

**THE HIGH COURT
JUDICIAL REVIEW**

[2013 No. 520 JR]

BETWEEN

ALAN LENAGHAN

APPLICANT

AND

JUDGE FLANN BRENNAN

RESPONDENT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA, IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Kearns P. delivered on the 6th day of March, 2015

This is an application which focuses on the interpretation of Order 35, rule 3 of the District Court Rules which provides:-

"Where a Judge is satisfied that a copy of an order or other document is reasonably required by any person for the purpose of any legal proceedings, such Judge may direct the Clerk to furnish a copy of such order or other document to such person upon payment by such person of the prescribed fee (if any)."

FACTS

On the 21st April, 2012 Detective Sergeant Joe Higgins applied to the respondent for a search warrant in respect of the applicant's dwelling house pursuant to s.10(1) of the Criminal Justice (Miscellaneous Provisions) Act 1997, as amended by s.6 of the Criminal Justice Act 2006. That section permits the District Judge to issue a search warrant where he or she is satisfied by information on oath from a member not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of or relating to the commission of an arrestable offence is to be found in any place, for the search of that place and any persons found at that place.

Section 26 of the Criminal Justice (Amendment) Act 2009 provides that an application under any enactment to a court, or a judge of a court, for a search warrant shall be heard otherwise than in public.

The respondent granted the search warrant and the applicant's home was searched on the 23rd April, 2012. The applicant was not present himself in the house at the time, but his partner and young son were present. No prosecution took place in the aftermath of the search.

The applicant subsequently sought a copy of the warrant and the sworn information grounding the warrant from the notice parties by way of correspondence beginning on the 23rd April, 2012. The applicant's solicitor simultaneously sought a copy of the warrant and information from the District Court Clerk. The Clerk refused same and suggested that the application be made directly to the court where the case was heard. On the 17th August, 2012 Detective Superintendent Thomas Maguire confirmed that neither copies of the warrant nor the information would be furnished to the applicant "in the absence of a court order" and requested that any further correspondence be directed to the head of legal affairs of An Garda Síochána.

The applicant redirected his attempts to obtain a copy of the warrant and information to the head of legal affairs of An Garda Síochána, who apparently referred the matter to the State Claims Agency. The State Claims Agency agreed to provide a copy of the warrant in September 2012 and actually provided same in April 2013. The applicant's submissions also indicate that he obtained a copy of the warrant ultimately from the District Court Clerk in Dundalk. The District Court Clerk refused however to furnish a copy of the information and quoted s.65 of the Court Officers Act 1926 explaining that any application for access to court records must be made directly to the court where the case was heard.

The applicant became aware from the terms of the warrant that it was applied for on foot of sworn information provided to the respondent by Detective Sergeant Joe Higgins. The warrant entitled the gardaí to search the applicant's home and seize:-

"... anything found therein or in possession of anyone present which the said Detective Sergeant Higgins reasonably believed to be evidence of or relating to the commission of the offence of membership of an unlawful organisation to wit the I.R.A., the Explosive Substances Act 1883, as amended and the Firearms Act 1964."

On the 23rd May, 2013 the applicant applied through his solicitors to the respondent, on notice to the District Court Clerk, the Superintendent at Dundalk Garda Station, and the State Claims Agency, for access to a copy of the information.

This application was refused by the respondent who took the view that there was "no precedent" for such an application and no provision in the District Court Rules for such an application. He concluded that he had no jurisdiction to grant the reliefs as sought.

Thereafter, the applicant initiated these judicial review proceedings seeking, *inter alia*, an order of *certiorari* quashing the refusal of the respondent to deliver to the solicitors for the applicant a copy of the information or, in the alternative, an order of *mandamus* directing the respondent to order a delivery to the applicant's solicitors of the copy information.

It is not asserted in the affidavit sworn on behalf of the applicant that the warrant was in any way defective. Nor are there any civil proceedings in being arising out of the search, although the applicant's solicitor has sworn that the applicant intended to give consideration to the possibility of issuing civil proceedings out of what he contends was the groundless search of his family home.

