Neutral Citation: [2014] IEHC 627

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 865 J.R.]

BETWEEN

DANIELLE FLANAGAN

APPLICANT

AND

JUDGE MARTIN NOLAN

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of Mr. Justice McDermott delivered on the 19th day of December 2014 .

1. The applicant seeks an order of *certiorari* by way of judicial review to quash the order of the respondent made on 16th July, 2012, in proceedings bearing Bill of Indictment No. DUCB0879/2011, and a declaration that the order of the respondent was made in excess of jurisdiction. The applicant was granted leave to apply for judicial review (Peart J.) on 15th October, 2012, on the grounds set forth in para. (d) of the statement of grounds dated 2nd July. These were:

> "(i) The respondent had no jurisdiction to make an order under s. 39 of the Criminal Justice Act 1994, as the cash the subject matter of the order had not been seized under s. 38 of the Criminal Justice Act 1994. The order was therefore made in excess of jurisdiction.
>
> (ii) The respondent failed to discharge his duty to give reasons in ruling on the submissions made on behalf of the applicant. The applicant submitted to the respondent that there was no jurisdiction arising out of the absence of a seizure having been made under s. 38 of the 1994 Act. The respondent did not specifically rule on the issue but merely held that "in the interests of justice . . . the State are entitled to their money". In so doing, he failed to engage with the issues raised and merely held that the applicant's "remedy lies elsewhere". This represents a failure on the respondent to discharge the duty to give reasons.
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> (iii) The respondent failed to properly exercise (his) discretion under s. 16 of the Courts of Justice Act 1947, to state a case to the Supreme Court. The issue was pending before the respondent and the application to state a case related to an issue in which there were substantial, weighty and solid grounds which called for a decision of the Supreme Court on the issue."

Background

2. On 13th March, 2005, a "tiger" kidnapping occurred during which the family members of a Securicor driver were forcibly detained by a number of raiders in their family home in Raheny. The family was taken to a wood known as Cloon Wood, County Wicklow, while the driver was forced to assist the raiders by delivering cash to them in return for the release of his family. When the driver went to work on 14th March, 2005, he informed his fellow team members in the security transit van that his family had been abducted and showed them photographs of his family held by the raiders at gunpoint in their home. The driver and his colleagues obeyed the instructions given to him to leave the cash, a mobile phone given to him by the raiders, and the photographs of his family held by the raiders in the 'Angler's Rest' car park, Knockmaroon near Strawberry Beds, Dublin. The sum of €2,800,000 was stolen. The Securicor team raised the alarm by pressing the panic alarm in the security van at 10.00am.

3. The Garda Siochána, in the analysis of phone traffic to mobile phones belonging to the suspects associated with the crime, identified a number of phone numbers as being connected with the offence. Gerard Grant was believed to have been using a mobile phone connected with this offence, in a period of 24 hours surrounding the kidnapping and movements of the family and the transfer of money to the kidnappers. Mr. Grant received 17 calls on his phone from a Mark Farrelly who was convicted for the false imprisonment of the family and the robbery of money from Securicor by Dublin Circuit Court on 30th July, 2009. The court notes that his conviction was set aside by the Court of Criminal Appeal on 24th May, 2012.

4. Investigations also revealed that Mr. Grant made and received a considerable number of calls to and from other persons suspected of involvement in the robbery, including Jason Kavanagh and Alan Costello. Investigations also revealed that the phone connected with Mr. Grant was in the Raheny area on the night of the kidnapping and in the Castleknock area the following morning at around the time the money was handed over to the kidnappers at Strawberry Beds. The garda investigators believed that Mr. Grant remained in the driver's home with him overnight along with two other gang members, Jason Kavanagh and Mark Farrelly. The investigators also believed that Mr. Grant made two phone calls during the night from the house to another accused person believed to have been in Glencree with the other members of the family.

5. They obtained CCTV footage from a Shell petrol station in Beaumont on 5th March, 2005, showing Mr. Grant putting a "top up" code into an identified mobile phone number. This topped up phone was given to the driver during his captivity in the family home so that he could speak to his wife at 2.35am on 14th March. She was, at that stage, held captive at Cloon Wood, County Wicklow. The

mobile phone used by her on that occasion was identified as belonging to one of the other accused persons in the Securicor robbery.

