Neutral Citation No: [2017] NIQB 37 | *Ref:* **GIL10213**

Judgment: approved by the Court for handing down | *Delivered:* **30/3/2017**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MARTIN O'NEILL FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS BY HER MAJESTY'S REVENUE AND CUSTOMS AND A LAY MAGISTRATE FOR THE COUNTY COURT DIVISION OF BELFAST AND NEWTOWNABBEY

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Before: Gillen LJ, Weir LJ and Burgess J

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GILLEN LJ (giving the judgment of the court)

Introduction

[1] On 3 February 2016 officers of Her Majesty's Revenue and Customs ("HMRC") entered and searched the applicant's property at 1 Forest Hill, Belfast and a silver Range Rover vehicle located there. The entry and search were effected on foot of a warrant obtained under Article 10(1) of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("the 1989 Order" or "PACE") on 29 January 2016 from a lay magistrate before whom a Complaint to Obtain Warrant of Search ("the warrant ") had been presented. The terms of the warrant are exhibited to the rear of this judgment.

[2] In this judicial review the applicant challenges the lay magistrate's decision to grant two search warrants under Article 10 of the 1989 Order, one relating to the premises at 1 Forest Hill, New Forge Lane and the other relating to the silver Range Rover.

[3] In addition the applicant challenges the lawfulness of the entry and search effected by HMRC on the purported authority of the warrants issued.

[4] Mr Power QC appeared on behalf of the applicant with Mr Sayers. Mr McLaughlin appeared on behalf of the respondent. We are grateful to both

counsel for the industry that they have invested in this case and for the succinct presentation of their oral arguments before us.

[5] The relief sought is:

(a) An Order of Certiorari to remove into this court and quash a decision of HMRC by which it sought warrants to enter and search the premises and a Range Rover there.

(b) An Order of Certiorari to quash a decision of the Lay Magistrate by which she issued warrants to enter and search the premises.

(c) A declaration that the decisions were and each of them was unlawful, ultra vires and of no force or effect.

(d) A declaration that the entries and searches effected on 3 February 2016 on the basis of the impugned warrants were unlawful.

(e) Damages for trespass to land and goods.

(f) Costs.

[6] The grounds on which relief is sought are as follows:

(a) The information advanced to the Lay Magistrate by HMRC disclosed no grounds for the belief of HMRC that entry would not be granted unless a warrant was produced. Consequently the Lay Magistrate could not rationally have been so satisfied pursuant to Article 10(3)(c) of the Police and Criminal Evidence (Northern Ireland) Order 1989 (hereinafter called "Ground 1").

(b) The entry and search effected on 3 February 2016 was unlawful by virtue of Article 17(1) of the 1989 Order in that the warrants issued failed to identify the articles to be sought so far as was practicable as required by Article 17(6)(b) and in searching for other "items which are likely to be relevant evidence" impermissibly delegated to the executing officer the responsibility for making a judgment as to relevance (hereinafter called "Grounds 2 and 3").

(c) The information advanced to the Lay Magistrate disclosed no connection between the silver Range Rover vehicle and suspected criminality or between the vehicle and the applicant. Consequently the Lay Magistrate could not rationally have been satisfied of the existence of reasonable grounds for believing that there was material on the premises (the vehicle) likely to be of substantial value to the

investigation as required by Article 10(1)(b) of the 1989 Order (hereinafter called "Ground 4").

(d) The entries and searches were unlawful in that HMRC failed to comply with the requirements of Article 18(5) in that the warrants were not produced to the applicant and he was not supplied with certified copies (hereinafter called "Ground 5").

(e) Decisions to seek search warrants and to issue search warrants were in breach of Section 6 of the Human Rights Act 1998 (read with Article 8 of the European Convention of Human Rights) (hereinafter called "Ground 6").

Background

[7] Mr McLaughlin asserted that the background of the case is as follows. The applicant was arrested and his premises were searched on 3 February 2016 by officers from HMRC as part of a UK-wide investigation known as Operation Bandstand into the activities of a suspected organised criminal gang. It was one of a number of searches carried out simultaneously in Northern Ireland and England. The investigation related to the suspected unlawful importation of hydrocarbon oils into the UK, evasion of excise duty, evasion of VAT and money laundering offences.

