THE COURT OF APPEAL

Neutral Citation No: [2018] IECA 289

Record No. 2016/267

Peart J.
Hogan J.
Baker J.

BETWEEN:

JUDYTA ROZMYSLOWICZ

APPELLANT

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY,

IRELAND, THE ATTORNEY GENERAL & THE

COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 17th day of August 2018

1. The plaintiff, Ms. Rozmyslowicz, is a Polish national who has lived and worked in Ireland for some time. The present proceedings arise from the actions of members of An Garda Síochána who entered the plaintiff's dwelling at 7 The Grove, Sallins, Co. Kildare on Sunday, 19th August 2012. It is common case that members of An Garda Síochána entered the plaintiff's dwelling on that day and that they did so without her consent. The essential issue, both in the High Court and in this Court, was whether the actions of the Gardaí in effecting this search in this manner were lawful. The Garda case is based on the provisions of s. 6(1) of the Criminal Law Act 1997 ("the 1997 Act"), provisions to which it will be necessary to return in more detail at a later point in this judgment.

2. In a lengthy and comprehensive judgment delivered on 13th April 2016 Fullam J. dismissed the plaintiff's claim. The plaintiff has now appealed to this Court against that decision. The issues which arise on this appeal are, however, difficult and are not straightforward.

The background to the present proceedings

3. The events giving rise to these proceedings may be said to have started on 16th February 2012. On that day members of An Garda Síochána came to the plaintiff's home with a European Arrest Warrant in respect of her then partner, Mr. Sebastian Snaidy. Mr. Snaidy was arrested and taken by Gardaí to Dublin. It is accepted that Mr. Snaidy was then brought before the High Court and that he was released on bail to Ms. Rozmyclowich's address. The plaintiff gave evidence in the present proceedings to the effect that she knew that Mr. Snaidy would have to return to the High Court in July 2012.

4. According to the plaintiff, Mr. Snaidy decided on the morning of that Court hearing on Tuesday 24th July 2012 to return to Poland and brought a suitcase of clothes with him as he left. Some time after noon on that day, two Gardaí called to the plaintiff's home and inquired as to Mr. Snaidy's whereabouts. She stated that she believed that Mr. Snaidy had travelled to Dublin to attend court, but the Gardaí informed her that he had not done so. The plaintiff then said that Mr. Snaidy must have travelled to Poland. The Gardaí then asked her about the motor vehicle in the driveway, but she stated that Mr. Snaidy had transferred the vehicle to her.

5. It is the events of 19th August 2012 which are, however, central to this appeal. The plaintiff stated that she was in bed in her pyjamas at around noon when she heard a ring on the doorbell. She was alone in the house at the time, save that her pet dog was also present in the house. The house itself appears to be a standard two storey semi-detached dwelling of relatively modest dimensions with a driveway sufficient to accommodate one car and a front garden of commensurate size.

6. Ms. Rozmyslowicz looked out of an upstairs window whereupon she saw two men in t-shirts whom she did not recognise. She went downstairs to open the door, but, in order to prevent the dog escaping she opened the door only slightly so that she could peer out. The two men in t-shirts identified themselves as Gardaí by showing identification badges and two uniformed Garda personnel were also present. The Gardai told her that they were there to search for Mr. Snaidy. The plaintiff responded by saying that he was not present and demanded to see a copy of any warrant they might have.

7. The Gardai did not, however, have a copy of any warrant in their possession and the plaintiff refused to give them consent to search the premises. At this point the plaintiff's dog went upstairs and jumped up onto a bed which was based beside a window ledge. There was a net curtain on the window and the dog may perhaps have rustled the curtain as it endeavoured to look out.

8. At that point one of the Gardaí, Garda O'Sullivan, said something to the effect that she saw some movement at the window upstairs. The plaintiff replied by saying that this was her dog. At that point one of the Gardaí started pushing the door (which was only slightly ajar) and as the door was pushed forward against the plaintiff's right foot, she fell and injured her ankle. The Gardaí then entered the dwelling, with one going into the back garden and the two other going upstairs. The other Garda, Garda O'Sullivan, subdued the dog. It was clear as a result of the search that no person other than Ms. Rozmyslowicz was present in the house at the

time it was searched.