6. Mr. Grant is a native of Dublin and in 1996 was sentenced to ten years imprisonment for an armed robbery at an AIB Bank in Limerick. He was released on 21st December, 2004.

7. On 27th April, 2005, Detective Sergeant Kelly, accompanied by several gardaí, called to 22, Glynn Avenue, Coolock, Dublin 5, the home of Gerard Grant, and pursuant to a search warrant issued under s. 29 of the Offences against the State Act 1939, searched the premises. Mr. Grant was arrested on suspicion of having unlawful possession of firearms at the driver's house in Raheny on 13th March, 2005. He was interviewed at Whitehall garda station but maintained silence throughout his interviews.

8. On 2nd February, 2006, a red Mitsubishi Lancer was intercepted by a garda unmarked patrol car. The driver of the car failed to pull over, initially, when requested by the gardaí, eventually stopping in the middle of the road in a cul de sac into which he had driven. The passenger, Mr. Grant, got out of the car and was informed by Detective Garda Keith Horgan that he wished to search him and the vehicle under s. 23 of the Misuse of Drugs Acts 1977/1984. Detective Garda Horgan observed Mr. Grant swallow a number of tablets from a tissue and give the driver a "nod of his head" which the Detective interpreted as a signal that he was not going to cooperate with gardaí. A struggle ensued between the driver of the car and the other garda present. Detective Garda Horgan, in an affidavit sworn on 4th July, 2011, in support of the confiscation application described what happened:

> "10. Suddenly, I observed Costello (the driver) becoming uncooperative with Sergeant Curtin and a struggle ensued between the two of them.
>
> 11. As I attempted to prevent Grant from swallowing any further tablets, a struggle ensued between us. He then became engaged in behaviour that was threatening and violent, shouting and roaring and resisting arrest, pushing and shoving me away from him, with the intent of being reckless as to provoke a breach of the peace, and in an attempt to make good his escape and evade arrest, he tried to run away but was apprehended a short distance away. I succeeded in handcuffing Grant on one arm, but he continued to resist arrest and continued in his acts of violence towards me. After informing him a number of times to desist, I drew my baton and struck him over the upper body. He subsequently desisted in his actions and he was handcuffed accordingly. I brought Grant to the front of the patrol car and then assisted Sergeant Curtin in the apprehension of Costello. I arrested Mr. Grant for breaches of s. 6 of the Criminal Justice (Public Order) Act 1994, and s. 21 of the Misuse of Drugs Act 1977/84."

9. Mr. Grant was conveyed to Coolock garda station and searched, in the course of which a sum of €15,000 was found in his underwear. Detective Garda Horgan described what happened:

> "12. Mr. Grant was detained in Coolock garda station and I searched Mr. Grant and found €15,000 in his underwear. I asked Mr. Grant for a reasonable explanation as to why so much money was on his person, in his under clothing. I indicated to him that he was still under caution. He made no reply. I asked him again, and again he gave no explanation. The money was subsequently seized by me from Grant, as I suspected that it was part of the money stolen in relation to the robbery and false imprisonment of the . . . family in Raheny, Dublin 5 in March 2005, and I put it in a secure safe at Coolock garda station for the investigation team."

Mr. Grant was charged with offences contrary to s. 6 of the Criminal Justice (Public Order) Act 1994, and s. 21 of the Misuse of Drugs Act 1977/84. He was granted station bail to appear at Dublin District Court No. 44, but failed to appear and a bench warrant was issued for his arrest on 17th February, 2006.

10. Mr. Grant died in the Philippines on 24th March, 2011, and his body was returned to Ireland on 3rd April. Letters of administration to the estate of the late Gerard Grant issued on 2nd February, 2012, to his daughter, who is the applicant in these proceedings.

11. In the meantime, a notice of motion dated 4th July, 2011, was issued on behalf of the Director of Public Prosecutions in proceedings:

"The Circuit Court, Dublin Circuit, County of Dublin

In the Matter of an Application Pursuant to Section 39 of the

Criminal Justice Act 1994

Bill No. DUCB0879/29011

Between

The Director of Public Prosecutions

Applicant

And

The Estate of Gerard Grant

Respondents"

12. The main relief sought in the notice of motion was:

> "An order pursuant to s. 39 of the Criminal Justice Act 1994, as amended by s. 21 of the Proceeds of Crime (Amendment) Act 2005, directing that the sum of approximately €15,000 together with interest thereon seized from the respondent on 2nd February, 2006, be forfeited to the Exchequer."