[8] The suspected activities of the group included the importation of a blend of hydrocarbon oils capable of use in diesel cars by misdescribing it as "lubricating oil", "anti-corrosion agent" or some similar environmentally hazardous substance.

[9] The importation of diesel oil into the UK attracts the payment of excise duty and its sale within the UK attracts payment of VAT. When imported into the UK, diesel oil should carry the hazardous marking "UN 1202".

[10] Other hydrocarbon products such as lubricating oil etc should carry the hazardous marking "UN 3082". These products do not attract excise duty upon importation and are the subject of less stringent customs controls. They can also be imported unaccompanied. HMRC suspects that the applicant was a member of a group which imported diesel oils into the UK using the marking "UN 3082" without payment of excise duty, selling the diesel to legitimate registered dealers in Controlled Oils.

[11] HMRC also suspects that a number of companies were used to receive the proceeds of sale of the diesel oil which were connected to the applicant. One of those companies is Edison Petrolio Limited ("Edison"). The complaint summarised the suspicions of HMRC which supported the search warrant. In brief they were as follows:

- The applicant is a former Director of Edison along with a Mr Popescu.

- 16 October 2014 he was replaced as a Director by John McCusker and on 12 November 2014 was adjudicated bankrupt. Mr McCusker was also suspected of involvement in the gang and was arrested and his home searched at the same time as the search of the applicant's house.

- On 29 September 2014 the Edison principal place of business was changed to the applicant's home at 1 Forest Hill, Belfast. This address remained the company's principal place of business on the date of the search.

- On 17 February 2014 Mr Popescu submitted a VAT registration form for Edison describing the business as "wholesalers of lubricating oil". No VAT returns have ever been submitted.

- The applicant along with others and the company Edison has been under surveillance by HMRC since 2014. Early investigations led HMRC to believe that the diesel was being imported into the UK in 30,000 litre road tankers under misdescription. The fuel was believed to come via Dover from a depot in Germany. On 17 March 2015 two of these tankers bearing the hazard marking "UN 3082" were stopped in Dover and found to contain diesel fuel.

- Following the seizure, further investigations and observations led HMRC to examine a fuel tanker in north Wales on 22 May 2015 bearing the hazard marking "UN 1202" (i.e. diesel oil). The driver of the vehicle stated he was employed by Edison Petrolio. Paperwork accompanying the tanker included an invoice for delivery of UN 1202 diesel fuel to North West Fuels Cheshire. Upon enquiries being made with North West Fuels, it produced nine invoices for UN 1202 fuel from Edison and two delivery notes which corresponded in date and volume with two of the invoices, but which referred to the delivery of "UN 3028" fuel. The consignor of the fuels was a company called Bybigon SRO.

- HMRC obtained a production order under Schedule 1 of PACE against financial institutions linked with Edison. These reveal that Edison had made payments to Bybigon SRO totalling £146,554.60. These findings reinforced the suspicion that Edison was involved in the importation of diesel fuels using a misdescription and evading duties and VAT.

- Observations on a number of premises and suspects (including the applicant) included the Williams Brothers Industrial Park on Merseyside. After a seizure of two further tankers, HMRC suspected that the gang had changed to importing using Isotanks which can be imported unaccompanied into the UK.

- HMRC observed Isotanks bearing the hazard marking UN 3082 being delivered to the industrial park. Undelivered road tankers bearing the hazard marking UN 1202 were driven to the same part of the yard and then departed.

- From September 2015 onwards Isotanks were observed being delivered to the yard by a haulier Den Hartogh. Enquiries with this company revealed that it had made 41 deliveries of lubricating oils to the industrial park under the hazard marking UN 3082.

- In October 2015 two tankers which had been reported using a firm NZ, with a delivery address of William Trucks Kirkby were examined. They carried the description "anti-corrosion fluid" but were found to contain diesel fuel.

