COURT OF APPEAL

(CIVIL)

Neutral Citation Number: [2019] IECA 113

[2017 No. 215]

The President
Edwards J.
McCarthy J.

BETWEEN

ADAM HOWE

APPLICANT/APPELLANT

AND

THE REVENUE COMMISSIONERS AND PATRICK ROCHE

RESPONDENTS

AND

LAURENCE KEANE

NOTICE PARTY

AND

[2017 No. 214]

LAURENCE KEANE

APPLICANT

AND

THE REVENUE COMMISSIONER AND PATRICK ROCHE

RESPONDENTS

AND

ADAM HOWE

NOTICE PARTY

JUDGMENT of the Court delivered on the 12th day of April 2019 by Birmingham P.

Background

1. This is an appeal from a decision of the High Court (White J.) delivered on 24th February 2017 refusing the applicant/appellants', Mr. Adam Howe and Mr. Laurence Keane, relief by way of judicial review. The judicial review proceedings see the applicants seek the return of a sum of money seized from them on behalf of the respondents on 8th August 2015.

2. The background to the case is to be found in the fact that on 8th August 2015, both applicants were at Dublin Airport. They were about to board a Ryanair flight from Dublin to Ibiza and had each checked in a bag. They were approached by Customs & Excise officials. Mr. Adam Howe had €3,900 in cash on his person and Mr. Laurence Keane had €4,250 on his person. When their checked baggage was examined, it was discovered that there was cocaine valued at €2,100 concealed in a sock inside a shoe in Mr. Howe's baggage and cocaine concealed in a tub of hair gel in the luggage of Mr. Keane which had an estimated street value of €2,100. The applicants did not provide any explanation for the cash apart from the fact that Mr. Howe stated that he had received the money from his mother and would be spending it during his three days in Ibiza. The cash was seized and detained by Customs Officers at 9.30am that morning. A small sum of money was returned to each applicant, presumably to cover immediate expenses. Later that morning, one of the Customs Officers swore an information before a Judge of the District Court seeking a detention order pursuant to s.38 of the Criminal Justice Act 1994, as amended by s. 20 of the Proceeds of Crime (Amendment) Act 2005, on the basis that there were reasonable grounds for suspecting that the applicants were exporting or intending to export cash of unknown origin and that the cash, directly or indirectly, represented the proceeds of crime. Having considered the sworn information, the Judge made an order authorising the detention of the monies for a period of three months, expiring on 7th November 2015. Thereafter, Mr. Patrick Roche, the investigating officer, wrote to both applicants and sought a detailed explanation of the source and the intended use of the cash, along with any available documentary proof in relation to whatever claim was being made. There was no reply to his letters.

3. On 28th October 2015, the investigating officer wrote again, this time putting the applicants on notice that he intended to seek a further detention order at a hearing on 6th November 2015. On that occasion, the applicants were represented by counsel who opposed the application. He did so on the basis that the sum seized from each individual was below the statutory threshold, and thus, that the suspicion was inadequate. The investigating officer outlined the basis of his suspicions and his belief that a process known as "smurfing" was involved whereby money from the same source is broken down into smaller amounts in order to avoid detection. Having considered the matters before him, Judge Halpin, who was the presiding Judge in the District Court on that occasion, authorised the further detention of the monies for another three months to 5th February 2016.

4. Following the hearing on 9th November 2015, the investigating officer wrote to the solicitor on behalf of the applicants enclosing a copy of the detention order of 6th November which authorised the continued detention of the cash that had been seized until 5th February 2016. The investigating officer requested that in order to progress his investigation, that he be provided with a full and detailed explanation of the source and intended use of the cash and any documentary evidence in support of any claim in respect of the cash. No reply was received to that letter. On 28th January 2016, the investigating

officer wrote again to the solicitor indicating that he would be applying at the District Court on 5th February 2016 for a further extension, and once more, setting out that he was seeking a full and detailed explanation. What occurred in the District Court on 5th February 2016 is central to the application for judicial review. A transcript of the proceedings in the District Court that day has been made available. From that transcript, it appears that when the case was called by the Registrar, counsel: Mr. Keith Spencer BL, said that he appeared for Laurence Keane and Adam Howe. The presiding Judge, Judge Faughan, asked "is this in for hearing?" and counsel responded "it's a renewal of the application for the detention of monies on the part of the Gardaí" to which the Judge said "alright, and has anything changed?" to which Patrick Roche, the investigating officer, erroneously described as Garda Roche in the transcript, said "no, Judge". Mr. Roche was then sworn, and, according to the transcript, said:

> "Judge, my application today is for an order authorising the further detention of cash in the amount of €8,150, being an amount not less than the sum prescribed by the Minister for Justice, Equality & Law Reform for the purpose of the said Act, the prescribed sum being €6,348.67. This was seized and detained on 8th August 2015 at Dublin Airport from Laurence Keane and Alan Howe. The cash was seized as it was suspected to be the proceeds of crime or for use in criminal conduct. There's two previous orders in this case, the last one being from 6th November 2015 to 5th February 2016. Investigations are currently ongoing in this case and we are currently awaiting various mutual assistance requests. I have also sent letters to the respondents' counsel asking for a full and detailed explanation as to the source and intended use of the cash, to which I have received no reply. Judge, if you wish, I can go and outline the factors of the case at the time when they were stopped?"