The application was said to be grounded upon the affidavit of Inspector Paul Scott which was sworn on 4th July, 2011. The reasons offered for the confiscation of the €15,000 were:

"(a) It was seized from Mr. Grant after an altercation (and arrest) for a public order offence.

(b) Mr. Grant refused to give any explanation for the €15,000 seized from him in February 2006.

(c) Mr. Grant was summonsed in relation to this offence but failed to appear and a warrant was issued for his arrest.

(d) Mr. Grant was closely associated with the Securicor robbery because of the voluminous amount of telephone calls made by him to a number of accused persons connected with that offence. These phone numbers were (numbers given) . . . phone number (number supplied) which has been identified as Mr. Grant's phone played a central role in the commission of the Securicor crime in 2005.

(e) Mr. Grant had serious previous convictions of his own . . .

(f) Mr. Grant is closely associated with Alan Costello who has a long list of previous convictions of his own . . .

(g) Mr. Costello's sister's house was searched after the Securicor case and over €25,900 was seized along with an Alpha Romeo car. Ms. Costello admitted that both her brother and Mr. Grant were in her house around 1st to 3rd April 2005.

(h) The carrying of large sums of money by Mr. Grant in such a fashion, nearly a year after the Securicor robbery, is indicative of the way that criminals carry such sums around to prevent detection by the prosecution authorities.

(i) Mr. Grant had no recorded work history in this State from which he could have generated this sum of money."

13. At para. 24 of the grounding affidavit, Inspector Scott stated:

"On the 4th day of July, 2011, I seized the cash the subject matter of this application from 9.00am at (sick)Sarah McArdle under s. 38 of the Criminal Justice Act 1994 (As Amended)."

The date of seizure coincides with the date of the swearing of the affidavit and the date of issuing the notice of motion seeking the relief under s. 39 from the Circuit Court.

14. The motion first came before the Circuit Court on 4th October, 2011, and was thereafter adjourned from time to time. On 21st February, 2012, the applicant swore an affidavit to ground an application for legal aid to defend the s. 39 applications which was granted on 22nd March. A short supplemental affidavit of Inspector Scott was sworn on 15th July, 2012, and on 16th July, the application was heard and His Honour Judge Nolan granted the order sought. The transcript of that hearing was exhibited in these proceedings.

15. In the course of the hearing on 16th July, Counsel for the applicant, having been a notice party to the application under Part V of the Act, submitted that the Court had no jurisdiction to deal with the application under s. 39 because the cash was not seized in accordance with section 38. It was not contended that the €15,000 was Mr. Grant's money.

Part VI of the Criminal Justice Act 1994 (as amended by Part IV of the Proceeds of Crime (Amendment) Act 2005)

16. The title to Part VI of the Criminal Justice Act 1994, was originally "Drug Trafficking Money Imported or Exported in Cash". This title was changed when that part of the Act was substituted by s. 19 of the Proceeds of Crime (Amendment) Act 2005, which came into effect on 12th February, 2005 to 'SEARCH FOR, SEIZURE AND DISPOSAL OF MONEY GAINED FROM, OR FOR USE IN, CRIMINAL CONDUCT'. The relevant amended provisions of Part VI are:-

"38. (1) A member of An Garda Síochána or an officer of Customs and Excise may search a person if the member 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.

1(A). A member of An 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.

(2) cash seized by virtue of this section shall not be detained for more than 48 hours unless its detention beyond 48 hours is authorised by an order 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 48 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…

(6) If at a time when any cash is being detained by virtue of the foregoing provisions of this section –

(a) an application for its forfeiture is made under section 39 of this Act; or

(b) proceedings are instituted (whether in the State or elsewhere) against any person for an offence with which the cash is connected,

the cash shall not be released until any proceedings pursuant to the application or, as the case may be, the proceedings for that offence have been concluded.

39. (1) A Judge of the Circuit Court may order the forfeiture of any cash which has been seized under section 38 of this Act if satisfied on an application made while the cash is detained under that section, that the cash directly or indirectly represents the proceeds of crime or is intended by any person for use in connection with any criminal conduct.

(2) Any application under this section shall be made or caused to be made by the Director of Public Prosecutions.