- On 6 January 2016 Merseyside police stopped Paul Collins driving a vehicle entering and leaving the William brothers premises. Investigations revealed that John McCusker (director of Edison) paid the utility bills.

- A further seizure of fuel took place on 20 January 2016. The applicant and two other suspected members of the group (who were under observation at the time) met in an hotel near Belfast and were heard by HMRC officers discussing the seizure, the distribution of fuel and associated paperwork.

- The warrant applications were made (and granted) on 29 January 2016 and executed on 3 February 2016.

Ground 1 – was the Lay Magistrate ("LM") satisfied of the existence of reasonable grounds for believing that entry to the premises would not be granted unless a warrant was produced as required by Article 10(1)(e)?

Statutory Framework

[12] Article 10(1) of the 1989 Order provides:

> "If on an application made by a constable a justice of the peace is satisfied that there are reasonable grounds for believing—
>
> (a) that an indictable offence has been committed; and
>
> (b) that there is material on the premises mentioned in paragraph (1A) which

is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence; and

(c) that the material is likely to be relevant evidence; and

(d) that it does not consist of or include items subject to legal privilege, excluded material or special procedure material; and

(e) that any of the conditions specified in paragraph (3) applies in relation to each set of premises specified in the application,

he may issue a warrant authorising a constable to enter and search the premises "

[13] Article 10(2) of the 1989 Order provides that a constable may seize and retain anything for which a search has been authorised under Article 10(1).

[14] Article 10(3) provides that:

"The conditions mentioned in paragraph (1)(e) are –

(a) that it is not practicable to communicate with any person entitled to grant entry to the premises;

(b) that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the evidence;

(c) that entry to the premises will not be granted unless a warrant is produced;

(d) that the purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them".

The Applicant's Case

[15] Mr Power advanced the following contentions:

- There was no evidence that the LM had considered the provisions of Article 10(3)(c). In England, magistrates are provided with a pro forma document to record their findings but as yet we do not have this in Northern Ireland.
- There was no affidavit from the LM to the effect that he had carried out such consideration and there were no notes made by the LM of his reasoning.
- We are unaware what was actually said to the LM by Mr Dunn who presented the case at the hearing in front of the Lay Magistrate on behalf of HMRC.
- This is a statutory obligation and accordingly it should be considered and recorded in terms of reasoning.

The Respondent's Case

[16] Mr McLaughlin advanced the following contentions:

- The grounds of suspicion were clearly set out before the LM in the complaint.
- The basis for the belief of the LM that entry to the premises would not be granted unless a warrant was produced was an obvious inference from reading the complaint. The warrant declares:

> "In accordance with Article 10(1) of the (1989 Order), I am satisfied upon information on oath laid before me day by Michael Dunn, Officer of HM Revenue and Customs, there are reasonable grounds to be believe that ……".

Legal Principles

[17] An array of authorities has been opened before us including Regina (Dulai & Ors) v Chelmsford Magistrates Court & Anor [2013] 1 WLR 220, Regina (Van der Pijl & Anor) v Crown Court at Kingston [2013] 1 WLR 2706, R (S) v Chief Constable of British Transport Police [2014] 1 WLR 1647 and Attorney General of Jamaica v Williams [1998] AC 351 at 358. In addition we have considered Cronin v United Kingdom (2004) 38 EHRR CD 233 and R (Mills) v Southwark Crown Court [2015] 1WLR 2199. From these we have harvested the following principles:

(i) All the material necessary to justify the grant of a warrant should be contained in the information provided on the application form which must identify which of the conditions specified in Article 10(3) is being relied on by the applicant.

(ii) If the LM requires any further information in order to be satisfied that the issue of a warrant is justified, a note should be made of the additional information provided orally so that this exists as a proper record of the full basis on which the warrant has been granted.

(iii) It is of the greatest importance that a judge granting a warrant must give reasons (see Regina (Van der Pijl & Anor) per Sir John Thomas at paragraph [96]). We pause to observe that in England a facility is provided for this in terms of a pro forma document headed "Application for Search Warrant" which provides a specific space for the magistrate to set out his reasoning in writing. We note that the Judicial Studies Board in Northern Ireland is advocating a similar practice and has provided training to District judges and LMs on the English practice.

