Neutral Citation Number: [2009] IEHC 243

THE HIGH COURT

2008 258 JR

BETWEEN

K. K.

APPLICANT

AND
GARDA EAMONN TAAFFE,
JUDGE JOHN COUGHLAN,
JUDGE MARY COLLINS
AND
THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENTS

JUDGMENT of O'Neill J. delivered the 15th day of May 2009

1. Relief sought

1.1 On the 7th March, 2008, leave was granted by this Court (Peart J.) to the applicant to seek the following reliefs by way of judicial review:-

1. An order of *certiorari* quashing the order made on the 13th October, 2007, by the second named respondent on the application of the first named respondent authorising the detention of €13,000 cash seized from the applicant until the 12th January, 2008.
2. A declaration that the order made on the 13th October, 2007, by the second named respondent on the application of the first named respondent authorising the detention of €13,000 cash seized from the applicant until the 12th January, 2008, is null and void and of no legal effect.
3. An order of *certiorari* quashing the order made on the 11th January, 2008, by the third named respondent on the application of the first named respondent authorising the detention of €13,000 cash seized from the applicant until the 11th April, 2008.
4. A declaration that the order made on the 11th January, 2008, by the third named respondent on the application of the first named respondent authorising the detention of €13,000 cash seized from the applicant until the 11th April, 2008, is null and void and of no legal effect.

2. The facts

2.1 On the 12th October, 2007, the applicant's house was searched by the gardaí on foot of a search warrant, issued pursuant to s. 26 of the Misuse of Drugs Act 1977, and a safe was discovered. As the applicant was not at home at the time of the search, he gave the gardaí the co-ordinates to open the safe. Cash in the sum of €13,000 was seized from the safe by the gardaí pursuant to s. 38(1) of the Criminal Justice Act 1994 ("the Act of 1994").

2.2 On the following day, the 13th October, 2007, the first named respondent made an *ex parte* application to the second named respondent, District Judge Coughlan, under s. 38(2) of the Act of 1994 for an order authorising the detention of the said cash for a period of three months. This order ("the first order") was duly made.

2.3 On the 11th January, 2008, an *inter partes* application was made to the third named respondent, District Judge Collins, to extend the detention of the said cash for a further three month period. An order ("the second order") to this effect was made on that date.

2.4 These proceedings were instituted on the 7th March, 2008, and leave was granted by this Court on the same date. On the 16th July, 2008, the Director of Public Prosecutions was released from the proceedings and the fourth named respondent, the Commissioner of An Garda Síochána, was added as a respondent, the Director of Public Prosecutions having written to the applicant's solicitors stating that he had no interest in the proceedings and wished to be released. The Commissioner was joined for the purpose of indemnifying the first named respondent in respect of costs.

3. Statutory Interpretation

3.1 The first issue to arise in these proceedings is one of statutory interpretation, the question being, whether or not a failure to insert an express reference to an amending statutory provision (i.e. s. 20 of the Proceeds of Crime (Amendment) Act 2005) connecting it to the original legislative provision (i.e. s. 38(2) of the Act of 1994) means that the District Court did not have power to make an order under s. 38(2) of the Act of 1994. Section 20 of the Proceeds of Crime (Amendment) Act 2005 ("the Act of 2005") substitutes two subsections for subsection s. 38(1) of the Act of 1994. It reads as follows:-

> *"20. - Section 38 of the Act of 1994 is hereby amended-*
> *(a) by the substitution of the following subsections for subsection (1):*
> *'(1) A member of the Garda Síochána or an officer of customs and excise may search a person if the member or officer has reasonable grounds for suspecting that-*
> *(a) the person is importing or exporting, or intends or is about to import or export, an amount of cash which is not less than the prescribed sum, and*
> *(b) the cash directly or indirectly represents the proceeds of crime or is intended by any person for use in connection with any criminal conduct.*
> *(1A) A member of the Garda Síochána or an officer of the Revenue Commissioners may seize and in accordance with this section detain any cash (including cash found during a search under subsection (1)) if –*
> *(a) its amount is not less than the prescribed sum, and*
> *(b) he or she has reasonable grounds for suspecting that it directly or indirectly represents the proceeds of crime or is intended by any person for use in any criminal conduct.'*
> *and*
> *(b) by the insertion of the following subsection after subsection (3):*
> *'(3A) Where an application is made under section 39(1) for an order for the forfeiture of cash detained under this section, the cash shall, notwithstanding subsection (3), continue to be so detained until the application is finally determined."*

