable", a step or other action required to be done was not done within a reasonable time in all the circumstances. However, there is no need on the facts of this case to express any view on whether, if that reasonable time was exceeded in relation to the recording in writing of an oral direction, it would necessarily have any effect on the lawfulness of the detention under section 50 (3) of the Act of 2007. I am certainly not to be taken as expressing any view on that question which should await any case in which the facts of such a case would make it necessary to decide.

For these reasons I am satisfied that the applicants are each in lawful detention, and I refuse their applications for release.