

THE HIGH COURT

2006 No. 122MCA

**IN THE MATTER OF AN APPLICATION UNDER SECTION 24 OF THE CRIMINAL JUSTICE ACT 1994
IN THE MATTER OF THE CRIMINAL JUSTICE ACT 1994 SECTION 46 (6) REGULATIONS 1996
IN THE MATTER OF A CRIMINAL INVESTIGATION BEING CONDUCTED IN THE UNITED KINGDOM OF GREAT BRITAIN AND
NORTHERN IRELAND IN RELATION TO JAMES ANTHONY TIGHE
IN THE MATTER OF A REQUEST MADE ON BEHALF OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND**

BETWEEN

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

APPLICANT

**AND
JAMES ANTHONY TIGHE
(AKA BERNARD TIGHE)**

RESPONDENT

Judgment of The Honourable Mr. Justice Kevin Feeney delivered on the 30th day of April, 2008.

1. This judgment relates to a preliminary issue raised on behalf of the respondent. The respondent has brought a notice of motion dated the 18th February, 2008, seeking to strike out the applicant's claim/action as against the respondent by reason of the fact that the applicant is not the appropriate applicant as identified by statute and/or law and has accordingly no legitimate and/or lawful basis and/or authority to prosecute the within proceedings.

2. The application was grounded on an affidavit sworn by David O'Shea, solicitor for the respondent on the 18th February, 2008. In that affidavit it was claimed that the Minister for Justice Equality and Law Reform was the incorrect applicant in that the legislation provided that the applicant in such cases is to be the Director of Public Prosecutions and no other person. Reliance was placed upon Regulation 24(4) of Statutory Instrument No. 343 of 1996 entitled Criminal Justice Act, 1994 (Section 46(6)) Regulations, 1996. The respondent and moving party in this preliminary application says that the only party who can make an application such as the application herein is the DPP and that it follows that the Minister for Justice Equality and Law Reform is not entitled under the legislation to bring such proceedings. This is the sole issue for consideration by this Court at this point in time.

3. The proceedings herein arise out of an application brought by the Minister for Justice Equality and Law Reform ("The Minister") on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland. The application was for a restraint order pursuant to the provisions of s. 24 of the Criminal Justice Act, 1994, as modified by the Criminal Justice Act, 1994 (s. 46(6)) Regulations, 1996. An ex parte application was made to the High Court on the 9th October, 2006, by the Minister and an order was made pursuant to s. 24 of the Criminal Justice Act, 1994 as inserted by the Criminal Justice Act, 1994 (s. 46(6)) Regulations, 1996 that the respondent, that is James Anthony Tighe, (aka Bernard Tighe) and any person having notice of the making of such order be restrained until further order of this honourable Court from disposing of or dealing with or diminishing the value of the property identified in the schedule to the said order. The property included a dwelling house at Pettiswood, Mullingar in the county of Westmeath and various sums of money standing in five specified bank accounts. The affidavits grounding the application for such relief averred that the Government of the United Kingdom of Great Britain and Northern Ireland acting on behalf of its Revenue and Customs Prosecutions Office was investigating the activities of the respondent and another person in relation to their alleged involvement in a conspiracy to cheat the Revenue of that country in the amount of approximately sixteen million pounds Sterling contrary to the U.K. Criminal Law Act of 1977. The affidavits also averred that a warrant had been issued for the respondent in the United Kingdom but that he had absconded from that jurisdiction prior to criminal charge and was as of the date of the ex-parte application residing in Ireland. It was also averred that a restraint order against the respondent had been obtained in the United Kingdom in January of 2006 which said order was varied on the 15th March, 2006. The order referred to property located within this jurisdiction which is the subject matter of these proceedings.

4. The respondent has contested the granting of the restraint order and has averred in an affidavit sworn on the 19th July, 2007, to the following effect, namely:-

"I beg this honourable Court to remove the restraining order against the assets and the property listed in the notice of motion dated the 6th October, 2006 as being not covered by the United Kingdom restraining order and not the proceeds of any fraud or crime".

5. The issue as to whether or not the restraining should be removed, as contended for by the respondent, is due for hearing and determination by the High Court at the end of April, 2008. This preliminary issue has been raised in advance of that hearing.

6. The Criminal Justice Act of 1994 was an Act to make provision for the recovery of the proceeds of drug trafficking and other offences, to create an offence money laundering, to make provision for international co-operation in respect of certain criminal law enforcement procedures and for forfeiture of property used in the commission of crime and to provide for related matters. Part VII of the Act deals with "international co-operation" and s. 46 deals with, inter alia, external confiscation orders. Section 46 identified that such external confiscation orders would be referred to as "confiscation co-operation orders".

