

THE HIGH COURT

[2016 No. 106 J.R.]

BETWEEN

QASIM HUSSAIN

APPLICANT

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

AND

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Mr. Justice Noonan delivered the 3rd day of November, 2016.

1. In these proceedings, the applicant seeks orders by way of judicial review arising from the seizure of certain items by An Garda Síochána pursuant to search warrants issued in that behalf. The essential claim of the applicant is that the items seized are subject to legal privilege, thus exempt from seizure and should be returned to him.

Factual Background

2. The applicant is a practising barrister and a member of the Law Library. He avers in his affidavits that he provides professional legal services to clients from premises at 42A Clanbrassil Street, Dublin 8. He is also a director of a number of companies whose registered place of business is 42B Clanbrassil Street, Dublin 8. 42A and 42B Clanbrassil Street are adjoining but physically separate premises. On the morning of the 25th of November, 2015, members of An Garda attended at the applicant's family home at Ratoath, County Meath pursuant to a search warrant issued by the District Court. There is no challenge to the validity of the warrant in these proceedings. At the time of execution of the warrant, the applicant, his parents and siblings were present at his home. A number of items were seized by the Gardaí which are identified by the applicant as follows:

- (a) Legal documentation including oral transcripts;
- (b) Laptop model Sony VAIO notebook;
- (c) Laptop model Lenovo Y50;
- (d) My Samsung Galaxy Note 4 mobile phone;
- (e) My personal hard drives (x2).

3. The applicant avers that during the course of the search, he informed a Garda present that he was a barrister and that the items above referred to contained information which was subject to legal privilege as it related to his current clients as well as documentation relating to other cases he had retained from his practice as a devil.

4. At the same time as the search of the applicant's home was being carried out, the Gardaí also attended at 42A and 42B Clanbrassil Street and carried out a search of those premises on foot of a separate warrant issued by the District Court. This warrant is not impugned in these proceedings. In the course of the search in Clanbrassil Street, the Gardaí removed a large number of items which are not the subject of these proceedings. Among them, the applicant avers that what he describes as "client files" of his were seized from 42A Clanbrassil Street which are also subject to legal privilege. In the course of the affidavits sworn in support of this application, extensive complaint is made about certain media coverage of the Garda raid on the Clanbrassil Street premises. It seems to me however that that is not in any sense material to the issues that arise for consideration in this case. Following the carrying out of the searches, the applicant emailed Sergeant David Kennedy, a member of the force involved with the investigation, later that afternoon. In his email the applicant said:

"As you are now aware, I am a barrister-at-law engaged in the advising of clients including immigration and related issues. Since the morning, I have had the opportunity to seek counsel from my colleagues and also consider s. 48 of the Criminal Justice (Theft and Fraud Offences) Act 2001 ("**the Act**"). In this regard I draw to your attention s. 48 (6) of the Act which specifies:

'Where a member of the Garda Síochána has entered premises in the execution of a warrant issued under this section, he may seize and retain any material, other than items subject to legal privilege, which is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the warrant was issued.'

My mobile telephone model and make of which is Samsung Note 4, my two laptops 'Lenovo Y50 and Sony VAOI', as well as the hard drive seized from my room, and all the immigration related data on the servers at 42B Lower Clanbrassil Street, Dublin 8 and documents including names, addresses, passport copies, work or other related documents of my clients are subject to legal privilege."

5. The applicant asked for their immediate return.

6. Sergeant Kennedy responded to this email on the 27th of November, 2015, in the following terms:

"Dear Mr. Hussain

Thank you for your correspondence in relation to this matter, can you please specify to me the following;

1. The exact basis on which you are claiming privilege as outlined below.
2. The exact files for which you are claiming are subject to legal privilege.

Kind regards, etc"

7. By letter of the 3rd of December, 2015, solicitors representing the applicant and his father, Zahid Hussain, wrote to the respondent again complaining about the media coverage and in a separate section entitled "Return of Privileged Items" said:

"Several of the items Gardaí have seized from the premises at Lower Clanbrassil Street and from the family home are subject to legal professional privilege as they predominantly contain confidential communications between Qasim Hussain and his clients for the purposes of giving legal advice. As a legal practitioner it is Qasim Hussain's duty to invoke this privilege on behalf of his clients until he is given the appropriate authority to waive such."

8. The letter went on to identify the items previously specified by the applicant.

9. The Gardaí responded to this letter on the 4th of January, 2015, saying, inter alia,:

"I also note that an electronic mail from Mr. Qasim Hussain was received on the 25th of November last; a copy of the email and my reply is attached. Please note that a response has not yet been received."