Section 38(2) of the Act of 1994, under which the first and second orders in the District Court in this case were made, states as follows:-

> *"(2) Cash seized by virtue of this section shall not be detained for more than forty-eight hours unless its detention beyond forty-eight hours is authorised by an order made by a judge of the District Court and no such order shall be made unless the judge is satisfied –*
> *(a) that there are reasonable grounds for the suspicion mentioned in subsection (1) of this section, and*
> *(b) that detention of the cash beyond forty-eight hours is justified while its origin or derivation is further investigatrd or consideration is given to the institution (whether in the State or elsewhere) of criminal proceedings*

against any person for an offence with which the cash is connected."

Counsels' Submissions

3.2 Mr. Mulloy S.C., for the applicant, submitted that there was a legislative lacuna, in that, there was an absence of express reference in s. 38(2) of the Act of 1994 to the exercise of powers under s. 38(1A) (the power to seize and detain, as substituted in the amendment) of the Act of 1994. He contended that s. 38(2) of the Act of 1994, as it stood, only referred to the exercise of powers under the original s. 38(1) (the power to seize) of the Act of 1994. He concluded that because the cash in this case was seized pursuant to s. 38(1A) of the Act of 1994, that there was no statutory authority under s. 38(2) of the Act of 1994 to make an order to detain the money seized under s. 38 (1A) of the Act of 1994.

3.3 Mr. Mulloy further submitted that the impugned provisions of the Act of 1994 were penal in nature and, as such, must be interpreted strictly as per O'Higgins J. in *Mullins v. Harnett* [1998] 4 I.R. 426; *Kenny J. in Swaine v. C.* [1964] I.R. 423; O'Higgins C.J. in *Director of Public Prosecutions v. Kemmy* [1980] 1 I.R. 160 and Hamilton P. in *Byrne v. Grey* [1988] 1 I.R. 31. He noted that s. 5 of the Interpretation Act 2005, which provides for the broad interpretation of Acts, expressly excludes penal statutes, thereby supporting the view that penal statutes were to be interpreted strictly.

3.4 For the respondents Mr. Murphy S.C. pointed out that the mechanism used by the Oireachtas when amending the Act of 1994 had been substitution and, in his submission, this inferred that a new provision had been inserted in the existing statutory scheme and that s. 38(2) of the Act of 1994 continued to operate as normal. He submitted that s. 38(2) of the Act of 1994 permitted an application to be made to the District Court to detain cash where that cash was seized and detained under the substituted s. 38(1A) of the Act of 1994.

Decision

3.5 I am satisfied that what is at issue here is the process of substitution i.e. removing one provision and replacing it with another. The insertion of new text into s. 38(1) of the Act of 1994, by virtue of s. 20 of the Act of 2005, creates the situation that the reference in s. 38(2) to the power under s. 38(1) continues the connection between s. 38(2) and the substituted provision. As is readily apparent, this substitution is achieved seamlessly without creating any textual awkwardness, let alone requiring any straining of interpretation and manifestly, in my opinion, preserves the functioning of s. 38(2).

3.6 Applying the rule of construction appropriate to a penal statute, namely, that the words of the statute must be construed in accordance with their natural and ordinary meaning and effect given accordingly [the literal test], I am quite satisfied that the amending provision is fully integrated into the original act, thus maintaining the connection between s. 38(2) and the amended s. 38(1A). Accordingly, it is unnecessary for me to consider whether the Act of 1994 is a penal statute or not.