[18] There may well be circumstances where the facts put before the magistrate are such that there are obviously reasonable grounds to believe that the giving of advance notice of the proposed search of the premises would defeat the object of the entry. Thus in Dulai's case, the nature of the fraud being investigated was such that anyone committing such a fraud would wish to destroy or to remove evidence of the fraud if he were given notice of an impending search by the council. Whilst it would have been in that case highly desirable for the council representative to have explained why he considered that notice would defeat the object of the visit, the fact that it failed to do so was not fatal. Nor was the fact that it was not clear that the judge had addressed the question on the grounds that the point was obvious. Burnton LJ said at paragraph [45] of Dulai "The question for this court, in judicial review proceedings is whether the information that it is alleged should have been given to the magistrate might reasonably have led him to refuse to issue the warrant" (cited with approval in R (Mills) v Sussex Police at paragraph [55]).

Conclusion

[19] We recognise that on the facts there may be instances where it is completely obvious that entry to the premises will not be granted unless a warrant is produced.

[20] However it has to be borne in mind that Parliament has seen fit to put an express condition into Article 10(3)(c) of the 1989 Order to the effect that the magistrate must be satisfied that entry to the premises will not be granted unless a warrant is produced. This is an expression of legislative intent that the matter must be specifically addressed.

[21] The fact of the matter is that courts have a vital role in ensuring that any necessary invasion in the privacy of citizens is properly controlled. The power of the judiciary to scrutinise independently the requests of officers of the executive to enter a person's premises, search his belongings and seize his goods is a vital part of this role (see R (S) v Chief Constable of British Transport Police [2014] 1 WLR 1647).

[22] The matter was well summed up by Lord Hoffmann in Attorney General of Jamaica v Williams [1998] AC 351 at 358:

> "The purpose of the requirement that a warrant be issued by a justice is to interpose the protection of a judicial

> decision between the citizen and the power of the state. If the legislature has decided in the public interest that in particular circumstances it is right to authorise a policeman or another executive officer of the state to enter on a person's premises, search his belongings and seize his goods, the function of the justice is to satisfy himself that the prescribed circumstances exists. This is a duty of high constitutional importance. The law relies on the *independent scrutiny of the judiciary* to protect the citizen against the excesses which would inevitably flow from allowing an executive officer to decide for himself whether the conditions under which he is permitted to enter on private property have been met".

[23] Accordingly it is of cardinal importance that the judiciary should be scrupulous in discharging that responsibility. Granting a warrant should only be done after the most mature and careful consideration of the facts of the case.

[24] In the instant case, it would have been very simple for the respondent to have produced evidence that such scrutiny had taken place. In the first place, there could have been an affidavit from the LM indicating that she had specifically considered Article 10(3)(c) and was satisfied that the condition was met. Alternatively she could have averred that the she had drawn an obvious inference from the facts without needing the point to be addressed to her. Secondly, there could have been an affidavit from Mr Dunn that he had drawn this matter to the attention of the LM and recording what the LM had said. Thirdly, Mr Dunn could have made a note then or shortly afterwards of what had transpired at the hearing and exhibited this to an affidavit if he personally was not to swear an affidavit. Fourthly, someone who accompanied Mr Dunn to the hearing from the HMRC could have made a note if it was anticipated that Mr Dunn would be too busy to perform this task. None of these steps has been taken.

[25] In fact what was produced was an affidavit from Marguerite Kerr, a Higher Investigation Officer with HMRC Fraud Investigation Service Belfast, who said at paragraph 22:

> "I did not accompany Michael Dunn to court on the day he presented the warrant applications. I have been advised by him of events that occurred during the presentation of the application. He informed me that a copy of the complaint and draft warrant was brought to court that morning. He met (*the Lay Magistrate*) in a room at Laganside Courthouse Belfast and swore to the contents of the complaint on oath before her. He was asked to provide an explanation of the grounds for the warrant application and she asked a number of specific

> questions in relation to what surveillance had been carried out by HMRC, to which he provided answers. The Lay Magistrate signed the Complaint, to signify that it had been sworn before her by Michael Dunn and upon expressing herself satisfied that the grounds for grant of a search warrant had been provided she initialled each page of the complaint, each page of the warrants, signed the warrants and returned them to Michael Dunn. He has advised me that he is unaware whether the Lay Magistrate took notes during the course of the hearing."