(3) The standard of proof in proceedings on an application under this section shall be that applicable to civil proceedings; and an order may be made under this section whether or not proceedings are brought against any persons for an offence with which the cash in question is connected.

40. (1) This section applies where an order for the forfeiture of cash (in this section known as "the section 39 order") is made under section 39 of his Act.

(2) Any party to the proceedings in which the section 39 order is made (other than the Director of Public Prosecutions) may, before the end of the period of 30 days beginning with the date on which it is made, appeal in respect of the order to the High Court.

(3) An appeal under this section shall be by way of rehearing…"

The Circuit Court Hearing and Order

17. The hearing of this motion took place on 16th July, 2012. The affidavits of Det. Garda Horgan and Inspector Scott were relied upon by counsel for the Director of Public Prosecutions. There was no replying affidavit from the notice party, Ms. Flanagan. A claim was not made that the late Mr. Grant owned the monies seized or that it was part of the assets of her later father's estate which she was obliged to gather in or administer as the administratrix of his estate. Counsel on behalf of the notice party made a legal submission to the effect that in order to exercise jurisdiction under Part VI, the court must be satisfied that the money was seized on 4th July, 2011, by Inspector Scott under s. 38 of the Act as amended. Counsel drew the court's attention to Det. Garda Horgan's evidence that he seized the money found in the late Mr. Grant's underwear on 2nd February, 2006, following a search under s. 23 of the Misuse of Drugs Act 1997/1984, while Inspector Scott averred that he seized the cash on 4th July, 2011, from Garda McArdle at Coolock Garda Station, who had possession of it at the time. At the time of the 2006 seizure, Det. Garda Horgan stated that he believed that the money was part of the cash stolen in the robbery and placed it in a secure locker in Coolock Garda Station for the investigation team. It was submitted on behalf of the notice party that it was a legal fiction to suggest that the money was purportedly seized from Garda McArdle by Inspector Scott under s. 38. Mr. Grant died in the Philippines some four months earlier.

18. Counsel for the Director of Public Prosecutions submitted that Det. Garda Horgan did not exercise a power under s. 38 and that the money was seized under the section by Inspector Scott on 4th July, 2011, when he took possession of it from Garda McArdle. The learned judge inquired whether seizure implied taking without consent, but counsel submitted that this was not necessarily so and that in this case, the investigation was ongoing and the cash could not have been seized under s. 38 because it was physically an exhibit in two very long trials. At the conclusion of the criminal proceedings, and when it was clear that the criminal aspect of the case had been disposed of, Inspector Scott seized the money and was entitled to do so. The learned judge ordered that the money be forfeited under s. 39 and stated:-

> "I don't know about the technicalities but it seems justice would demand that the State should be allowed to seize this money and I will make the order as set out…"

An application was then made to the learned judge to state a case to the Supreme Court under s. 16 of the Courts of Justice Act 1947, in respect of the legal point canvassed during the course of argument. The learned judge stated:-

> "I refuse your application. I will grant the relief to the State as sought. Obviously you have your remedies if you think I am wrong…It seems to me that the State in this case are entitled to their money…"

Ground (ii)

19. The applicant in this case claims that the respondent failed to discharge his duty to give reasons when making the above ruling, and failed to engage with the issues raised in the course of argument. The single point at issue before the respondent was that set out in Ground (i) of this application. It is perfectly clear from the transcript that the very short submissions on this net point from both parties were received and considered by the learned trial judge. The facts were not contested by the applicant. The respondent clearly rejected the submissions made by counsel for the notice party. The learned judge accepted that the actions of Inspector Scott constituted a lawful seizure of the money by him on 4th July 2011 and that he was entitled to do so under s. 38 of the Act. The attempt to rely on the phrase "I don't know about the technicalities", fails to have full regard to the fact that it was crystal clear what the issue was, and that the submissions of counsel for the Director of Public Prosecutions and the reasons as to why the forfeiture order should be made as set our earlier, were accepted by the trial judge. This was understood by both sides at the time and enabled counsel for the applicant to frame the basis for a case stated to the Supreme Court and Ground (i) of this application. To isolate the phrase upon which the applicant now focuses, fails to have sufficient regard for the reality of what transpired and was understood to have transpired at the hearing.