9. The plaintiff claims damages for trespass and for personal injuries sustained as a result of the forcible entry. She also claims damages for violation of constitutional rights.

The course of evidence in the High Court
10. It is next necessary to consider the course of evidence in the High Court. After the plaintiff had given evidence, the State parties applied for a direction on the ground that there was no case to answer. After considering the matter overnight, Fullam J. refused the application on the ground that there was a case to answer. The defendants then went into evidence.

The evidence of Detective Garda Hanrahan
11. Detective Garda Hanrahan gave evidence that he was responsible for the execution of European arrest warrants in the Naas district. He had previously arrested Mr. Snaidy in respect of the EAW warrant in February 2012 and he was aware that Mr. Snaidy had given this address when granted bail.

12. The next development was that he had been made aware that Mr. Snaidy had failed to appear at the High Court hearing and that a bench warrant had been issued for his arrest by Edwards J. He was then given responsibility for the execution of that warrant. Detective Garda Hanrahan then checked the Garda PULSE intelligence system to ascertain the later intelligence on Mr. Snaidy. Early on the morning of Sunday, 19th August 2012 Detective Garda Hanrahan drove by the house and noticed that Mr. Snaidy's red BMW motor vehicle was still parked outside the door. He then assembled a Garda team to go to search the premises.

13. When the door was opened by Ms. Rozsmyslowicz, it was opened only to the extent that it allowed her to peer out. Detective Garda Hanrahan explained that there was a warrant for the arrest of Mr. Snaidy, but the plaintiff kept repeating that he was not there. Detective Garda Hanrahan then asked whether, if he was not there, "can I come in and have a quick look?" The plaintiff refused this request, saying that the Gardaí would have to produce a warrant.

14. Detective Garda Hanrahan said that he then heard one of his colleagues, Garda O'Sullivan, say that she had seen a hand moving the net curtains upstairs. He asked the plaintiff who was upstairs, but she denied that there was anyone else in the house, that she was alone there with her dog and repeated her insistence that the Gardaí could not enter the dwelling without a warrant. Detective Garda Hanrahan then said that he had reasonable grounds to believe that Mr. Snaidy was in the house and that he was now entitled to enter. He denied in evidence that he had used force or that he had injured the plaintiff during the course of the entry into the dwelling. A thorough search of the premises revealed nothing of interest to Gardaí.

15. Garda Joanne O'Sullivan was the other witness for the defence. She stated that she had remained at the front of the driveway when Detective Garda Hanrahan and Detective Sergeant McHale went to the front door. She stated that she noticed a hand moving the net curtain in the window of the top left of the house. She relayed this information to Detective Garda Hanrahan who then put this to the plaintiff. Garda O'Sullivan then said she heard the plaintiff explaining that there could not have been a hand at the window and that must have been her dog. Garda O'Sullivan then repeated that she had seen a hand and that at that point the Gardaí entered the dwelling.

The failure to put certain matters in cross-examination
16. One unsatisfactory aspect of the proceedings in the High Court was that it emerged during the course of the defendants' evidence in chief that certain key aspects of their case were not put in cross-examination to the plaintiff. These omissions included the failure to suggest that Garda O'Sullivan had positively seen a hand - rather than simply just movement - at the upstairs window and Detective Garda Hanrahan's claim that he did not push the front door and that the plaintiff had not injured herself in the process. Counsel for the State defendants accepted that a deliberate choice had been taken not to put these elements of the State case to the plaintiff in cross-examination. It seems that this decision was taken because it was anticipated that the State parties would be making an application for a direction.

17. The failure to put this case was quite fundamental and it went to the very fairness of the trial. If, as seems to have been the case, the failure to put these matters was a part of some strategy on the part of the State defendants, I will merely say that, as matters have transpired, it is a strategy that has done them few favours.

18. All practitioners will be familiar with instances where, not least in a complex and difficult trial with a multiplicity of witnesses, there will have been a failure to put certain matters, often as a result of inadvertence or oversight. In such circumstances, as part of the give and take of the Bar, a witness will often be recalled without objection to have this particular detail put to him or her.