3.7 In a result, the applicant's argument on this point must fail.

4. The content of the orders

4.1 Mr. Mulloy submitted that there were errors on the face of the two orders made in the District Court such that they are void and of no legal effect. In respect of the first order, he submitted that the order did not make grammatical sense, that it was not apparent from a reading of the order that it was made on foot of sworn testimony and that the District Court Judge did not make the appropriate election as to the precise grounds for the suspicion formed. He made similar arguments as to defects in form with regard to the second order, in particular, that the order stated that the District Court was exercising its powers pursuant to s. 38(1A) in making the order instead of s. 38(2) of the Act of 1994, that it was not clear that the order was being made pursuant to sworn testimony and that an election was not made as to the particular grounds for suspicion. It was submitted that the first order does not state whether there were reasonable grounds for suspecting that the cash directly or indirectly represents the proceeds of crime or alternatively that there are reasonable grounds for suspecting that the cash was intended by the applicant for use in connection with criminal conduct. Both phrases appear on the order, it was submitted, but no election was made between them. The applicant makes a similar contention of non-deletion and non-insertion of the word "and" with regard to the terms of the second order. He further contended that the order was null and void and of no legal effect by reason of the fact that it was based on the making of the first order, which in itself was invalid.

4.2 He relied on *Byrne v. Grey* [1988] 1 I.R. 31 in support of his contention that the orders did not reveal, on their face, that the District Judges had satisfied themselves that there were reasonable grounds for the requisite suspicion, required to make orders under s. 38(2) of the Act of 1994. As to the issue of uncertainty or error on the face of the records he relied on the judgement of Carney J. in *Director of Public Prosecutions v. Dunne* [1994] 2 I.R. 537. He relied on the judgment of Keane J. in *Simple Imports Ltd. v. Revenue Commissioners* [2000] 2 I.R. 243 in support of his argument that the first order failed to show jurisdiction.

4.3 Mr. Murphy submitted that the real issue was whether there had been such a defect in form so as to affect the substance of the orders. He argued that there was not and that the documents, on their face, enabled the reader to understand why the orders had been made and on what basis. He pointed to the fact that there was evidence that the orders were made pursuant to the sworn information of a garda. If there was an infelicity, he submitted, it was not one of substance. In addition, he emphasised that the first order was now spent and that it would not be appropriate for this Court to intervene in respect of it.

4.4 The relevant segments of the first order read as follows:-

> *"IT APPEARING from the Information of Garda Eamon Taaffe … that on the 12th day of October, 2007 at 1.50pm at … in exercise of his powers under subsection (1a) of Section 38 of the Criminal justice Act, 1994, as amended by Section 20, proceeds of Crime (Amendment) Act, 2005, Garda Eamon Taaffe seized and detained from one K. K. of … €13,000.00 (thirteen thousand euro). He had reasonable grounds for suspecting that It*
> *(directly or indirectly represented the proceeds of crime of K.K. of …*
> *(was intended by K.K. of … for use in criminal conduct).*

…

> *"AND BEING SATISFIED THAT there are reasonable grounds for suspicion that the informant and that the further detention of the cash is justified*
> *while its origin or derivation is further investigated and*
> *while consideration is given to the Institution (whether in the State or elsewhere) of criminal proceedings against any person for an offence with which the cash is connected."*

4.5 It appears that there is a linguistic error in the latter paragraph of the above passage, in that, what is at issue is the suspicion of the informant that the further detention of the cash is justified.

4.6 The relevant part of the second order is:

> *"UPON APPLICATION this day by the above named applicant, a member of the Garda Síochána, for an Order authorising the further detention of the said cash*
> *BEING SATISFIED THAT*
> *Notice of application was duly served*
> *There are reasonable grounds for suspecting that:*

the said cash directly or indirectly represented the proceeds of crime
the said cash was intended by K.K. for use in connection with criminal conduct.
The continued detention of the said cash is justified
while its origin or derivation is further investigated
while consideration is given to the institution (whether in the State or elsewhere) of criminal proceedings against any person for an offence with which the cash is connected."