At this point, the Judge interjected and said "well, let's see what counsel has to say firstly". In response, counsel said "well, Judge, it's the State application" to which the Judge said "yes, is it being opposed is what I'm asking?" Counsel said "it's being opposed, yes Judge". The Judge asked "on what basis?" Counsel said "well perhaps the guard can give his evidence first" to which the Judge said "no, no, at that stage why are you opposing it before we get into it? There are two previous orders already made". Counsel said "yes, Judge". The Judge repeated "what has changed?" Mr. Spencer said "well, in substance, I opposed the last order that was made, the amount, as the Garda has given evidence, Judge, was just over €8,000 and in terms how that amount was arrived at, it's an amount that was held on the person of two individuals and each individual amount is less than the prescribed statutory amount that's required". The Judge said "you've said that letters were written to the solicitors and not responded to, to clarify as to what" Counsel said "that's the case". The Judge said "when was that letter written?" Mr. Roche interjected to say "the most recent letter was sent out last week, there was another letter sent out on 9th November and there was a previous one sent out". The Judge asked "have any of those letters been responded to?" and was told, no. Counsel commented "yes, Judge, it's the State's obligation to make out the proofs". The Judge said "no, no, I'll do all of that, I want to get to the nub of it as to why and why is this being opposed today". To this, counsel said "in the first instance, Judge, it's being opposed because we say that there's something of an abuse of process where the two amounts are added together individually, the statutory provisions wouldn't have applied to each of these amounts and they were, the individuals were apprehended separately. Those individual amounts then added together did add to an amount over the prescribed statutory sum". The Judge asked "and has that been put in writing?" To which counsel said "in fairness, the guard is well aware of my argument because I made it on the last occasion". To this, Mr. Roche said:

> "Judge, I am aware of the arguments, but Judge, you might be aware of a term called 'smurfing' in the financial industry, it's where – whereby cash originates from the source or from the same account and use, it's broken down into smaller amounts so as to avoid detection, and we believe that was the matter in this case. These two individuals were traveling together and I believe that this cash from both amounts arrived from the same source or for the same intended use."

The Judge said "but you're making that application today or you're responding to the application, but you haven't engaged in the correspondence in the intervening period?" Counsel confirmed "no, no, we haven't Judge". Upon being invited to continue, Mr. Roche resumed his evidence, saying:

> "Judge, just also to add, at the time that Mr. Howe and Mr. Keane were stopped, a quantity of white powder was discovered and sealed in both respondents' baggage. Mr. Howe was discovered with approximately 30grams of cocaine with a value of around €2,100 hidden in a shoe in his baggage. Mr. Keane was also discovered with approximately 30 grams of cocaine with a value of €2,100 hidden in a tin of Brylcreem in his baggage. For this, both individuals were arrested at the time of the offence. Mr. Howe is registered for self-assessed Income Tax, but to date has never submitted a tax return. Mr. Keane does have employment, and again, there's been no documentation produced in this case as to the source or intended use of this cash."

At this point, the Judge said "very good, thanks. Anything else?" to which Mr. Roche said "no, Judge, my application would be for a 3-month order in this case", the Judge said "very good". At this stage, counsel said:

> "[y]es, Judge, in terms of the proofs that must be brought before the Court, I'd say that the evidence is deficient, Judge. The Garda didn't give evidence as to how the origin and derivations of the funds is being further investigated."

The Judge responded "there are two previous orders: this is a continuation". Counsel said "yes, Judge". The Judge asked "am I right?" Mr. Roche said "yes, there is, Judge". The Judge invited counsel to continue. Counsel said "well, what I should say, Judge, is that just because an order has been made in the past, it doesn't follow automatically that this Court will rubberstamp it. The evidence has to be given". The Judge indicated that he did not have rubberstamping in mind, saying "…I'm simply trying to get the thing moved on. There's a big list". Counsel said "I won't take up much of the Court's time. The Court will appreciate that I'm appearing to show opposition to the continued detention and pointing out that certain proofs haven't been made out". The Judge asked "okay, are your clients in Court?" to which counsel said they were not and the Judge said "so how can they give evidence?" to which counsel said "they're not giving evidence". The Judge said "yes, well, if you want to call them? If you want to get to the nub of the correspondence that he was dealt with". Counsel said "no, Judge, in the first instance, that's not my case. I don't have to make any case I'm saying". The Judge then said "yes, I've heard, I've heard. I want to hear from your clients, are they here?" Counsel confirmed again that they were not there. The Judge then said "alright, we need to hear from the clients. Now what date suits both parties?" Counsel and Mr. Roche indicated whatever date was convenient for the Court with Mr. Roche indicating that in the meantime, there was a need for an order for the cash to be retained as the order would run out today. The Judge agreed that it had to be, saying to counsel:

> "[y]ou can't come in one hand, even two hands tied behind your back. Your clients need to be here. They need to deal with it. They need to be examined. If you want this dealt with and they want it dealt with as to the origins of the money, if it was 50/50 or whatever breakdown it was, have them in Court and let's deal with it, put it in for hearing."

The matter was then put in for the next available date which was 23rd March. Mr. Roche observed "and just to point out to the Court, that this detention is simply just to investigate the source of the cash. We're not making a determination whether an application would be made to the Circuit Court for forfeiture just at this point".

5. Some fifteen grounds were formulated in support of an application for judicial review. In summary, these contend that the sum seized from each individual was below the prescribed statutory minimum in order for the provisions of s. 38 of the Criminal Justice Act 1994, as amended by s. 20 of the Proceeds of Crime (Amendment) Act 2005 to apply; that the hearing in the District Court on 5th February 2016 was not conducted in accordance with fair procedures, or the procedures mandated by s. 38 and that the Judge erred in law and acted unreasonably by reversing the burden of proof and stating that he was adjourning the matter so that the applicants could attend and give evidence of the origin of the money. It was also contended that in adjourning the case, the Court did not make an order pursuant to s. 38 and that, in consequence, the previous order had lapsed and that there was therefore no order in place

permitting the continued retention of the funds pursuant to the Criminal Justice Act 1984, and that accordingly, the funds should be returned to the applicants.

The Approach of the High Court Judge

6. The High Court Judge addressed, first, the issue relating to the aggregation of two sums of money and the response by the authorities that what was involved was 'smurfing'. He said that that was not a valid ground to quash the order of 5th February 2016. This issue had already been determined by Judge Halpin on 6th November 2016 and Judge Faughnan did not determine the issue again. Indeed, the fact that he did not determine the issue was the subject of a separate submission. He felt it would be inappropriate for the High Court to make a final determination on that issue in these proceedings as the applicants were entitled to make their arguments in that regard in the course of the s. 39 application for forfeiture before the Circuit Court. The High Court Judge addressed the complaint that the proceedings in the District Court on 5th February 2016 were reduced to a rubberstamping exercise by pointing out that the Judge in the District Court had acknowledged that it did not follow that because an order had been made in the past that it should be continued. He said that there was ample evidence before the District Court from the sworn testimony of Officer Roche to pass the threshold contained in the section that there were reasonable grounds for suspicion that the monies, directly or indirectly, represented the proceeds of crime. He said that to suggest that the District Court hearing was a mere rubberstamping exercise was incorrect as the Judge in the District Court, from the evidence already given by Officer Roche had ample evidence ultimately to make the determination, and in fact, did make an order that the monies be detained until 23rd March 2016. He pointed out that consideration had also to be given to the determination of the District Court to allocate sufficient time for an ample hearing and to adjourn the application to the next available date, when adequate time would be available.

7. The Judge then grouped a number of grounds together, these being the arguments relating to:

> (i) the reversal of the burden of proof and requirement that the applicants attend Court;
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> (ii) denial of fair procedures and
>
> (iii) not completing the hearing and refusing to entertain further arguments until the applicants were present.

The High Court Judge said that he felt that the Judge in the District Court had misunderstood the burden of proof and the onus on the Customs & Excise authorities to justify continuing detention. The Judge of the District Court was in error as the Act does not mandate an explanation from a person from whom monies have been seized, nor does the section, or indeed s. 39, require that a person from whom cash is seized give sworn evidence. The High Court Judge went on to observe that if an appropriate explanation for the source of monies is not given at a forfeiture hearing then that can create difficulties for those seeking the return of the seized cash. He referred to High Court decisions of Feeney J. and Fulham J. which had noted that the best person to give an account of large quantities of cash is the person in whose possession the cash is found.