10. The applicant's solicitors again wrote on the 1st of February, 2016, seeking the return of the items previously identified stating:

"These items predominantly contain confidential communications between Qasim Husain B.L. and his clients for the purposes of providing legal advice and also documentation relating to applications in immigration matters, including his client files."

11. In a supplemental affidavit sworn herein on the 25th of February, 2016, the applicant says:

"[3.] ...I am unable to provide the court with a comprehensive list of the file names and the exact contents of each file. I believe the respondent has seized and retained over 100 of such files but I am unable to cross reference and confirm this number as I have no access to my computers and hard drives.

[4.] I say that these files relate to my clients to whom I provided legal advice in respect of mainly immigration matters but in some cases other areas of law also. I say that I provided such advice from the offices of 42A Clanbrassil Street. I say that I provided such services always in my capacity as a qualified legal professional, having been called to the Bar of Ireland in 2013 and been a member of the Law Library ever since this date. I say that these files contain identification documents which are of high importance to my clients and to which I am receiving continuous demands for their immediate return. The documents that are contained in the client files generally include:

- (i.) Original passports;
- (ii.) Original birth certificates;
- (iii.) Marriage certificates;
- (iv.) Evidence of clients' employment/self employment;
- (v.) Utility bills;
- (vi.) Bank statements;
- (vii.) Miscellaneous correspondence from institutions which formed the part of evidence of residence;
- (viii.) Correspondence to or from the client;
- (ix.) In some cases, correspondence from the clients and certain solicitors and their instructions to me;
- (x.) Correspondence from Irish naturalisation and immigration services."

12. The applicant goes on to say that some of the documents relate to family law matters and some to drafting submissions to the Irish Naturalisation and Immigration Service ("INIS") or legal advice relating to applications or appeals before the INIS. In relation to the laptops and mobile phone, the applicant avers that they are subject to legal privilege as they contain confidential information communicated to him for the purpose of seeking legal advice by his clients.

13. It is of note that in none of his affidavits does the applicant identify a single client or any solicitor who instructed him on behalf of such client. Other than general assertions, the applicant gives no information as to the nature of the legal advice he gave to any of his clients or the context in which it was given or the subject matter thereof. The applicant does not suggest that any advice allegedly given related to litigation.

14. A number of replying affidavits are relied upon by the respondent, the first being of Superintendent Stephen Courage, the senior investigating officer appointed to conduct a Garda operation known as "Operation Vantage". Superintendent Courage says that the purpose of this operation is to investigate so called "marriages of convenience" and focuses primarily on marriages between EU nationals and non-EU nationals. The investigation encompasses not only specific marriages but also organised networks facilitating same and the procurement of forged documents. Superintendent Courage gives a comprehensive outline of the nature of Operation Vantage, its aims and objectives. A particular focus of the investigation is into non-EU nationals with United Kingdom residency who seek to bring family members into the United Kingdom through what is described as the "Surinder Singh" route, a reference to a decision of the European Court of Justice in 1992 which Superintendent Courage describes as having created a loophole for British

nationals to secure immigration rights for their non-EU family members through another EU state. He avers that Ireland has become an attractive option for persons seeking to pursue the Surinder Singh route, with many creating bogus residency applications in Ireland with false documentation indicating that they have been resident in this jurisdiction for the requisite period of time.

15. In relation to the premises 42 Clanbrassil Street, Superintendent Courage avers that enquiries disclose that there are at least 24 different companies and business names registered at this address. The applicant is a director of some of these companies as is his father. These companies appear to engage in extremely diverse activities from immigration services to currency exchange to fast food. Superintendent Courage avers at para. 21 of his affidavit that No. 42A Clanbrassil Street consists of two rooms, one occupied by a barber shop and the other vacant. He says that an impasse has arisen in relation to the applicant's claim of privilege herein because he has made no effort to identify the privileged documents in this case. The applicant's position is simply that all documents are privileged.

16. Faced with that situation, Superintendent Courage avers that independent documentary counsel has been retained to examine all of the documents seized and give an opinion as to whether or not they might be subject to privilege. Counsel has the assistance of a member of An Garda not associated with the investigation. Counsel's assessment of the hard copy documents has now been completed. A further affidavit was sworn by Sergeant Kennedy in which he says that at no time has the applicant specifically identified what items seized are the subject of privilege. He says that the applicant claimed privilege over all items seized because he is a barrister. In a further replying affidavit, sworn after the grant of leave herein, the applicant again says that he is unable to list specific documents that are subject to privilege without any more precision than he has done to date. At para. 17 of his affidavit, the applicant appears to resile somewhat from his earlier claim that all the items seized are privileged and says:

"I say that I am aware that not every document contained in the computers, mobile phones and client files will be a legally privileged document. As outlined in my supplemental affidavit, the contents of the client files are predominantly composed of original identification documents and other material evidence to be used in applications before the INIS. The majority of these files will not contain confidential communications and this is evident from my previous affidavit."