4.7 Section 38(2) states that no order shall be made under it "*unless the judge is satisfied – (a) that there are reasonable grounds for the suspicion mentioned in subsection (1) of this section, and (b) that detention of the cash beyond forty-eight hours is justified while its origin or derivation is further investigated or consideration is given to the institution (whether in the State or elsewhere) of criminal proceedings against any person for an offence with which the cash is connected*." Hence, it is clear that what is required is for the District Judge to be satisfied that there are reasonable grounds for the suspicion as described in s. 38 (1) of the Act of 1994 (i.e. the garda has reasonable grounds for suspecting that the cash directly or indirectly represents the proceeds of crime or that it is intended by any person for use in any criminal conduct) and not that the District Judge himself or herself be satisfied that there is a reasonable suspicion of the aforementioned.

4.8 As recorded in the passage from the first order, the first named respondent submitted information to the court setting out the basis for his suspicion. As regards the second order, the affidavit of the first named respondent sworn by him on the 2nd May, 2008, avers that he gave evidence on oath in the District Court on the 11th January, 2008, as to his reasons for applying for a further order pursuant to s. 38(2) of the Act of 1994:-

"6. I say and believe that on the 11th January, 2008, I gave evidence to the effect that the Applicant was a known associate of persons involved in drug dealing in Ballymun, that he was one of few persons to associate with several different individuals in the drug scene in the area and that he regularly frequented areas known for drug dealing. I further gave evidence that the Applicant had refused several invitations to meet me to account for the seized monies. I re-iterated my belief that the monies seized were the proceeds of criminal activity and might be destined for use in further criminal activity. I advised the Court that I wished to investigate the origins of the monies and depending on the outcome, consider a criminal prosecution. The Fourth Named Respondent [now the third named respondent] made an order authorising the further detention of the monies and said that the unwillingness of the Applicant to co-operate with the Garda Síochána had influenced the decision of the Court."

4.9 It is to be observed that the text of s. 38(2) of the Act of 1994 does not require that the facts, upon which the suspicion is grounded, are to be set out by the District Court Judge in the order. In respect of the first order, the "*Information of Garda Eamonn Taaffe*" is expressly referred to and it is clear that the District Court considered this sworn information before making the order to detain the cash. This is to be contrasted with the facts of *Byrne v. Grey* [1988] 1 I.R. 31 where Hamilton P. held that the respondent Peace Commissioner had acted without jurisdiction in issuing a search warrant as he personally had no information before him which would have enabled him to be satisfied that there were reasonable grounds for suspecting that an offence was being committed. In this case I am satisfied that the first order does refer to the sworn information of the first named respondent and hence the second named respondent did satisfy himself that the first named respondent had reasonable grounds for suspecting that the cash seized directly or indirectly represented the proceeds of crime. The word "*sworn*" is not on the face of the order, but it is clear there was a sworn information, which is exhibited in these proceedings. Hence, I am satisfied that the omission of that word is an error of no substance and is certainly not one which could vitiate the force and effect of the order.

4.10 I am also of the view that the linguistic error referred to above is insubstantial and of no consequence, the sense of the passage being apparent in spite of it and could not render the order void, and bears no comparison to the error in the case of *Director of Public Prosecutions v. Dunne* [1994] 2 I.R. 537. In that case a search warrant under s. 26(1) of the Misuse of Drugs Act 1984, to search the defendant's premises was held by this Court (Carney J.) to be defective because the words "*is on the premises*" were deleted from it, such that it did not contain a statement that the Peace Commissioner issuing the search warrant was satisfied that drugs were on a particular premises. That missing phrase formed an essential part of the matters in respect of which a Peace Commissioner or District Judge had to be satisfied so as to conclude that there were reasonable grounds for the suspicion under s. 26 (1) of the Misuse of Drugs Act 1977, as amended by s.13 of the Misuse of Drugs Act 1984, thereby representing a fundamental component of the terms of the order. There is no absence of a similarly important provision in this order.

4.11 As to the second order it is clear that the third named respondent heard the sworn evidence of the first named respondent before making an order. The fact that this is not recorded on the face of the order cannot vitiate the order, particularly in circumstances where s. 38(2) of the Act of 1994 nor the prescribed form for an order authorising further detention of cash seized, as contained in O. 38, r. 6(3) of the District Court Rules 1997, as amended by S.I. No. 47 of 2006 does not require or provide that the giving of sworn testimony be recorded on its face.