[26] Not only was this affidavit of little or no assistance in ascertaining the reasoning of the LM on this topic or whether this matter had been brought to her attention, but there were no notes produced from Mr Dunn of the events.

[27] Parliamentary intent and the need for transparent compliance cannot be treated with the degree of casualness exhibited by the respondent in this instance if public confidence is to be preserved in a matter as solemn as the right to enter private property. This is neither a matter of mere oversight nor a considered decision that the inference was obvious as in Du Lai's case. Rather it is an instance where not even an elementary attempt has been made to comply with a fundamental proof of statutory obligation. We cannot be satisfied in these circumstances that a condition under paragraph 10(3) (c) was either expressly or inferentially considered or found by the LM. It would appear no attempt was made either to address the issue of article 10(3)(c) or to give the LM any assistance on the matter. Notwithstanding the background facts of this case we have concluded that if addressed and assistance had been given on this vital proof, it might reasonably have led to the LM refusing to issue the warrant. We therefore quash the determination made by the LM.

Ground 2 – Breach of Article 17(6)(b) of the 1989 Order.

Statutory Framework

[28] Article 17 of the 1989 Order is set out under the heading "Search Warrants – Safeguards". Articles 17(1),(2), (3) and (4) covers the process for applying for a warrant. Article 17(5) authorises entry on one occasion only.

[29] Article 17(6) merits full citation:

> "(6) A warrant –
>
> (a) shall specify –
>
> (i) the name of the person who applies for it;
> (ii) the date on which it is issued;

(iii) the statutory provision under which it is issued; and

(iv) each set of premises to be searched, or (in the case of an all premises warrant) the person who is in occupation or control of premises to be searched together with any premises under his occupation which can be specified and which are to be searched; and

(b) shall identify, so far as practicable, the articles or persons to be sought."

The Applicant's Case

[30] Mr Power advanced the following contentions:

- The affidavit of Ms Kerr made it clear that a detailed investigation was underway and the individuals suspected of criminal involvement had been identified.
- The terms of the warrant must be precise and intelligible by reference exclusively to its own terms and not by reference to any other material.
- The warrant in this instance referred to "the alleged offender" without identifying that offender, in circumstances where there was no reason why the name had not been specifically set out. Article 17(6)(b) has not been complied with in that the articles were identified by reference to "the alleged offender" who was unknown.

The Respondent's Case

[31] Mr McLaughlin advanced the following contentions:

- Article 17(6) does not require the offences for which people are suspected to be identified, and does not require the articles to be linked to a person or offence. It only requires the articles to be identified or the person sought.
- This warrant does not attempt to identify articles by reference to the person or offence.

Legal Principles

[32] The following principles can be distilled from a perusal of Lees & Ors v Solihull Magistrates' Court & the Commissioners for HM Revenue & Customs [2013] EWHC 3779 (Admin), R (Van der Pijl v Crown Court at Kingston [2013] 1 WLR 2706,

McGrath v Chief Constable of the Royal Ulster Constabulary [2001] 2 AC 731 and R (Energy Financing Team Ltd) v Bow Street Magistrates' Court (Practice Note) [2006] 1 WLR 1316.

(1) The warrant must be read as a whole.

(2) The warrant must be judged by reference to its own terms exclusively and not by reference to any other source material.

(3) The person on whose premises the warrant is executed is entitled to know from the warrant as a whole what is covered by it. It is not enough to look at the warrant in conjunction with the information supporting its grant. The warrant is the only document which provides lawful cover for what would otherwise be an unlawful act.

(4) A warrant should be capable of being understood by those carrying out the search and by those whose premises are being searched without reference to any other document.

(5) It is not a requirement of Article 17(6) that the material is to be defined by the person or the offence.