19. The present case was rather different: there were only two witnesses for the State and a vital part of their case was (i) that a human hand had been seen at an upstairs window and (ii) the plaintiff had suffered no personal injuries as a result of the forced entry. Yet these vital details were not put to the plaintiff when she was giving evidence. In these particular circumstances it was no answer at all for the defendants somewhat lamely to venture the suggestion that Ms. Rozmyslowicz might be recalled to give evidence thereby enabling the State's to mend its hand and exposing the plaintiff to a second round of cross-examination on these critical issues.

20. In his judgment in the High Court Fullam J. stated (at para. 103):

> "Furthermore, the court would observe that while it was unfortunate that important details of the evidence that was to be given by Detective Garda Hanrahan and Garda O'Sullivan were not put to the plaintiff this did not, it seems to me, give rise to any unfairness to the plaintiff in circumstances where she was given the opportunity by the court to return to the witness box and to comment on the matters which had not been put to her. I am fortified in this view by the decision of the Court of Criminal Appeal in *Director of Public Prosecutions v. Brett* [2011] IECCA 12 where Murray C.J. held that [it was sufficient] that the trial judge had informed counsel for the defendant that they were at liberty to recall their client to deal with matters not put and the defendant was thereby afforded an appropriate opportunity to fully and fairly address the evidence against him."

21. For my part, however, I consider that in the particular circumstances of this case the matter goes rather further than this. The decision in *Brett* concerned an allegation that a co-defendant had not put a suggestion that the defendant had arrived on the scene of the crime in possession of a knife. The judgment of the Court of Criminal Appeal appears to proceed on the basis that this issue was not a critical one in the context of that particular trial and that the failure to put that suggestion seems in the circumstances to have been regarded a form of harmless error which could have been rectified by a witness recall.

22. One way or the other, I doubt if *Brett* can be regarded as exemplifying any wider principle. The failure here to put these, and, indeed, other important, points to the plaintiff must be regarded on the facts of this particular case, at least, to go to the fairness of the trial, especially as a great deal turns in this case on the detail of these particular facts. It is perhaps sufficient to say that the plaintiff would have been entitled in the particular circumstances of this case to a re-trial on this ground alone, should it have proved necessary to do so.

The judgment of the High Court

23. In his judgment in the High Court Fullam J. commenced his discussion of the legal issues regarding the search and entry of the dwelling by referring to the provisions of Article 40.5 of the Constitution:

> "The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law."

24. Fullam J. then stated:

> "It is common case that the Gardaí entered the plaintiff's dwelling against her wishes: in doing so, they were trespassers and were violating the plaintiff's constitutional rights, unless they can establish that their entry was in accordance with law."

25. What, then, was the "law" which authorised the entry by the Gardaí in the present case? As it happens, Fullam J. held that the entry in the present case was a forcible one, but it is nonetheless pertinent to observe in the present context that Article 40.5 does not protect against forcible entry only. As Walsh J. stated in *The People (Attorney General) v. O'Brien* [1965] I.R. 142, 169 the reference to forcible entry in Article 40.5:

> "…does not mean that the guarantee is as against forcible entry only. In my view, the reference to forcible entry is an intimation that forcible entry may be permitted by law but that, in any event, the dwelling of every citizen is inviolable save where entry is permitted by law and that, if necessary, such law may permit forcible entry."