7. Section 46(1) of the Criminal Justice Act, 1994 states:

"The Government may by order designate countries as countries in whose case orders (referred to in this section as "confiscation co-operation orders") may be made for the confiscation, in accordance with the law of the State, of property which is liable to confiscation in accordance with orders (referred to in this section as "external confiscation orders") made by a court in the country in question for the purpose -

(a) of recovering payments or other rewards received as a result of or in connection with drug trafficking or their value, or

(b) of recovering -

(i) property obtained as a result of or in connection with conduct corresponding to an offence in respect of which a confiscation order could be made under section 9 of this Act, or

(ii) the value of the property so obtained,

or

(c) of depriving a person of a pecuniary advantage obtained as mentioned in paragraph (b) of this subsection.

8. Section 46(2) states:-

"if an application is made to the High Court by or on behalf of the government of a country designated under *subsection (1)* of this section (referred to in this section as a "designated country") and with the consent of the Minister for the making of a confiscation co-operation order pursuant to an external confiscation order made by a court in that country, and the High Court is satisfied that the conditions specified in *subsection (3)* of this section are satisfied, the court may make a confiscation co-operation order".

9. These proceedings relate to a restraint order in aid of a confiscation co-operation order and it is contended, as outlined above, that such order can only be applied for by the DPP. Section 46(2) of the 1994 Act expressly provides that an application can be made to the High Court by or on behalf of the Government of a designated country and makes no reference to the DPP. That subsection refers to an entitlement to make an application not only on behalf of a Government of a designated country but also on such Government's behalf. There is no identification as to the party who may make such an application on behalf of the Government of a designated country.

10. There is no issue in this case but that the Government of the United Kingdom of Great Britain and Northern Ireland is a designated country.

11. Section 46(6) of the 1994 Act states:-

"The Government may by regulations make such modifications of this Act as appear to it to be necessary or expedient for the purpose of adapting to confiscation co-operation orders any of the provisions of this Act relating to confiscation orders, in particular in relation to enforcement and the taking of provisional measures to prevent any dealing in, or transfer or disposal of, property that may be liable to confiscation in accordance with any confiscation co-operation order that may be made".

12. That subsection is of particular relevance to the issue before this Court. At issue in these proceedings is a restraint order in the nature of a provisional measure. The applicant to these proceedings and the respondent to this motion relies on the terms of s. 46(6) as providing the legal basis and the entitlement for his application for provisional measures to prevent the respondent dealing in or transferring or disposing of certain property. Such reliance is based upon a claim not that there is a confiscation order in force but rather that the property may be liable to confiscation in accordance with a confiscation co-operation order that may be made.

13. Pursuant to the provisions of s. 46(6) of the 1994 Act, Regulations were made by Statutory Instrument No.343 of 1996. Those Regulations were made to make such modifications to the 1994 Act as appeared to be necessary or expedient to the Government. The Regulations provided that it appeared to the Government that it was both necessary and expedient to make modifications to s. 2 and 3 and part 3 of the 1994 Act. Regulation 3 of the Regulations provided:-

"In so far as it relates to confiscation co-operation orders, the Act of 1994 is hereby modified, for the purpose of adapting it to such orders, to the extent that sections 2 and 3 and part III of that Act can be read as set out in the schedule to these Regulations".

14. Part III of the 1996 Regulations as set out in the schedule dealt with the enforcement, etc., of confiscation co-operation orders. That part also expressly dealt with confiscation co-operation orders. Section 24 of the 1994 Act which provided for restraint orders was modified so as to adapt restraint orders and the taking of provisional measures to international confiscation co-operation orders.

15. Section 24 of the schedule to the 1996 Regulations dealt with restraint orders. Section 24 of the 1994 Act provided in relation to restraint orders at subsection (4) that a restraint order "may be made only on an application by the Director of Public Prosecutions." It is that process provided for in s. 24, subs. 4 which the respondent/moving party relies on as the basis for this application. Sections 23 and 24 of the 1994 Act provided for the cases in which restraint orders might be made and the process for applying for such restraint orders. Sections 23 and 24 of the schedule to the 1996 Regulations modifies and adapts the provisions of the 1994 Act. In particular the provisions set out in s. 23 and 24 of the Act were modified and adapted by use of s. 46(6) of the 1994 Act, to provide for the enforcement and the taking of provisional measures to prevent any dealing in, or transfer or disposal of, property that may be liable to confiscation in accordance with any confiscation co-operation order that may be made.

16. Pursuant to s. 24 of the 1994 Act a restraint order may only be made on the application of the Director of Public Prosecutions. However, the 1996 Regulations have modified and adapted the process for the making of a restraint order in respect of confiscation co-operation orders in that such applications may be made on the application by or on behalf of the Government of a designated country and not by the DPP.