(6) It is necessary to approach search warrants with a sense of proportion to the type of issues which are embraced in an investigation of the scale in question. It is legitimate also to have regard to the whole warrant.

Conclusion

[33] This point of challenge amounts to a question of factual construction of the warrant. The principles are all tolerably clear. Is this a case where, as in Van der Pilj, the material has been described by reference to the offender or is the reference to offender in the impugned warrant purely a reference to the purpose for which the material will be used and therefore since the warrant does not define the articles by reference to the persons who allegedly committed the offences, the warrant is not invalid?

[34] We have come to the conclusion that the wording used in this instance does offend against the provisions of Article 17(6)(b) for the following reasons.

[35] Whilst the articles are clearly and comprehensively set out in the second bullet point of the warrant, the third bullet point goes on to say "which may link the alleged offender to the offences". We consider that these words render it impossible for the occupiers of the affected premises to know from the warrant itself the extent of the powers of search and seizure available to the officers. Anyone reading this warrant would clearly form the impression that the articles are those which link "the alleged offender" to the offences. The difficulty the reader would then confront is

that the offender is not identified. How then is the reader to know which articles – which may belong to a number of people – can be seized? If for example the warrant had referred to "an" offender or had not clearly connected the words "which may link the alleged offender" to the articles specified in the earlier bullet point the position would have been different. As a simple matter of construction we consider that within the four corners of this warrant it is not clear which articles are the subject of the seizure simply because they have been clearly linked to and defined by the reference to "the offender" and that offender is not named. It cannot be assumed that the offender is necessarily the applicant.

[36] Accordingly we consider this is a ground for declaring the entry and search to be unlawful.

Ground 3 – do the words "any other items which are likely to be relevant evidence" delegate to the officer the responsibility of making the judgement of relevance?

The Appellant's Case

[37] Mr Power advanced the following contentions:

- Relying on the authority of Cheema & Ors v Nottingham Newark Magistrates' Court & Her Majesty's Revenue & Customs [2013] EWHC 3790 (Admin) it is contended that these words give to HMRC too wide a margin of discretion as to what can be seized and disables anyone reading the warrant from ascertaining the limits of the authority.
- In Cheema's case a search warrant had listed a number of articles which were authorised to be lawfully seized but concluded with the words "any high value items suspected of being proceeds of crime and any other items which appear relevant to the offences under investigation". It provided no means within the warrant of identifying what the stated offences were and consequently the search was declared to be unlawful.
- The danger of delegation in the instant case is particularly clear in the context of a warrant that does not identify the alleged offender with whom the search is centrally concerned.

The Respondent's Case

[38] Mr McLaughlin advanced the following contentions:

- Cheema can be distinguished on the basis that in that case the warrant was defective and failed to identify the items sought. Moreover the warrant did not identify the suspected offences contained in the phrase "any other items which appear relevant to the offences".
- Contrast the instance case where the suspected offences are set out on the face of the warrant.

- A "catch all" description after a list of specific items does not offend against article 17(6) of the 1989 Order. Officers cannot always know in advance what they will encounter when carrying out a search. They may uncover material which evidences a modus operandi or lines of inquiry about which they were previously unaware. They cannot be compelled to ignore evidence of that nature.

Legal Principles

[39] Cheema's case, R (Anand) v HMRC [2012] EWCA 2989, Van der Pilj's case and R (Hoque & Das) v City of London Magistrates' Court [2013] EWHC 725 provide authority for the proposition that the use of a phrase such as "and any other items which appear relevant to the offences under investigation" by which to identify articles – and where there is not any means from within the warrant of identifying what the offences are and absent any sustainable argument based on lack of practicability - would fall foul of Article 17(6)(b).

Conclusion

[40] We are unable to divorce this aspect of the case from the ground number 2 dealing with the phrase "which may link the alleged offender to the offences". The failure to provide the identity of the offender within the terms of the warrant renders the phrase "and other items which are likely to be relevant evidence etc." incapable of providing any means from within the warrant of identifying what those articles are and therefore it falls foul of 17(6)(b).