26. Forcible entry is, in principle, certainly permitted by s. 6(1) of the 1997 Act. Section 6 provides:

> "(1) For the purpose of arresting a person on foot of a warrant of arrest or an order of committal, a member of the Garda Síochána may enter (if need be, by use of reasonable force) and search any premises (including a dwelling) where the person is or where the member, with reasonable cause, suspects that person to be, and such warrant or order may be executed in accordance with section 5.
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> (2) For the purpose of arresting a person without a warrant for an arrestable offence a member of the Garda Síochána may enter (if need be, by use of reasonable force) and search any premises (including a dwelling) where that person is or where the member, with reasonable cause, suspects that person to be, and where the premises is a dwelling the member shall not, unless acting with the consent of an occupier of the dwelling or other person who appears to the member to be in charge of the dwelling, enter that dwelling unless:-
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> (a) he or she or another such member has observed the person within or entering the dwelling, or
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> (b) he or she, with reasonable cause, suspects that before a warrant of arrest could be obtained the person will either abscond for the purpose of avoiding justice or will obstruct the course of justice, or
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> (c) he or she, with reasonable cause, suspects that before a warrant of arrest could be obtained the person would commit an arrestable offence, or
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> (d) the person ordinarily resides at that dwelling.
>
> (3) Without prejudice to any express amendment or repeal made by this Act, this section shall not affect the operation of any enactment or rule of law relating to powers of search or powers of arrest."

27. Section 5 of the 1997 Act provides:

> "A warrant for the arrest of a person or an order of committal may be executed by a member of the Garda Síochána notwithstanding that it is not in the member's possession at the time, but the warrant or order shall be shown to him or her as soon as practicable."

28. In the light of this provision Fullam J. held it was not necessary "for the Gardaí to have the arrest warrant in their possession in order lawfully to execute it." The judge then went on to determine the various elements of the s. 6(1) power "which must be found to exist before its provisions can be lawfully invoked". Accordingly, it followed that:

> (i) The purpose of its use must be to arrest a person on foot of an arrest warrant or an order of committal;
>
> (ii) That for such purpose members of An Garda Síochána may enter any premises, including a dwelling, where that person is or, with reasonable cause, is suspected to be;
>
> (iii) Such entry may, if needs be, be effected by the use of reasonable force.
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> (iv) The Gardaí must properly invoke their powers under s. 6(1) of the 1997 Act.
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> (v) Was the use of force reasonable and was it proportionate?

29. Fullam J. then addressed in turn each of these specific requirements. He held first that the object of the Gardaí at all times was to arrest Mr. Snaidy on foot of the bench warrant which had been issued by the High Court on 24th July 2012 and it followed that this element of s. 6(1) had been satisfied in the present case. This finding is obviously correct on the evidence and it is not really in dispute so far as the present appeal is concerned.

30. The judge then went on to deal with the more troublesome issue of whether the Gardai had reasonable cause to suspect that Mr. Snaidy was in the dwelling. In this regard Fullam J. followed the analysis contained in the judgment of O'Malley J. in *Kessopersadh v. Keating* [2013] IEHC 317 where she set out the relevant principles regarding the reasonable suspicion requirement contained in the parallel provisions found in s. 6(2) of the 1997 Act as follows:

> "The question whether a particular suspicion existed in the mind of the arresting officer is a question of fact, to be determined in the light of his sworn evidence and the surrounding circumstances- see *The People (DPP) v Quilligan* [1986] I.R. 495. The existence of reasonable cause is a mixed question of fact and law. In his work *Criminal Procedure* Walsh defines suspicion by reference to the judgment of Lord Devlin in *Hussein v Chong Fook Kam* [1970] A.C. 942, where it is said:
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> > "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove." Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end."
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> However, it is clear that the permitted scope of conjecture or surmise is limited to what is reasonable in the circumstances. In *Walshe v Fennessy* [2005] 3 I.R. 516, the Supreme Court considered the suspicion grounding arrests under s. 30 of the Offences Against the State Act, 1939. Kearns J. noted that the suspicion grounding the arrest, to be "not unreasonable" must "find some objective justification from the surrounding circumstances and the information available to the arresting officer."
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> In the case of *DPP v O'Driscoll* (Supreme Court, 1st July, 2010) the Court endorsed the following principles:-
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> > (a) The reasonable cause to suspect must be fair and reasonable and honestly held on the basis of the information available to a member of An Garda Síochána at the relevant time.
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> > (b) The reasonable cause to suspect must be referable to facts or information which would satisfy an objective observer: it is an objective test.
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> > (c) The objective test requires that the basis for the reasonable cause to suspect be examined by reference to the time and the circumstances in which the power was exercised.
> >
> > (d) The facts or information grounding the reasonable cause to suspect may be either what the member of the Garda Síochána has observed or information that he has received. The information acted on by the member need not be based on his own observations since he is entitled to have a reasonable cause to suspect based on what he is told.
> >
> > (e) The reasonable cause to suspect may be based on information from any source including an anonymous source. Since it is only the information that is in the mind of the member of An Garda Síochána that is relevant it is unnecessary to investigate what was known to an informant or whether the information is true. If the information grounding the reasonable cause to suspect turns out to be ill-founded the lawfulness of the entry will not be impugned. What is relevant is the information available to the member of the Garda Síochána at the relevant time.
> >
> > (f) Material grounding a reasonable cause to suspect need not satisfy the same threshold as is required to lay a charge nor is it necessary that it constituted admissible evidence."