8. Finally, the High Court Judge addressed the question of whether the order of the District Court was spent and thus moot and that an order of certiorari would be futile. He proceeded to review a number of the leading authorities in this area including *Barry v. Fitzpatrick [*1996] 1 ILRM 512, *Howard v. Early* [2000] IESC, *Joyce v. Watkins* [2007] 3 IR and *Finnegan v. Member in Charge Santry Garda Station* [2007] 4 IR. He then concluded:

> "40. If the court accedes to the applicants' application, it is quashing a spent order which no longer has any legal effect as it was replaced with an order made on 23rd March, 2016.
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> 41. The decision to grant an order of certiorari is a discretionary remedy of the court particularly if there are alternative legal remedies. The order of 5th February, 2016, did not prejudice the applicants in the final determination of the forfeiture application. It related to a temporary detention order pending investigation. The evidence is that the money was lodged in an interest bearing account.
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> 42. In addition, the court has already concluded that the point identified by the applicants' counsel on 5th February, 2016, in respect of the aggregation of the monies was, in effect, res judicata in those hearings to detain the monies temporarily pending decision on a forfeiture application, as Judge Halpin had already determined the issue as against the applicants and in this Court's view correctly as the threshold in the Act for temporary detention is quite low, that is 'reasonable grounds for suspicion'.
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> 43. The order was not bad on its face, and was not made in excess of jurisdiction. There was sufficient evidence available to the court to make the order. It was made for a short period of time on the clear understanding there would be time allocated on the next available date to conduct a comprehensive hearing. The learned Judge's misunderstanding of the evidential burden, and the restriction on cross-examination, is not sufficient to ground a decision by this Court to grant an order of certiorari of an order which is spent and which is moot apart from consequences further on in the process. The respondents were not prejudiced by the order which made no finding against them, other than to ratify the detention of the monies for a further six weeks.
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> 44. If this was a final order rather than a temporary detention order, the applicants' contention that the judge acted ultra vires in terms of the conduct of the hearing on 5th February, 2016, would be compelling."

He then proceeded to refuse the application.

Discussion

Aggregation/Smurfing

9. Like White J, in a situation where this is an issue likely to be addressed by the Circuit Court in the context of a forfeiture application, I do not think it wise to express any concluded view at this stage, except to say that it seems to me that consideration of the question of aggregation/smurfing necessarily involves findings of fact. If two individuals are found exporting cash on the same day, and there is nothing to suggest a connection between them, then no question of aggregation arises. At the other end of the spectrum, if there was a family group travelling together, perhaps parents, grandparents and several children, some of a young age, and each have a sum of €6,000 on them, then the arguments for aggregation would indeed be compelling. In short, whether one engages in aggregation is very much dependent on the facts.

10. In terms of what happened in the District Court, the transcript is certainly open to the interpretation that the Judge there was in error in relation to the onus of proof. This begs two questions: how significant was that error and is it an error that should result in the decision of the District Court being quashed by way of certiorari? In my view, the error was not of any great significance. Undoubtedly, the error would be of consequence if the Judge was embarking on a forfeiture application. However, that was not the case and all that was in issue was continued detention of the funds in an interest-bearing account for a limited period. When it became clear that the applicants wanted to contest the matter in a substantial way, his reaction was to list the matter for a full hearing, allocating 45 minutes of court time for that purpose, even though counsel for the applicants suggested it might be dealt with in 20 or 25 minutes. It is true that the Judge envisaged that the applicants would have to give evidence. in that respect, as a matter of law he was incorrect, but given the low threshold required for continued detention, it is not easy to see how resistance could be successful, absent something being put forward by way of explanation from those found in possession of cash and cocaine.

11. In any event, I do not believe that the error provided a basis for judicial review. The substantial issues between the parties, namely, aggregation/smurfing, had already been litigated before Judge Halpin and ruled on in a manner adverse to the applicants. Thereafter, the order made on 6th February was a limited one, adjourning the matter to a date six weeks hence identified as available for a full hearing. Counsel acquiesced in the making of an order covering the intervening period as is evident from the following exchange that appears on the transcript:

> "Mr. Roche: Judge, can I ask that get an order just in the meantime?"
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> "Judge: Oh yes, of course, it will have to"
>
> Mr. Spencer: "just to hold on to it."

12. A further reason why this was not, in my view, an appropriate case for certiorari is that the order the applicant was seeking to quash was spent. As such, it no longer had any legal effect after it expired and was replaced with an order made on 23rd March 2016 and further orders made subsequently.

13. Insofar as certiorari is a discretionary remedy, a matter to which I would pay some attention, the information put before the Court at the leave stage was, in my view, not as comprehensive as it ought to have been. Insofar as the nexus between Mr. Howe and Mr. Keane, if there was one, was potentially relevant to the aggregation/smurfing issue, in my view, the fact that each applicant had 30 grams of cocaine contained in their checked-in luggage should have been brought to the attention of the Judge from whom leave was sought. While not of itself decisive, it is a further factor to be weighed in the mix.

14. Overall, I am satisfied that this was not a case for certiorari. Rather, this was a case where the merits of the dispute should be addressed in the context of forfeiture proceedings in the Circuit Court. I find myself in agreement with the approach taken in the High Court.

15. Accordingly, I would dismiss the appeal.