20. The court accepts that in the circumstances of this case the reasons for the finding made by the learned trial judge were obvious to the parties involved in the light of the case made to the court and the evidence and submissions made in respect of the core issue. The Court is satisfied in the circumstances that the short statement by the learned trial judge as to his conclusion left no one present in doubt as to his acceptance on the balance of probabilities of the evidence adduced and the submissions made on behalf of the Director of Public Prosecutions. The Court respectfully adopts and applies principles as set out in *Lynch v. Judge Collins* [2007] IEHC 487, *Sisk v. Judge O'Neill* [2010] IEHC 96, *Kenny v. Coughlan* [2008] IEHC 28 and *EMI Records (Ireland) Ltd v. The Data Protection Commissioner* [2013] IESC per Clarke J at para. 7.4. I am satisfied that the case is distinguishable from a case that might

require more detailed reasoning as considered in *O'Mahony v. Ballagh* [2002] 2 I.R. 410 (subsequently discussed in the Kenny case above).

Ground (i)
21. The question remains whether the receipt by Inspector Scott of the €15,000 cash when handed over to him by Garda McArdle on 4th July 2011 constituted a lawful seizure under s. 38 of the Act. The jurisdiction to make a forfeiture order vested in the learned judge under s. 39 of the Act is said to depend upon the lawfulness of the seizure made under s.38.

22. It is clear that the money was originally seized in the course of a search of the late Mr Grant under s. 23 of the Misuse of Drugs Act 1977 as amended. Apart from permitting the seizure and detention of anything found in the course of the search which appears to the Garda to be something which might be regarded as evidence in proceedings for an offence under the Act, s.23 (2) provides that nothing in the section operates to prejudice any power to seize or detain property which may be exercised by a member of Garda Siochana apart from this section. The late Mr Grant was undoubtedly at the time of the search a suspect in the investigation of the robbery and false imprisonment offences as outlined above. Detective Garda Horgan retained the money for the proper investigation of these offences and clearly there were reasonable grounds to do so having regard to the suspicions which he held. Ultimately, the money was lawfully retained and preserved as an exhibit for use as evidence in the prosecution of these offences in the Circuit Criminal Court (see s. 9 of the Criminal Law Act 1976 and *Dillon v. O'Brien & Davis* [1887] 20 LRIR 300 per Palles C.B at pp. 316-318, *Dunne v. Director of Public Prosecutions* [2002] 2 I.R. 305 and *McLoughlin v. Avis Insurance (Europe)* [2011] IESC 42).

23. It is clear that during the period in which criminal proceedings were contemplated, initiated and conducted the late Mr Grant could not have sought the return of this cash successfully under the provisions of the Police (Property) Act 1897 or otherwise. Following the conclusion of the criminal trials relevant to these matters and the death of Mr Grant, the money was seized by Inspector Scott. An appeal against conviction by Mark Farrelly, one of the alleged culprits, was allowed on 24th May 2012.

24. The Court is satisfied that the amendment of the Act by the insertion of s. 38 (1) (A) widened the basis upon which a seizure might take place under s. 38. It gave a power to seize cash but did not require that this take place as a result of a search of a place or person. Section 38 (1) (A) empowers a member of An Garda Siochana to "seize" and in accordance with the section detain any cash including cash found under a search under subs. (1) *"…if or 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."*

25. The lawfulness of the Inspector's "seizure" did not depend upon the exercise of a power of search as was previously required under s. 38 (1) before the insertion took place. Thus cash found in a discarded or hidden parcel in a public area may depending on the circumstances be seized by a Garda who has reasonable grounds for suspecting that it represents the proceeds of crime. For example, cash discovered in a bin but left there as ransom in a kidnapping could be "seized" under the section as could cash found in an abandoned car. The court is satisfied therefore that it was not necessary for the seizure to be made directly from Mr Grant under s. 38 (1) (A) as a matter of law.

26. The applicant contends that the word "seize" used in the section requires that the cash be forcibly taken into possession and this could only have occurred when the late Mr Grant was searched under s. 23. It is submitted that this is the only basis upon which a seizure could have taken place in respect of this money under the Act. Consequently, as in the Circuit Court, it is submitted the only lawful seizure under s. 38 that could have been made was by Detective Garda Horgan who did not purport to make it under s. 38, and that even if it were a lawful seizure at that time, if it was intended to hold on to the cash beyond 48 hours, an application should have been made to the District Court for lawful authority so to do. It is further submitted that the learned judge had no jurisdiction to entertain the application under s. 39 unless that procedure was followed and that otherwise the intention that there be judicial supervision of a seizure made under s. 38 would be frustrated.