31. It followed, therefore, that the suspicion must not be an unreasonable one and must find "some objective justification from the surrounding circumstances and the information available to the arresting officer." In the light of this test Fullam J. found that Detective Garda Hanrahan had indeed such a reasonable suspicion. Since the analysis of this question is at the heart of the appeal, I propose to return to this issue at a later point in the judgment.

32. So far as the third limb of the test was concerned, Fullam J. found that the Gardai had indeed used force to enter the dwelling. He accepted the plaintiff's evidence that Detective Garda Hanrahan pushed the door open and that "she was thereby caused to fall and [to] sustain an injury to her right ankle." Forcing the door open in this fashion clearly amounted to a form of forcible entry: see, *e.g.*, *Swales v. Cox* [1981] 1 Q.B. 849, 854 *per* Donaldson L.J. There was ample evidence to support Fullam J.'s findings of fact in this regard and, in truth, this aspect of the judgment is also not really in dispute.

33. So far as the obligation to inform the plaintiff that this statutory power of entry was being invoked is concerned, Fullam J. followed well established case-law regarding powers of arrest, search and entry to the effect that the citizen is entitled to know in general terms "of the nature and description of the statutory powers which is being invoked": see *Director of Public Prosecutions v. Rooney* [1992] 2 I.R. 7,10 *per* O'Hanlon J. This does not, of course, mean that precise technical language has to be used for this purpose, provided that the citizen knows in substance the reason for the exercise of the power in question: thus, for example, it is sufficient for a Garda to tell a motorist that he is being arrested for drunk driving, even if the precise statutory offence has not been identified: see, *e.g.*, the comments of Hardiman J. in *Director of Public Prosecutions v. Ennis* [2011] IESC 46.

34. Fullam J. found that Detective Garda Hanrahan had adequately explained the basis of the proposed search of the dwelling. He concluded on the evidence that the Gardaí had stated that there was a warrant for the arrest of Mr. Snaidy and that they were entitled under law to search the dwelling in these circumstances.

35. Turning to the final limb of the test, Fullam J. drew attention to the importance of the words "if need be" in s. 6(1) of the 1997 Act so far as the use of reasonable force was concerned. He concluded, drawing on the decision of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Byrne* [2011] IECCA 105, that the circumstances in which forcible entry might be permitted depended very much on the facts of any given case. In that case McKechnie J. held that the phrase "if need be" must be read as meaning "whether in all the circumstances in which the Gardaí are situated, informed by the information then available, there is in their view, arrived at by objective assessment, a necessity to enter by force."

36. McKechnie J. further concluded that the sub-section has "no specific requirement to seek consensual entry" and that the context was an important determinative in this context. He distinguished the earlier decision of that Court in *The People (Director of Public Prosecutions) v. Laide* [2005] 1 I.R. 209 which, on view, had suggested that a prior request of the occupant to permit entry would generally be necessary before necessary:

> "Take, for instance, a situation where armed criminals are hiding in a dwelling house owned by one of them. Could *Laide* possibly be relied upon to suggest that the door should be first knocked at or the doorbell rung. We think not. Surprise may be the essence of the operation. We therefore cannot accept any suggestion that operational needs as a matter of principle could not also give rise to a necessity for a forced entry if, on assessment, that can be objectively justified."