17. There is no express provision for restraint orders in part 7 of the 1994 Act. The position is that s. 46(6) provides that Regulations can be made in order that the legislative scheme set up by s. 23 and 24 of the 1994 Act can be modified so as to adapt such scheme in accordance with the requirement of international confiscation co-operation orders. The 1994 Act provides expressly for the making of such modifications as appear necessary and expedient. It is the 1994 Act itself which provides the statutory basis for the modifications which were necessary or expedient to adapt the restraint orders provided for in s. 23 and 24 of the 1994 Act, which related to proceedings instituted within the State, to applications for external confiscation co-operation orders. The provisions of s. 24 of the schedule to the 1996 Regulations provide for the making of an application for a restraint order in circumstances such as the case herein. This is a case where an application for a restraint order may be made on the application by or on behalf of the foreign Government of a designated country pursuant to s. 24(4) of the schedule to the 1996 Regulations.

18. Such application for restraint can be made by the requesting Government but it can also be made on its behalf. Section 24(4) of the schedule to the 1996 Regulations is silent on the issue of the identity of the party who make seek a restraint order on behalf of a foreign Government of a designated country. The Regulations, in effect, allow for a third party to make such an application on behalf of a foreign Government. On the facts of this case the application for a restraint order was made by the Minister on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland. The Court is satisfied that the Minister is a third party so entitled to make such application and is entitled to prosecute these proceedings.

19. It is contended on behalf of the respondent and moving party herein that the 1994 Act has not been amended and that therefore

the provision contained in s. 24(4) of the Act that a restraint order may be made only on an application by the Director of Public Prosecutions cannot be amended or materially altered by Regulation. It was contended that if s. 24(4) of the schedule to the 1996 Regulations is to be read as allowing and permitting for an application for a restraint order to be made by any party other than the DPP that such provision would amount to an amendment of the 1994 Act and would be impermissible. This Court is satisfied that the Regulations made pursuant to the powers conferred on the Government under s. 46(6) of the 1994 Act do not purport to amend that Act but rather are necessary and expedient modifications to the scheme expressly permitted for in the 1994 Act. The modifications allow and permit the provisions within the 1994 Act relating to confiscation orders and restraint orders to be adapted so as to apply to confiscation co-operation orders. The Court is satisfied that the matters provided for in s. 23 and 24 of the schedule to the 1996 Regulations cannot be viewed as an attempt to legislate or amend existing legislation but are rather Regulations made within the power provided for in s. 46(6) of the 1994 Act. The modifications made are the modifications necessary or expedient for the specific purpose envisaged within the legislation. The nature of such modifications are expressly identified by the terms of s. 46(6). The Court is satisfied that there is statutory authority for such modifications.

20. The Court is therefore satisfied that this is not a case, as contended for by the respondent applicant of delegated legislation seeking to amend primary legislation and thus falling foul of the provisions of Article 15. 2.1 of the Constitution.

21. In making the 1996 Regulations modifying the 1994 Act, the Government did so in a manner which was commensurate with what was envisaged or intended by the 1994 Act. The 1994 Act itself indicated a particular intention to modify the provisions providing for the making of domestic restraint orders to cover international restraint orders arising from international co-operation. This is not a case where legislation has been indirectly repealed, altered or derogated by the force of general words without any indication of a particular intention to do so.

22. The Court is satisfied that the authority relied upon by the respondent moving party of the *Director Public Prosecutions v. Logan* [1994] 3 I.R. 254 and in particular the quotation relied upon by Blayney J. at p. 264 set out below has no applicability to the facts of this case:-

“Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.”

23. The Court is satisfied that the deletion of the reference to DPP in the modified scheme provided for in s. 24 of the schedule to the 1996 Regulations relating to restraint orders concerning property liable to confiscation in accordance with any confiscation co-operation order does not and cannot be viewed as amounting to an invasion of the function of the Oireachtas. As identified above the 1994 Act itself makes it clear that the domestic provisions will be modified by regulation to the extent necessary for the purposes of adapting the provisions set out for the taking of provisional measures provided for in s. 23 and 24.

24. The Supreme Court identified in the case of *Cityview Press v. An Chomhairle Oiliúna* [1980] I.R. 381 at p. 399 the approach which a Court should apply in testing whether or not that which is challenged as an unauthorised delegation of parliamentary power is permissible. O'Higgins C.J. stated:-

“In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits – if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body – there is no unauthorised delegation of legislative power.”

25. This Court is satisfied that there has not been any unconstitutional delegation of authority in the manner in which the relevant regulations of 1996 have modified the 1994 Act. The 1994 Act identified the principles and policies and provided for the making of Regulations in s. 46(6) of the 1994 Act. Regulations of the type made herein amount to the giving effect to the principles and policies contained in the 1994 Act.

26. This Court is satisfied that the applicant is an appropriate applicant and has a legitimate and lawful authority to prosecute these proceedings. In those circumstances the reliefs sought in the notice of motion herein is refused.