

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Grew's (Aidan) Application (Leave Stage) [2011] NIQB 130

IN THE MATTER OF AN APPLICATION BY AIDAN GREW FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE POLICE SERVICE OF
NORTHERN IRELAND

Before: Morgan LCJ, Girvan LJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the court)

[1] The applicant seeks leave to apply for judicial review to quash the decision of the Police Service of Northern Ireland to seize approximately £500,000 in cash from his sister, Patricia O'Neill, at HMP Maghaberry on 15 September 2011 and to compel the Police Service of Northern Ireland to deliver the said sum of money to HMP Maghaberry to discharge the warrant under which he is held thereby securing his release.

Background

[2] The applicant was charged with fraudulent evasion of duty contrary to section 170 (2) of the Customs and Excise Management Act 1979 relating to a cigarette smuggling operation on 16 November 2005. He eventually pleaded guilty to one such charge and was sentenced by Weatherup J on 19 November 2008 to three years imprisonment suspended for a period of two years. On the application of the prosecution a confiscation order was made in the sum of £500,000. There had been some discussion between the prosecution and the defence and the learned trial Judge noted that it was not contested by the defendants that the benefit to the applicant was £500,000 and that the available amount was the same.

[3] In the course of the sentencing hearing senior counsel on behalf of the applicant applied for an extension of 12 months to pay the confiscation amount. The learned trial Judge noted that in order to be allowed more than six months to pay the applicant had to establish exceptional circumstances. He took into account the size of the payment and the submission that was made to him that there was a real probability that satisfaction of the confiscation order would require the sale of property. In light of the difficult property market the learned trial judge accepted that this amounted to an exceptional circumstance and extended the time for payment by 12 months.

[4] The applicant appealed the confiscation order and that appeal was dismissed by the Court of Appeal on 30 June 2011. The period for payment of the amount ordered was extended to 5 September 2011. On 6 September 2011 the applicant was arrested as a result of his failure to satisfy the confiscation order.

[5] On the evening of 8 September 2011 Detective Constable Robinson states that he was advised by the PPS that the applicant's solicitor intended to collect £500,000 in cash to lodge in court in discharge of the confiscation order. The solicitor informed the PPS that the money was not an asset but the proceeds of crime. He sought an assurance that he would not be arrested with the cash in transit but was advised that no such assurance could be given. On 9 September 2011 the applicant made an application to the Court of Appeal to extend the time for payment of the confiscation order but that application was unsuccessful.

[6] Shortly thereafter the Police Service of Northern Ireland commenced a money laundering investigation in relation to the cash which it was proposed should be used to discharge the warrant. On 13 September 2011 the applicant's solicitors suggested that the cash emanated from the criminal activity in respect of which the confiscation order had been made. Detective Constable Robinson stated, however, that there had been no mechanism for selling the cigarettes as the applicant had been detained with them and the benefit figure related to a liability avoided, namely the duty on the cigarettes. In those circumstances there was no evidential basis for the assertion that the cash emanated from the criminal activity in respect of which the applicant had been convicted.

[7] On 15 September 2011 Detective Constable Robinson was informed that someone had attended at the prison with a large amount of cash to discharge the confiscation order. In light of the fact that there had been no opportunity to sell the cigarettes recovered by the police, the conversation between the applicant's solicitor and the PPS and the fact that the applicant had no discernible income he concluded that the cash was the proceeds of

crime and that it should be seized as evidence of money laundering offences and as a cash seizure under the Proceeds of Crime Act 2002 (the 2002 Act). The cash had been brought to the prison by Patricia O'Neill, the sister of the applicant. She was arrested, interviewed and then released on unconditional bail.

[8] Thereafter forensic examination of the cash commenced. The rubber bands associated with each bundle were submitted for DNA processing. The top and bottom note of each bundle of cash from the suitcase was submitted to the specialist fingerprint unit. There is a concern that some of the notes may be counterfeit and an expert has been retained to advise police on this. Each note is being scanned and the serial number recorded so that the issuing bank can provide any issue history that is available. The notes include a large number of new issue Scottish notes in £100 and £50 denominations issued in 2010. These notes could not have been in circulation at the time of the original offence in 2005.

[9] On 16 September 2011 an application was made to the District Judge for the continued detention of the cash under Section 295 of the 2002 Act. He dismissed that application. On 19 September 2011 a forfeiture application under Section 298 of the 2002 Act was lodged and the cash remains seized both as an exhibit under Article 21 of the Police and Criminal Evidence (NI) Order 1989 (PACE) and pursuant to Section 298.

The statutory basis for the seizure of the cash

[10] The respondent submitted that there were two bases upon which it was entitled to seize the cash. The first was under the general power of seizure contained in Article 21 of PACE.

“21. - (1) The powers conferred by paragraphs (2), (3) and (4) are exercisable by a constable who is lawfully on any premises.

(2) The constable may seize anything which is on the premises if he has reasonable grounds for believing-

- (a) that it has been obtained in consequence of the commission of an offence; and
- (b) that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed.