37. Fullam J. then (at para. 143) applied these principles to hold the use of force had been justified in the circumstances:

> "After the movement had been observed at the upstairs window, which gave rise to a reasonable and objectively justifiable suspicion in the minds of Detective Garda Hanrahan that Mr. Snaidy was in the dwelling, the Gardaí were under no obligation to prolong their engagement with the plaintiff in an attempt to persuade her that she was mistaken in her understanding of the law in relation the powers conferred by bench warrants, and the manner in which they are to be executed. In the particular circumstances [of this case], I am satisfied that the Gardaí were merely obliged to request admittance to the dwelling and to explain to the plaintiff in ordinary language the general power of entry on foot of the bench warrant. It was then up to the plaintiff whether she accepted their explanation: she chose not to do so."

38. On appeal to this Court many of the findings of fact and legal analysis contained in this judgment were not really in dispute. It is, for example, accepted that the entry was a forcible one and counsel for the plaintiff did not really press the argument that the Gardaí had not sufficiently informed her of the reason for the search. Nor can it be doubted but that the plaintiff suffered injury to her ankle when the door was pushed open by the Gardaí. In truth, this entire appeal really turns on the question of whether the Gardaí had "reasonable cause" within the meaning of s. 6(1) of the 1997 Act to effect this forcible entry. I propose now to turn to that issue.

Whether the Gardaí had "reasonable cause" to search the plaintiff's dwelling

39. As Fullam J. correctly noted, the powers of search contained in s. 6 of the 1997 Act must, of course, be seen against the constitutional guarantees in Article 40.5. While it is clear from the very terms of Article 40.5 itself that the use of the word "inviolable" to describe the dwelling cannot quite literally mean what it says – because, if it did, no forcible entry at all would be permitted – nevertheless, as I put the matter in my judgment in the High Court in *Schrems v. Data Protection Commissioner* [2014] 3 I.R. 75 "the reference to inviolability in this context nonetheless conveys that the home enjoys the highest level of protection which might reasonably be afforded in a democratic society. "

40. As Hardiman J. observed in *The People v. O'Brien* [2012] IECCA 68, Article 40.5:-

> "...presupposes that in a free society the dwelling is set apart as a place of repose from the cares of the world. In so doing, Article 40.5 complements and re-inforces other constitutional guarantees and values, such as assuring the dignity of the individual (as per the Preamble to the Constitution), the protection of the person (Article 40.3.2), the protection of family life (Article 41) and the education and protection of children (Article 42). Article 40.5 thereby assures the citizen that his or her privacy, person and security will be protected against all comers, save in the exceptional circumstances presupposed by the saver to this guarantee."

41. The forcible entry of a private dwelling is accordingly a serious matter for which there must always be the appropriate legal justification. In *Damache v. Director of Public Prosecutions* [2012] IESC 11, [2012] 2 I.R. 266 the Supreme Court held that s. 29 of the Offences against the State Act 1939 was unconstitutional precisely because that section permitted a senior Garda officer to grant a warrant for the search of private premises who was not independent of the process. As Denham C.J. said ([2012] 2 I.R. 266, 285):

> "….These circumstances include the fact that the warrant was issued by a member of a Garda Síochána investigating team which was investigating the matters. A member of An Garda Síochána who is part of an investigating team is not independent on matters related to the investigation. In the process of obtaining a search warrant, the person authorising the search is required to be able to assess the conflicting interests of the State and the individual person, such as the appellant. In this case the person authorising the warrant was not independent. In the circumstances of this case a person issuing the search warrant should be independent of the Garda Síochána, to provide effective independence.
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> The circumstances of the appellant's case also includes the fact that the place for which the search warrant was issued, and which was searched, was the appellant's dwelling house. The Constitution in Article 40.5 expressly provides that the dwelling is inviolable and shall not be forcibly entered, save in accordance with law, which means without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution. Entry into a home is at the core of potential State interference with the inviolability of the dwelling.
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> These two circumstances are at the kernel of the Court's decision. No issue of urgency arose in this case, and the Court has not considered or addressed situations of urgency. The Court points out that it is best practice to keep a record of the basis upon which a search warrant is granted.
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> This Court would grant a declaration that s. 29(1) of the Offences against the State Act, 1939 (as inserted by s. 5 of the Criminal Law Act, 1976) and referred to as s. 29(1) of the Act of 1939, is repugnant to the Constitution as it permitted a search of the appellant's home contrary to the Constitution, on foot of a warrant which was not issued by an independent person. "