4.12 The non-deletion of either of the choices set out in the following "*while its origin or derivation is further investigated while consideration is given to the Institution (whether in the State or elsewhere) of criminal proceedings against any person for an offence with which the cash is connected*", is explained in the light of the evidence on both applications to the effect that both choices were active and appropriate considerations. In the first order it is indicated that both reasons existed by the presence of the word "*and*". In the equivalent part of the second order, I am satisfied that the omission of "*or*" or "*and*" is an inconsequential omission which could not affect the validity of the order. Similarly, the failure on the face of both orders, to make a selection between either of the choices of grounds of suspicion, namely, whether the cash was the proceeds of crime or would be used in the conduct of crime, is fully explained by the sworn information in the first application and the oral testimony in the second which evidence supports both choices.

Failure to show jurisdiction

4.13 The applicant submitted that the first order does not state what power is relied upon in order to give jurisdiction to make the order, in contrast to the terms of the second order. At the top of the first order the following is stated:-

"Criminal Justice Act, 1994, Section 38 (as amended by Section 20, Proceeds of Crime (Amendment) Act 2005) ORDER AUTHORISING DETENTION OF CASH BEYOND FORTY EIGHT HOURS"

The second order recites the following in the first paragraph:-

"Whereas an order was made by the Court at Dublin District Court on the 13th day of October, 2007 authorising pursuant to subsection 1(a) of Section 38 of the above mentioned Act of 1994 the detention for the period of 3 months until the 12th day of January, 2008 of cash in the amount of approximately €13,000 (being an amount not less than the sum prescribed by the Minister for Justice, Equality and Law Reform, for the purpose of the said Act, as the prescribed sum) seized and detained on the 12th day of October, 2007 at [-] in the court (area and) district aforesaid from one K.K. in exercise of powers under subsection (1A) of Section 38 of the above mentioned Act of 1994."

4.14 Although the first order does not have a recital paragraph such as the one featured in the second order, the fact that the first order has a heading with the relevant legislative provision under which the order is being made makes the jurisdiction the District Court is exercising sufficiently clear.

4.15 In the case of *Simple Imports Ltd. v. Revenue Commissioners* [2000] 2 I.R. 243 Keane J. held that the invalidity of a

search warrant could not be cured by the giving of evidence that there was before the District Court evidence which entitled that Court to issue the warrant within the terms of the statute. In that case, which concerned the validity of search warrants, the statutory provisions from which the powers to issue the warrants emanated, s. 205 of the Customs Laws Consolidation Act 1876, and s. 5(1) of the Customs and Excise (Miscellaneous Provisions) Act 1988, expressly required that there be a sworn information before the District Judge to permit him or her to conclude that the customs officer had a reasonable cause to suspect certain matters but the impugned warrants did not show on their faces that this statutory precondition had been satisfied. In the instant case no such express requirement is laid down in s. 38(2) of the Act of 1994. I am satisfied that this case is properly to be distinguished.

4.16 The second order incorrectly recites that the first order, authorising the detention of the cash, was made pursuant to s. 38(1) of the Act of 1994. This should read s. 38(2) of the Act of 1994. In light of the fact that the order then goes on to apply the specific requirements for making an order under s. 38(2), this error, in my opinion, is inconsequential and does not invalidate the second order.

4.17 As is clear from the above there are a number of errors present in both orders. However, I am satisfied that none of these so-called infelicities are so grave so as to detract from the reality that the provisions of s. 38(2) of the Act of 1994 were correctly followed in making both orders and that both orders on their face with sufficient if not impeccable clarity display all essential features for validity.

4.18 I have come to the conclusion, therefore, that the matters submitted by Mr. Mulloy as errors on the face of these two orders invalidating both orders do not have that effect and hence the applicant's contention on this aspect of the case also fails.

5. Delay

5.1 This issue of delay was raised in the written submissions of the respondents but it was not vigorously pressed by them at hearing. I note that the *ex parte* application for leave to pursue judicial review proceedings was made comfortably within the six month time limit. In such circumstances this Court is not disposed to take the view that the applicant moved otherwise than promptly.

6. Conclusion

6.1 For the reasons set out above, I must refuse the reliefs sought in these proceedings.