[41] That is not to say that had the offender been properly identified within the terms of the warrant (which we have construed not to be the case), that this phrase would have been in breach of compliance with Article 17(6)(b). We see the logic of Mr McLaughlin's assertions that it would be completely illogical if another similar piece of evidence, of the same type in nature as the articles already identified, was discovered and yet the authorities could not seize it with all the attendant risks of it being removed or destroyed if they failed to obtain another warrant swiftly. The difficulty they face here is that we have found that it is impossible to identify the articles by virtue of the fact that they have been linked to an unidentified offender and thus this further phrase must fall foul of Article 17(6) in the particular circumstances of this case.

Ground 4 – the warrant to search the Range Rover.

The Applicant's Case

[42] Mr Power advanced the following contentions:

- The silver Range Rover vehicle was not within the ambit of the warrant because a "residential warrant" provides no reasonable basis for the search of

the vehicle. Thus for example the vehicle of a visitor to the property which was coincidently on site at the time of the execution of the residential warrant should not fall within it.

- The complaint disclosed no connection between the silver Range Rover vehicle and suspected criminality, between the vehicle and the applicant, or between the vehicle and the premises referred to in the residential warrant.
- Given the absence of any basis for such a conclusion in the complaint the LM could not rationally have been satisfied of the existence of reasonable grounds for believing that there was material on the premises (the vehicle) which was likely to be of substantial value to the investigation of an indictable offence as required by Article 10(1)(b) of the 1989 Order for the lawful issue of the vehicle warrant.

The Respondent's case

[43] Mr McLaughlin advanced the following contentions:

- HMRC applied for and was granted two warrants, one for the applicant's home and one for his Range Rover car. Both applications were grounded on the same complaint.
- The vehicle warrant authorised the search of the car wherever situated in Northern Ireland. However when HMRC arrived intending to execute only the residential warrant the vehicle was parked on the driveway located within the curtilage of the house. It was therefore searched under the authority of the residential warrant and the vehicle warrant was not executed.
- Article 10 of the 1989 Order authorises a magistrate to issue a search warrant in respect of "premises". The term is defined by Article 25 of the 1989 Order in these terms:

> "25. In this order –
>
> 'Premises' includes any place and, in particular, includes –
>
> (a) any vehicle …"

- The premises were correctly identified. The vehicle was in the driveway. Article 25 makes clear that the warrant to search those premises clearly "includes" any vehicle on the premises.

Conclusion

[44] We have no doubt that the argument submitted by Mr McLaughlin is correct in light of the terms of Article 25 of the 1989 Order and we therefore dismiss this aspect of the challenge.

Ground 5—supply of the warrant to the occupier

[45] A further ground of challenge had been contained in the applicant's skeleton argument to the effect that it was alleged that the occupier of the house had not been supplied with a certified copy of the warrant. There was clearly a factual dispute between the parties as to whether or not this had occurred with competing arguments on each side. Wisely, Mr Power did not pursue this aspect of the case in oral submissions recognising, we assume, that the factual dispute was not a matter for determination in a judicial review.

Ground 6 – under the provisions of the Human Rights Act 1998

[46] In light of our conclusions this ground is redundant.

Conclusion

[47] Since we have determined that the warrant has not been issued in compliance with Article 10(1) and (3) of the 1989 Order, we make an order quashing the decision of the Lay Magistrate granting a search warrant with the attendant orders. We order HMRC to return to the complainant all property seized and any copies of that material currently in its possession within 28 days of this court's order unless, within that period, HMRC has made an application to the relevant court pursuant to Section 59(5)(b) of the Criminal Justice and Police Act 2001 (extended to Northern Ireland per s.138(6)(b)of the 2001 Act) for an Order authorising retention of that property on the grounds set out in the conditions contained in that Act.

[48] Non-compliance with the provisions of Article 17(6)(b) does not render the warrant itself unlawful but renders unlawful the entry and search (and necessarily any seizure consequent upon such unlawful search) under the authority of a non-compliant warrant (see Cheema's case at paragraph 18). Accordingly we make a declaration that the entry and search and consequent seizures were unlawful.

[49] We shall invite the parties to address us on the issue of costs.