27. The applicant also claims that s. 38 (1) (A) does not contemplate that following the seizure of cash and its retention by the Gardai for use in respect of criminal proceedings, a member of An Garda Siochana might at some future date "seize" it from the exhibits officer in the case on the grounds set out in the section.

28. The court is satisfied that the money was seized and retained lawfully by Detective Garda Horgan following a search under s. 23 because he believed it to be the proceeds of the robbery and false imprisonment cases under investigation. He did not and does not purport to have seized the money pursuant to the provisions of s. 38(1) (A). The money was in the possession of An Garda Siochana and was ultimately retained and preserved as an exhibit by Garda McArdle in respect of criminal proceedings when she was, as deposed to by Mr Brady Solicitor, the exhibits officer in the course of those cases. The money was properly and lawfully preserved as an exhibit until 4th July 2011. At this point the money was handed over by Garda McArdle to Inspector Scott. No issue was raised in the Circuit Court or in this court concerning Inspector Scott's evidence that he had reasonable grounds for believing that the €15,000 was the proceeds of crime. It is submitted that the circumstances of the seizure could not amount to a seizure as contemplated under s. 38 (1) (A) because there was no element of force involved as is required by law. Inspector Scott attended at a garda station and met with Garda McArdle from whom he purported to "*seize*" the money. Reliance is placed upon the definition of "*seizure*" by Cave J in *Johnston v. Hogg* [1883] 10 QBD 432 in the absence of any more recent authorities.

29. In *Johnston*, in an action on a policy of insurance upon a ship in which the subject matter was warranted "*free from capture and seizure and consequences of any attempt thereat*" it was proved that during the continuance of the risk some "*natives*" took forcible possession of a ship "*The Cypriot*" on the Brass River, Nigeria, plundered the cargo and damaged the ship. It was contended that the intention of the attackers was to plunder the ship and not to keep it. Cave J held that the acts of the attackers constituted "seizure" within the meaning of the warranty and the underwriters were not liable in respect of such a seizure. He stated that "an ordinary and natural meaning of "seizure" is a forcible taking possession". However he also acknowledged that while the word must be taken in its ordinary and natural meaning it was capable depending on the circumstances of assuming a very wide meaning:-

> *"I have no doubt that the word 'seizure' like so many other words is sometimes used with more general and sometimes with more restricted meaning, and whether it is used in a particular case with the one meaning or the other depends not on any general rules but in the context and issues of the case."*

30. The Concise Oxford English Dictionary (11th edition revised 2006) gave the following definition:-

> *"seize: to take hold suddenly and forcibly, take forcible possession by the Police or another authority, take possession by warrant or legal right"*

31. The respondent contends that the money seized under s. 38 (1) (A) was taken into his possession by Inspector Scott by legal right. This did nor require the use of force. The court is satisfied that there is a wide range of circumstances in which cash may be

"*seized*" beyond the taking of possession under the coercion of a legal search. The natural and ordinary meaning of the word "seize" embraces the concept of taking an item into possession without force or in execution of a warrant or under the power of a search. This interpretation is supported by the insertion of s. 38 (1) (A) in addition to the powers set out in s. 38 (1).

32. Inspector Scott was invoking a statutory power separate and in addition to that which had been exercised up to that point by Detective Garda Horgan and Garda McArdle and took possession of the cash from Garda McArdle in accordance with the power vested in him under s. 38 (1) (A). Up to that point on the 4th July 2011, the cash was retained as an exhibit in respect of criminal proceedings in accordance with common law and/or s. 9 of the Criminal Law Act 1976. The fact that Garda McArdle on the exercise of the appropriate authority by Inspector Scott handed over the cash as requested and without the necessity for any force on the part of Inspector Scott is irrelevant to the lawfulness of the seizure when the word "seize" is understood in this way.

33. The court is therefore satisfied that the sum of €15,000 was lawfully seized and taken into his possession by Inspector Scott on the 4th July 2011 in the proper exercise of the power vested in him under s. 38 (1) (A) of the Act. The court is not satisfied that the applicant is entitled to relief in respect of ground (ii).