At para. 18, he says:

"I have now received several solicitors' letters threatening legal action against me personally",

and he exhibits these. There are four letters, two addressed to the applicant's father at a business known only as "IBI" and two to a business called "DSQ Associates". The applicant is not referred to in any of this correspondence.

17. By letter of the 13th of April, 2016, the Chief State Solicitor on behalf of the respondents and notice parties wrote to the applicant's solicitors indicating that counsel had completed the assessment of the hard copy files which was found to come within a number of categories and extended the following invitation to him:

"We suggest that the applicant could greatly assist this exercise by identifying the potential files and/or agents and/or solicitors and/or clients and/or customers and/or applicants and/or work areas, including the provision of a methodology statement which would describe how he manages his practice to help in narrowing any review of the electronic material and devising a review methodology. This would have the effect of speeding up the process of review."

18. In a supplemental affidavit, Superintendent Courage refers to the completion of the assessment of the hard copy documents and also refers to threats and intimidation to a potential witness in the investigation allegedly made by a member of the applicant's family. Insofar as the hard copy documents are concerned, documentary counsel has identified a number of categories, one of which includes material which in his opinion is subject to legal privilege. The latter category is not conceded by An Garda on the basis that although it may be prima facie subject to privilege, the crime/fraud exception may apply.

19. With regard to the electronic data on the applicant's laptops and mobile phone, this has not been accessed by An Garda or documentary counsel to date pending the resolution of these proceedings. Although certain proposals and counter proposals have been made in correspondence, the issue remains unresolved.

Section 48 of the Criminal Justice (Theft and Fraud Offences) Act 2001

20. This section provides for the issuing of search warrants by a judge of the District Court in relation to suspected offences under the Act. Subsection 6 provides as follows:-

"(6) Where a member of the Garda Síochána has entered premises in the execution of a warrant issued under this section, he may seize and retain any material, **other than items subject to legal privilege**, which is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the warrant was issued." (My emphasis).

21. It is thus clear that once an item is subject to legal privilege, the Gardaí have no entitlement to seize it in the course of executing a warrant issued under the section.

The Applicant's Case

22. The applicant makes a relatively simple case. He says that the items seized by the Gardaí are subject to legal privilege and accordingly, the power to seize and retain such material pursuant to a warrant issued under s. 48 of the Criminal Justice (Theft and Fraud Offences) Act 2001 is expressly excluded. He argues that the seizure and retention of the items in issue are accordingly unlawful. He says that once the privilege is asserted, that is the end of the matter and the Gardaí have no right to sift through or examine the material with a view to ascertaining whether the claim is well founded or not. It necessarily follows from this contention, the argument goes, that even though some of the material seized is not subject to legal privilege, the fact that it is mixed or intermingled with material that is privileged means that none can be retained, it being impermissible for the Gardaí to seek to differentiate between privileged and non-privileged material.

23. The applicant argues that this is the necessary consequence of the fact that the 2001 Act provides no machinery which enables or entitles the Gardaí to test a claim of privilege once asserted. The applicant draws attention to the provisions of the Companies Act 2014 and in particular s. 787(4) thereof which expressly provides for an extended power of seizure where the seizable material is mixed with non-seizable material permitting the seizure of the entire. The absence of such an extended power of seizure in the 2001 Act must therefore mean that once a claim of privilege is asserted over material that is mixed with other material, none may be the subject of seizure. The applicant places reliance on the analogous provisions of the Criminal Justice and Police Act 2001 in the United Kingdom and the decision of the High Court in that jurisdiction in *R. v. Chesterfield & Ors. ex parte Bramley* [2000] QB 576.

24. Mr. McDonagh S.C. for the applicant argues that if the electronic material on the laptops, hard drives and mobile phone is not subject to legal privilege as the Gardaí claim, then they should have the courage of their convictions and examine the material. If on the other hand they believe that it does contain privileged material, then its seizure was patently unlawful under the subsection and it must be returned forthwith.

25. This creates a dilemma for the Gardaí. If they access the electronic material and it contains material which is clearly subject to legal privilege, they risk prejudicing any potential criminal prosecution that may be brought. The approach adopted by the respondent in this respect to date appears to me to be both reasonable and pragmatic. However, insofar as the cooperation of the applicant may be required in respect of the balance of the material, he clearly cannot be compelled to provide it. The Act itself provides no mechanism for the resolution of this issue.