Accordingly, a very net point arises for the consideration of this Court, that is to say, whether the District Court Judge correctly interpreted O.35 of the District Court Rules when holding he had no jurisdiction to make the order sought.

While it is suggested on behalf of the notice parties that "alternative mechanisms" exist whereby the information sought can be obtained, it was agreed by the parties that the court should first determine the issue as to jurisdiction. It was further agreed that if the answer was in the affirmative, the notice party was not precluded from raising objections to the making of any such order on grounds of privilege.

SUBMISSIONS OF THE PARTIES

On behalf of the applicant it was submitted that the terms of the District Court rule straightforwardly permit the respondent to order that a copy of the information be delivered to the applicant. The District Court Judge was informed at the time of the making of the application that the document in question was required in order to properly specify a claim in respect of civil proceedings which his client intended launching against the State on foot of the execution of the warrant. The terminology of Order 35, and in particular the reference to "any" legal proceedings, must be construed as also encompassing legal proceedings which have not yet been instituted. It was submitted that it was within the contemplation of the District Court Rules Committee that a document might be necessary for a party to be able to institute proceedings and it was the intention of the Rules Committee to enact a rule which gave the District Court extensive scope to order the furnishing of documents in connection with proceedings be they be intended proceedings or already instituted proceedings.

If the respondent was correct as a matter of law that he had no jurisdiction, the applicant would be left without any effective remedy to vindicate the inviolability of his dwelling and would be forced to launch expensive and (as yet) speculative civil proceedings in an effort to secure discovery of the information.

In response, the notice parties submit that the reliefs being sought by the applicant should not have been sought as against the respondent. It was submitted that there are adequate legal procedures which enable a person in the position of the applicant to seek and, where permitted, to obtain material such as that sought by him in this case. None of those were availed of by the applicant prior to the initiation of these proceedings which, it was submitted, were both unnecessary and premature. The application brought by the applicant was effectively premised on the contention that the applicant has a freestanding right of access to the information and that the respondent was obliged to accede to his application in order to vindicate that right. There was no authority for the proposition that a right can only be vindicated through the applicant's choice of procedure.

It was further argued that the request for the release of the information does not come in the context of a criminal prosecution of the applicant and does not engage any issue of fair procedures in a trial process or pre-trial disclosure.

There is no allegation in the present proceedings that the search conducted by An Garda Síochána was improperly commenced or conducted. The State is obliged and entitled to investigate crime and the potential commission of a crime and An Garda Síochána has a range of statutory powers to investigate allegedly criminal acts. Part of that range of powers includes search warrants. They are a perfectly normal and valid method of crime investigation. There is no challenge or complaint advanced in the present case as to the lawfulness of the procedure for the obtaining of the search warrant in question. The same was validly obtained and properly executed. Therefore the present application by the applicant is effectively a procedural one, being the absence of a mechanism before the respondent pursuant to which the information can be released to him. It was submitted that this is too narrow a base to pursue a claim such as the present one having regard to the totality of mechanisms available to the applicant to pursue production of the information sought.

DECISION

The Court is satisfied that the learned District Judge in this case correctly construed his jurisdiction when refusing to make the order sought.

Any other interpretation of the relevant rule under O.35 of the District Court Rules would have the effect that a freestanding application could be brought before the District Court for the production for any document in any proceedings whatsoever or where so ever contemplated by an applicant. For example, a disappointed investor in Anglo Irish Bank could, on the interpretation contended for on behalf of the applicant, apply to the District Court for a production of transcripts of all recorded conversations taking place between officials of that bank in the period leading up to its collapse. They could legitimately state that they required sight of such material for the purpose of bringing proceedings in some other court. The Court believes this simple example illustrates that the rule in question cannot have the omnibus meaning contended for by the applicant.

Taking O.35 as a whole, it is important to look at the preceding rules in O.35 which provide:-

"1.(1) Where, pursuant to section 14 of the Courts Act 1971, a copy of an order made in any case of summary jurisdiction is required, the order shall be drawn up by the Clerk for the court area wherein the order was made and shall be signed by a Judge. The Clerk shall retain such order in his or her custody.