(3) The constable may seize anything which is on the premises if he has reasonable grounds for believing-

- (a) that it is evidence in relation to an offence which he is investigating or any other offence; and
- (b) that it is necessary to seize it in order to prevent the evidence being concealed, lost, damaged, altered or destroyed."

In light of the admission by the applicant's solicitor that the cash was the proceeds of crime and the other factors set out at paragraphs 6 and 7 above there were reasonable grounds for believing that the cash had been obtained in consequence of the commission of an offence.

[11] Section 294 of the 2002 Act sets out the circumstances in which a constable may seize cash.

"294. - (1) An officer of Revenue and Customs, a constable or an accredited financial investigator may seize any cash if he has reasonable grounds for suspecting that it is-

- (a) recoverable property, or
- (b) intended by any person for use in unlawful conduct."

[12] Recoverable property is defined in section 304(1) as property obtained through unlawful conduct. Section 295(1) provides that while the Constable continues to have reasonable grounds for his suspicion, the cash seized under section 294 may be detained initially for a period of 48 hours excluding Saturdays and Sundays. Once the forfeiture application was made on 19 September within the 48 hour period the effect of section 298(4) of the 2002 Act was to ensure that the cash be detained until the forfeiture proceedings were concluded.

[13] Section 308(9) of the 2002 Act provides that property is not recoverable if it has been taken into account in deciding the amount of a person's benefit from criminal conduct for the purpose of making a confiscation order under section 156 of the 2002 Act. In this case the order was made under section 156.

The applicant's case

[14] The first ground advanced on behalf of the applicant was that the Police Service of Northern Ireland did not have reasonable grounds for suspecting that the sum of money seized was "recoverable property" as it had been taken into account in deciding the amount of the applicant's benefit from criminal conduct for the purpose of making the confiscation order. The height of the applicant's case on this point was an averment by Mr Pownall QC that it was understood by both prosecution and defence that the applicant would probably pay the confiscation amount in cash. The replying affidavits make it plain that this understanding was not shared by the prosecution. In any event it is common case that the existence of this cash as a means of satisfying the confiscation order was not opened to the learned trial Judge. Indeed the explanation advanced to him for the 12 month extension of time to pay suggested that the applicant intended to satisfy the confiscation order by the sale of property. If he had been aware of the existence of this cash it is difficult to see how he could have been persuaded that there were exceptional circumstances justifying the extension of time to pay by 12 months. There is no evidence that the existence of this cash was taken into account in calculating the applicant's benefit from the criminal conduct and accordingly this ground is unarguable.

[14] The second ground advanced was that the Police Service of Northern Ireland did not have reasonable grounds for suspecting that the money was intended for use in unlawful conduct given that the clear intention was to deliver it to an employee of the Northern Ireland Prison Service to ensure compliance with a court order and thereafter the applicant's release. We are inclined to accept that the cash was not intended by any person for use in unlawful conduct but the respondent's case has always been that the seizure was justified on the basis of reasonable grounds for suspecting that the cash was recoverable property under section 294(1)(a) set out in paragraph 11 above. We do not accept, therefore, that this ground advances the applicant's case.

[15] The third ground advanced was that the respondent did not have reasonable grounds for believing that the seizure was "necessary" as required by Article 21 of PACE given that the clear intention was to deliver it to an employee of the Northern Ireland Prison Service. The concept of necessity in respect of arrest under PACE was considered by the Divisional Court in Re Alexander and others [2009] NIQB 20. The test was whether the constable considered that the course followed was the practical and sensible option. We accept that this is the appropriate test to be applied.

[16] The affidavits of Detective Constable Robinson demonstrate that there has been ongoing forensic examination of the seized cash. The extent of this

has been set out in paragraph 8 above and need not be repeated here. That forensic investigation is clearly directly related to the money-laundering investigation. The seizure of the cash to prevent the forensic evidence being altered clearly fell within Article 21(3) of PACE. We accept, therefore, that the seizure of the cash was necessary as the practical and sensible option to prevent alteration of the forensic evidence.

[17] The final ground advanced on behalf of the applicant was the submission that the seizure of the cash was an abuse of process, unfair and irrational. The first basis for this contention was the fact that the money was intended to satisfy the confiscation order. We do not consider that the making of a confiscation order enables a convicted criminal to satisfy the order from recoverable property.

[18] The second basis for the submission was that an agreement had been reached between the prosecution and defence during the proceedings that the applicant would not oppose the making of a confiscation order against him in the sum of £500,000. That appears to be accurate but again cannot give rise to entitlement to an offender to use recoverable property to satisfy the order.

[19] The final argument advanced was that if the money seized was recoverable property the applicant will never be able to satisfy the confiscation order. We do not accept that submission. Section 173 of the 2002 Act provides a mechanism for a defendant in respect of whom a confiscation order has been made to apply to the court to reduce the amount payable under the confiscation order where the amount available to the defendant is inadequate for repayment of the sum ordered. This course remains open to the applicant.

Conclusion

[20] For the reasons set out we concluded that leave to apply for judicial review should be refused.