Legal Privilege

26. Central to the issue in this case is what constitutes legal privilege. The *locus classicus* is *Smurfit Paribas Bank Ltd v. A.A.B. Export Finance Ltd* [1990] 1 I.R. 469. In delivering the majority judgment of the Supreme Court, Finlay C.J. reviewed the historical development of the privilege. He drew attention to the fact that originally, it appeared to be confined to litigation but evolved by expansion into the sphere of legal advice. Even then, the Chief Justice felt that such advice should necessarily be closely and proximately linked to the conduct of litigation and the function of administering justice in the courts. Underlying all legal advice in the true sense is the potential for litigation. He said (at p. 478):

"Having regard to those considerations I accept that where it is established that a communication was made between a person and his lawyer acting for him as a lawyer for the purpose of obtaining from such lawyer legal advice, whether at the initiation of the client or the lawyer, that communication made on such an occasion should in general be privileged or exempt from disclosure, except with the consent of the client.

Similar considerations do not, however, it seems to me, apply to communications made to a lawyer for the purpose of obtaining his legal assistance other than advice. There are many tasks carried out by a lawyer for his client and properly within the legal sphere, other than the giving of advice, which could not be said to contain any real relationship with the area of potential litigation. For such communications there does not appear to me to be any sufficient public interest or feature of the common good to be secured or protected which could justify an exemption from disclosure."

27. The *Smurfit Paribas* principles were succinctly summarised by Kelly J. (as he then was) in *Miley v. Flood* [2001] 2 I.R. 50 where he said (at 69):

"The decision in *Smurfit Paribas Bank Ltd. v. A.A.B. Export Finance Ltd.* (No. 1) [1990] 1 I.R. 469 established the following propositions:-

1. legal professional privilege can only be invoked in respect of legal advice and not in respect of legal assistance;
2. where the claim of privilege is challenged, the onus is placed upon the person invoking that privilege to justify it;
3. the correct formulation of that privilege which arises in Irish law, other than in contemplation of furtherance of legal proceedings is as follows '... where it is established that a communication was made between a person and his lawyer acting for him as a lawyer for the purpose of obtaining from such lawyer legal advice, whether at the initiation of the client or the lawyer, that communication made on such an occasion should in general be privileged or exempt from disclosure, except with the consent of the client' (per Finlay C.J. at p. 478);
4. what is privileged is the communication. That communication only attracts privilege if it seeks or contains legal advice. The communication of any other information is not privileged in Irish law."

28. The same judge speaking subsequently in *Irish Haemophilia Society Ltd v. Lindsay* (unreported, High Court, Kelly J., 16th of May, 2001) said (at p. 13):

"As is clear from my judgment in *Miley v Flood* [2001] 1 I.L.R.M. 489 following the *Smurfit Paribas* case the obligation and onus is on a party asserting legal professional privilege to prove that such a claim is justified."

29. In *Ochre Ridge Ltd v. Cork Bonded Warehouses Ltd* (unreported, High Court, 13th of July, 2004), Lavan J. considered that for the communication to attract the privilege:

"...the dominant purpose of the communications must be the seeking or giving of legal advice. While most of the Irish cases or textbook writers do not employ the terminology of a 'dominant purpose' as to the test for legal advice privilege (it more usually being associated with 'litigation' privilege, not the subject of discussion here), it is useful in determining the scope of 'legal advice' and appears to form part of the test in the English authorities: see *Three Rovers District Council v. Governor and Company of the Bank of England* (No.5) [2003] QB 1556."

30. Lavan J. also considered where the onus of proof lay once privilege is asserted:

"The Onus Of Proof As To Legal Professional Privilege"

Legal advice privilege belongs to the client and entitles them to refuse to disclose any communications with his or her lawyer. As is stated succinctly in *Delany & McGrath Civil Procedure in the Superior Courts* (Roundhall, 2001) at para. 8.098, the onus of proof as to legal professional privilege is on the person claiming privilege to establish that the documents are privileged. However, once the party claiming privilege has discharged this onus, it then falls on the party impugning the claim of privilege to do so by evidence."

31. The remarks of Barron J. in the Supreme Court in *Gallagher v. Stanley* [1998] 2 I.R. 267, at 274 echo the same approach:

"In the present case, the hospital authorities [*who are claiming privilege*] maintain that the steps which they took to obtain statements related solely to the consideration that legal proceedings might be issued. That might well be, but it is not the view of the defendant which is relevant, but that of the court. Before the court can be satisfied, it needs evidence from which it can determine the reality and not just a bald assertion without anything to back it up."