(2) Any person having a bona fide interest in the mater may, upon payment of the prescribed fee (if any), obtain from the Clerk a copy of the order (in the form 35.1, 35.2, 35.3, or 35.4, Schedule B, as appropriate) certified by the Clerk in accordance with the provisions of rule 4 of this Order.

2. Any party in any proceedings may, upon payment of the prescribed fee (if any), obtain from the Clerk a copy of any information, written complaint or deposition which is in his or her custody and was made or taken in any case in his or her court area, and of any order which is in that Clerk's custody and was made by a Judge in the preliminary examination of any indictable offence in the said court area.

3. Where a Judge is satisfied that a copy of any order or other document is reasonably required by any person for the purpose of any legal proceedings, such Judge may direct the clerk to furnish a copy of such order or other document to such person upon payment by such person of the prescribed fee (if any).

4. A copy of an order or other document furnished under this Order shall be certified by the Clerk to be a true copy of the original order or document as the case may be, which is in his or custody."

From the foregoing, it is apparent that orders made under O.35 relate to cases of summary jurisdiction for the court area in question. The District Court would have no jurisdiction outside its own functional area. Thus the document sought must derive from District Court proceedings in that District Court area and be for the purpose of other District Court proceedings. In the absence of specificity as to the other proceedings, actual or intended, to which the application relates, a District Court judge would certainly have no jurisdiction to direct production of documents on any wider basis. Indeed to do so would be to usurp the jurisdiction of the Circuit Court or High Court if the other proceedings fell within either of their respective jurisdictions.

Rule 2 provides that a party "in any proceedings" before that court may obtain from the clerk a copy of any information, written complaint or deposition which is in his or her custody and was made or taken in any case in his or her court area, and of any order made by a judge in the preliminary examination of any indictable offence of the said court area.

Rule 3 follows on from the preceding rules. The Court is satisfied that, properly interpreted, the rule must be taken as meaning that a copy of any order or other document can only be directed to be furnished from one set of proceedings in the District Court for the purpose of legal proceedings in other District Court proceedings, whether actual or intended. There are no such proceedings in being or stated to be intended in the instant case.

Furthermore, it has been established in a number of decisions of the Superior Courts that the issuing of search warrants is an administrative as opposed to a judicial function and indeed, in certain exceptional circumstances, may be carried out by persons other than members of the judiciary, such as peace commissioners or Gardaí. In *Ryan v. O'Callaghan* (High Court, 22nd July, 1987), Barr J. concluded that searching a premises under the authority of a search warrant "*is no more than a part of the investigative process*" which may or may not lead to the charging of an individual in respect of an offence. Barr J. stated that the prosecution of an offence commences only when a decision is made to issue a summons or to charge a person and it was held that that, as the issue of a search warrant occurs prior to the commencement of the prosecution, it forms part of the investigative process and as such was "executive rather than judicial in nature". More recently in *Simple Imports Ltd. v. Revenue Commissioners* [2000] 2 I.R. 243, Keane J. held that:-

"The District Judge is no doubt performing a purely ministerial act in issuing the warrant. He or she does not purport to adjudicate on any lis in issuing the warrant. He or she would clearly be entitled to rely on material, such as hearsay, which would not be admissible in legal proceedings."

In *Damache v. DPP* [2012] IESC 11 the Supreme Court considered the power of members of An Garda Síochána to issue search warrants pursuant to s.29 of the Offences Against the State Act 1939. In arriving at the conclusion that any person who issues a warrant must be independent from the investigation, the Court held that:-

"The issuing of a search warrant is an administrative act, it is not the administration of justice. Thus a search warrant is not required to be issued by a judge. However, it is an action which must be exercised judicially."

In light of these decisions, it would seem that the application made to the District Judge for the issuing of a warrant falls outside the definition of "case" or "proceedings" as contemplated by the District Court Rules.

I would therefore conclude that the learned District Court Judge correctly interpreted his jurisdiction under O.35, r. 3 and the Court will proceed to deal with the other arguments which were placed in abeyance pending the Court's ruling on this particular point.