42. In one sense s. 6 of the 1997 Act goes further than s. 29 of the 1939 Act which was invalidated in *Damache* in that there is not even provision for the issue of a formal search warrant prior to the entry of the dwelling. At the same time s. 6(1) does not empower a purely warrantless search for no reason, since one of two possible pre-conditions are specified by the sub-section: the subject of the warrant of arrest must either be present in the house or the member in question must have "reasonable cause" to suspect that that person is present in the house. Without these pre-conditions, it is hard to see how, in the light of *Damache*, the section would survive constitutional challenge, since in those circumstances the Oireachtas would have permitted warrantless searches of private dwellings unattended by any appropriate safeguards and without having specified an objective necessity for such a far-reaching intrusion by agents of the State into the privacy of the private dwelling.

43. These pre-conditions to the lawful exercise of the power of search therefore assume a particular importance, because it is compliance with these conditions which provides the necessary objective justification for the search. All of this in turn means that Gardaí effecting such a search must, generally speaking, comply in full with the requirements of the section and, specifically, the reasonable cause requirement. I use the term "generally speaking" advisedly because I fully recognise that there may well be circumstances of manifest urgency or danger – such as those instanced by McKechnie J. in *Byrne* – where a more accommodating approach to the actions of the Gardaí may be required: see, *e.g.*, the judgment of O'Flaherty J. in *Director of Public Prosecutions v.*

Delaney [1997] 3 I.R. 453, a case where the Gardaí forcibly entered a dwelling in order to protect four young children from a threatening crowd outside. This was not a case, however, where there was any such urgency or danger.

44. The critical question remains, therefore, namely, whether the Gardaí complied with these statutory requirements. I think it first necessary for this purpose to consider the reasons given by the Gardaí themselves before then considering whether, in the words of Kearns J. in *Walshe v. Fennessy* [2005] IESC 51, [2005] 3 I.R. 516, 542 these reasons "find some objective justification from the surrounding circumstances and the information available to the arresting officer."

45. It is clear that the decision to forcibly enter the dwelling was taken by Detective Garda Hanrahan only following an exchange with Garda O'Sullivan. What, perhaps, is of central importance in this context, is that Detective Garda Hanrahan expressly accepted that he had no reasonable cause to suspect the presence of Mr. Snaidy in the dwelling *prior* to that point. It is true, of course, that the Gardaí knew that Mr. Snaidy had given 7 The Grove, Sallins, as his address for bail purposes. They also knew that Mr. Snaidy's car was present in the driveway and for this purpose it probably does not matter whether (as the plaintiff stated in evidence) the formal ownership of that car had been transferred to her. But they also knew that the plaintiff had emphatically stated that Mr. Snaidy was not present in the dwelling and that he had gone back to Poland.

46. While these were facts which obviously formed the background to the ultimate decision to enter the premises, I stress again that Detective Garda Hanrahan expressly accepted that these facts *in themselves* did not afford him a reasonable cause to suspect Mr. Snaidy's presence. What was critical to the ultimate decision to enter the premises were the utterances of Garda O'Sullivan, since it was this additional piece of evidence which crystallised the decision to enter.

What words were spoken by Garda O'Sullivan?
47. In her evidence Garda O'Sullivan was emphatic that she had seen a hand at an upstairs window and that this is what she had stated to her colleagues. She never wavered from that evidence in cross-examination. Indeed, she re-asserted her continued belief that another person must have been in the dwelling at the time of the search, even though no such person was found following a thorough search of the premises.

48. In assessing the nature of this evidence, I do not overlook the fact that on this point Fullam J. preferred the account of the plaintiff – who had stated that she had heard Garda O'Sullivan say that she had seen movement at the upstairs net curtain – rather than that of Garda O'Sullivan herself. I also agree that any assessment of these facts and the precise sequences of events has been complicated by the failure to put certain matters to the plaintiff in her cross-examination.