Ground (iii)
34. The applicant submits that the respondent's failure to exercise his discretion under s. 16 of the Courts of Justice 1947, to state a case to the Supreme Court was unlawful. Section 16 provides:-

> "A Circuit Judge may, if an application in that behalf is made by any party to any matter… pending before him, refer, on such terms as to costs or otherwise as he thinks fit, any question of law arising in such matter to the Supreme Court by way of case stated for the determination of the Supreme Court and may adjourn the pronouncement of his judgment or order in the matter pending the determination of such case stated."

35. As noted in *McKenna v. Deery* [1998] 1 I.R. 62 by Lynch J., the section confers a discretion on a Circuit Court Judge to accede to or refuse an application for a consultative case stated, but does not qualify the discretion in any way. Lynch J. gave some guidance as to how the discretion might be exercised:-

> "Nevertheless, consultative cases stated are primarily for the guidance and assistance of the judge who is asked to state such a case and if the judge is quite clear in his own mind as to the proper decision in the case, prima facie, he is entitled to refuse the application and to go ahead and decide the case in accordance with his firm and positive views. The Superior Courts should be slow to interfere in such a case and should only do so if there is not merely an arguable case, but substantial, weighty and solid grounds calling for a decision by the Supreme Court on the question or questions of law the subject matter of the application by one of the parties to the proceedings."

It is submitted that the remark made by the judge "I don't know about the technicalities" suggested that he was not "quite clear in his own mind as to the proper decision in the case". Having reviewed the transcript the court has reached a contrary conclusion. The learned trial judge was satisfied to decide the case in accordance with the submissions made on behalf of the Director of Public Prosecutions, the uncontested evidence before him, and in accordance with what he clearly demonstrated were "his firm and positive views". I am satisfied that the application to state a case to the Supreme Court was made while the matter was still pending and before the final order of the court was made. It is clear from the transcript that the learned judge indicated his views on the core issue quite promptly which led to the Section 16 application. He then refused that application and granted the relief to the state as sought. The learned judge was entitled to form a view in relation to the legal submissions made and did so.

36. It was accepted by counsel for the applicant that if the money had been seized on 4th July, 2011, as was averred by Inspector Scott, the application was properly before the court under s. 39. As a matter of fact and law the learned judge accepted that the Inspector had "seized" the money on 4th July under section 38. If the interpretation of s. 38 adopted by the learned trial judge was incorrect, the appropriate remedy was to appeal the matter under s. 40 of the Act to the High Court by way of full rehearing. There is no doubt that the entire case made by the applicant in these proceedings could have been made on such an appeal, or an appeal confined to the net point raised by counsel. An order of forfeiture could only have been made if a seizure had been made under section 38. It was a matter for the court to consider at first instance or on appeal, whether such a lawful seizure had taken place under section 38. If the essential proofs in that respect were not established, the application would inevitably fail. (See *O'Connor v. the Private Residential Tenancies Board* [2008] IEHC 205).

37. The court does not consider that the learned judge lapsed into any jurisdictional error in declining to state a case to the Supreme Court. He indicated to the applicant's counsel that if he disagreed with the determination made, he had his remedies: the primary remedy was a right of appeal under section 40. There is no basis upon which to grant leave by way of judicial review in respect of the exercise of the court's discretion under section 16.

Discretionary Relief
38. The court is satisfied that having regard to the rehearing available to the applicant by way of appeal to this Court under s. 40 of the Act, she had an alternative remedy in which the issue which she now canvasses by way of judicial review might have been addressed. For the notice party to obtain a forfeiture order under s. 39 it had to establish on the balance of probabilities that the cash had been seized under s. 38, and that it directly or indirectly represented the proceeds of crime, or was intended by any person for use in connection with any criminal conduct. If it is contended that the Director of Public Prosecutions failed to establish either of these factors, there was a full appeal to the High Court. The jurisdiction on appeal was ample to address any ground of law or fact raised by the applicant. Though the court has rejected the applicant's claim based on ground (ii), even if that ground could be established, the court would decline to exercise its discretion in favour of the applicant having regard to the ample appeal jurisdiction available under section 40. (See *EMI Records (Ireland) Limited (Supra)* at paras. 4.8 to 4.10 per Clarke J., and *O'Connor (Supra)).*

Conclusion
39. For all of the above reasons, this application is refused.