32. Even where a document might otherwise be subject to privilege, the privilege can be lost in circumstances where the communication in issue is criminal or fraudulent in itself or intended to further any criminal or fraudulent purpose. In *Murphy v. Kirwan*

[1993] 3 I.R. 501, Finlay C.J. summarised the matter thus (at 511):

“the essence of the matter is that professional privilege cannot and must not be applied so as to be injurious to the interests of justice and to those in the administration of justice where persons have been guilty of conduct of moral turpitude or of dishonest conduct, even though it may not be fraud.”

33. For the crime-fraud exception to apply it is not necessary that the lawyer concerned should be party to or even aware of the criminal or fraudulent purpose to which his client intends to put the communication between them.

Discussion

34. The applicant has asserted in both his statement of grounds and notice of motion a blanket claim to privilege over all of the items in schedule A to which I have referred. He subsequently resiled significantly from that claim by conceding that many of the items seized are not in fact privileged. Indeed it is manifest from his own evidence that this must be so. The documents listed by the applicant in his supplemental affidavit as being client files seized from 42A Clanbrassil Street include a list of items such as original passports, birth certificates, marriage certificates etc., that could not conceivably be subject to a claim of privilege.

35. The circumstances in which the applicant advances a claim of privilege in this case are extremely unusual and perhaps unique. He is a practising barrister, a member of the Law Library and thus subject to its code of conduct. This ethical code, which governs his legal practice, prohibits him from providing legal services to the public directly without instructions from a solicitor, save in the case of the Bar Council's scheme of direct professional access, which does not arise here. He claims to be providing legal advice to “clients”, but whose clients they are is a matter of considerable doubt. Insofar as any clients are identified from exhibited correspondence, they are clients of his father and of some of the businesses registered in Clanbrassil Street.

36. The applicant by his own admission is providing a service to “clients” without the intervention of a solicitor and as such, he clearly does so outside the ethical parameters of the profession of which he is a member. While this might not be unlawful, it is difficult to see how he could legitimately claim to be representing “clients” in a professional capacity in such circumstances. This of course is a prerequisite to a claim of privilege as explained in the authorities to which I have referred.

37. Although the applicant professes to practice from the Law Library, and holds himself out as such on its website, in his affidavits he has sworn on more than one occasion that he practices from 42A Clanbrassil Street, a premises which according to the uncontroverted Garda evidence, comprises a barber shop with an empty room behind. Many of the documents identified by the applicant such as original passports and the like, are not documents of a kind that would normally be associated with instructions to counsel. Furthermore, his father has sworn an affidavit in which he avers that “I instructed the applicant to draft submissions of my clients for residence cards and applications for reviews submitted to the Irish Naturalisation and Immigration Service.” Patently therefore, the clients referred to are not clients of the applicant but rather of his father, a non lawyer.

38. The applicant exhibits a number of letters in his replying affidavit which are said to underpin the claim that solicitors acting on behalf of his clients are threatening to sue him. This assertion is plainly misleading. Strikingly, none of the letters is addressed to the applicant, threaten to sue him or even contain a reference to him. Despite the blanket claim of privilege initially asserted, the applicant has not identified a single client or solicitor who allegedly instructed him to provide legal advice. His explanation is that he cannot be expected to remember the name of every client he represents in circumstances where his practice is in effect contained in the items seized. While that proposition might not seem unreasonable, it would be extraordinary if a barrister could not recall the identity of any solicitor who briefed him and thereby seek information from such solicitor which would assist him in identifying the relevant clients.

39. As *Smurfit Paribas* and succeeding cases make clear, it is not sufficient that the communication in question be between a person and a lawyer, but the lawyer must be acting for that person as a lawyer and must give the legal advice in that capacity.

Conclusion

40. The onus remains squarely on the applicant to make out the claim of privilege which he asserts. Having regard to the factors which I have identified, it does not seem to me that he has discharged this onus. Apart from a bald assertion made by the applicant himself that the items are privileged, in itself insufficient to ground a claim of privilege, all the available evidence points to the opposite conclusion. Even if it could be said that the applicant might in some circumstances be regarded as having provided legal assistance to members of the public, that is not enough. The view of documentary counsel as to whether privilege has been made out in a small number of instances does not of course bind the court or operate to discharge the onus that lies upon the applicant. Nor does it bind the respondent who has reserved the right to rely on the crime/fraud exception in relation to such documents.

41. Accordingly, as the applicant has not discharged the onus of establishing that legal privilege attaches to any of the seized material, this claim must fail.