49. Since, however, it is first necessary to ascertain the grounds on which the Gardaí had relied in order to justify the forcible entry, it is important to recall that Detective Garda Hanrahan himself stated in evidence that he had heard Garda O'Sullivan say that she had seen a hand at an upstairs window. Accordingly, it was that utterance – *i.e.*, that Garda O'Sullivan stated that she had seen a hand at the upstairs window - which was the critical one in his mind, since it was this additional statement which then crystallised his belief that Mr. Snaidy was also present in the dwelling, whereas he accepted that he did not have the requisite reasonable belief immediately prior to that point.

50. The difficulty here, so far as the defendants are concerned, is that Fullam J. preferred the evidence of the plaintiff on this point to that of the two Gardaí. He found – and he was entitled to find – that Garda O'Sullivan stated that she had simply seen *movement* – as distinct from a hand - in the net curtains upstairs. If that is so, then the key element which actually formed the basis for Detective Garda Hanrahan's belief as to the existence of a reasonable cause to justify a forcible entry on that afternoon – namely, Garda O'Sullivan stating that she saw a *hand* at the window – simply disappears.

51. I accept, of course, that in the unusual circumstances of this case Detective Garda O'Hanrahan had a *bona fide* subjective belief that he had reasonable cause to enter the dwelling at that point because he *thought* he had heard Garda O'Sullivan say that she saw a hand at the upstairs window. Yet if Garda O'Sullivan was found never to have said these words, then, viewed objectively, there was no proper basis for Detective Garda O'Hanrahan to have formed a reasonable belief based on such a statement.

52. It is true that Fullam J. considered that not much turned on this factual conflict between the two accounts, stating (at para. 120):

> "….having regard to the totality of the evidence which was available to Detective Garda Hanrahan at the relevant time, including in particular Garda O'Sullivan's information regarding movement at the window, which raised real doubts about the plaintiff's claim to have been alone in the house, I am satisfied that Detective Garda Hanrahan's state of mind constituted an objectively justifiable suspicion that Mr. Snaidy was in the dwelling."

53. For my part, however, I think that reasoning in this vital paragraph must suffer two criticisms. First, it tends to overlook the fact that Detective Garda Hanrahan expressly accepted that the other information (the car in the driveway etc.) did not in *itself* justify reasonable cause for a forcible entry. Second, the vital information was that a human hand had been seen at the window: it was this fact – and this fact alone – which tipped the balance in favour of a forcible entry on the part of Detective Garda Hanrahan. It may be, of course, that something less than that – such as the movement at the net curtain – would have sufficed for his purposes. But the fact remains that Detective Garda Hanrahan never gave that evidence: his case rested on Garda O'Sullivan having exclaimed that she saw a hand at the window. To repeat, therefore, once Fullam J. found against Garda O'Sullivan on that point, the key element of the reasonable cause was then also missing. Absent reasonable cause, therefore, the search of the dwelling was unlawful since the necessary elements of the exercise of the s. 6(1) power simply were not present.

Conclusions
54. In the particular circumstances of this case, viewed objectively, the Gardaí must be held not have to discharged the evidential burden of demonstrating that they had a reasonable cause to believe that Mr. Snaidy was present in that dwelling for the purposes of s. 6(1) of the 1997 Act such as would justify the forcible entry of the plaintiff's dwelling.

55. That belief ultimately rested on a claim that Garda O'Sullivan had stated that she had seen a hand at the upstairs window. It matters not that the State might possibly have been in a position retrospectively to justify the search by pointing to other factors to support the existence of a reasonable cause such as the address given for bail purposes or that the car was parked in the driveway. What matters are the reasons given at the time for the reasonable cause and, in this respect, the alleged utterance of Garda O'Sullivan was critical. Once the trial judge found, however, that Garda O'Sullivan did not utter these words regarding the presence of a hand upstairs, the evidential basis for the reasonable cause requirement simply collapsed. This in turn inevitably leads to the conclusion that the forcible entry was not authorised by law and that the Gardaí entered the dwelling as trespassers and in violation of her constitutional rights to the inviolability of the dwelling as protected by Article 40.5.

56. In these circumstances it is unnecessary to consider the other grounds of appeal. I would accordingly allow the appeal and remit the case to the High Court for an assessment of damages.