JSB Judicial Studies Board for Northern Ireland

Search Warrants – steps to be followed by LMs

The following outline of the appropriate steps to be followed when considering any application for a search warrant should be read in conjunction with earlier guidance and in particular the Signatory Duties Guide and the slides from the JSB Signatory Duties Presentation given in October 2014. These instructions serve to underline the importance of the role which is being performed and the particularly invasive nature of the actions which you are being asked to authorise. As Lord Hoffmann explained in *A-G for 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 other executive officer of the State to enter upon a person's premises, search his belongings and seize his goods, the function of the Justice is to satisfy himself that the prescribed circumstances exist. *This is a duty of high constitutional importance. The law relies upon 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 upon private property have been met.*' [Emphasis supplied]

Preliminary issue – Is it urgent?

If an officer ('the informant') comes to your home (or other venue away from court) seeking a warrant your first enquiry should always be whether the matter is urgent. In particular you should ask yourself: Is the proposed search so urgent that it cannot wait until after a warrant can be sought at the next regular sitting of the appropriate court? The decision whether the matter is urgent is yours and not the informant's so it is not sufficient to accept his/her analysis. You must hear what he/she has to say under oath on the subject, taking a written note of the points he/she makes (see further below), and then decide for yourself whether or not there is anything urgent about the application that requires it to be dealt with there and then. If there isn't

the informant should be told to bring the application to the next available court.

Careful note-taking is indispensable

It is essential that you make and retain an accurate written record of all the key aspects of the hearing. The Search Warrant Checklist should be completed on every occasion and the notes detailing all the evidence and submissions made in support of the application can be entered on the reverse of that document with blank continuation pages used, if required. These notes do not need to give a *verbatim* account but should accurately cover, at least in bullet point form, all relevant matters in the case including the evidential basis for the warrant and your reasons for deciding whether or not to grant it. At the hearing's conclusion you should invite the informant to read over your notes and have him/her agree and initial them as an accurate account of the hearing. Under the current procedures no copy papers are left with the judicial officer or the court office after a warrant has issued and no audio recording is made of the hearing. This makes it all the more essential that a reliable note of the hearing is retained by you.

Probing the evidential basis for the warrant

For practically all search warrant applications you will need to be satisfied that there are: 'reasonable grounds/cause for believing/suspecting *etcetera*'. You should request a copy of the legislative provisions under which the application is made[1], noting the statutory conditions in each case, and invite the informant to put the case for a warrant with specific reference to those provisions. While in many cases the prior approval of a police inspector or other senior officer is a necessary condition for seeking the warrant, that approval cannot ever constitute a sufficient basis for you to grant it. You must scrutinise carefully the case made in support of the application and probe the evidence sufficiently so as to be satisfied of the basis for granting a warrant. The burden is on the informant to make the case and if for any reason you feel that there isn't sufficient evidence to allow you to conclude that a warrant should issue – this may include where the informant chooses to withhold certain evidence from you – you should refuse the warrant.

[1] The most frequently relied upon legislative provisions are available on the JudiciaryNI website. These are:

1. Articles 17 & 18 Police and Criminal Evidence (NI) Order 1989
2. Article 10 Police and Criminal Evidence (NI) Order 1989
3. Schedule 5 to the Terrorism Act 2000
4. Article 52 Firearms (NI) Order 2004
5. Section 23(3) Misuse of Drugs Act 1971
6. Section 25 Theft Act (NI) 1969

You must give reasons for your decision

Recent case law from England & Wales based on equivalent legislation lays down that clear and coherent reasons must be given for your decision. This is because: (i) the person in respect of whose premises a warrant has issued is entitled to know why it was granted; (ii) the requirement to give reasons will ensure that a LM does, as he/she must, address each of the statutory requirements in turn before deciding to grant an application; and (iii) if the granting of a warrant is judicially reviewed before a Divisional Court those reasons will be of vital importance in enabling the court to know why the LM decided as he/she did.

The primary importance of fact finding

The first stage in the judicial decision-making process is determining what the facts are. You will make your findings after carefully probing the written and oral evidence provided by the informant to ensure that you are satisfied that there is a sufficient basis for each stated fact. Since these are *ex parte* applications there is no one present from the other side to cross-examine the informant and test the evidence so there is an important onus on you not to take it at face value but to test it and satisfy yourself as to its accuracy and adequacy. When you have determined the relevant facts list them in your written notes as a record. If, having made your findings of fact, you do not believe that the evidential basis exists to satisfy one or more of the conditions of the statutory test in each case then you should refuse the warrant.

Exercising your judicial discretion

In each case if you find that each of the conditions required by the relevant statute is met you still retain discretion whether or not to grant a search warrant. In each case the language used says that you *may* (rather than must) grant a search warrant. Among the questions you will wish to address is whether the issuing of a search warrant is a proportionate means of dealing with the situation. Can the investigating authority's objective be met by less onerous means? Further, does the measure have an excessive or disproportionate effect on the interests of affected persons? Is it necessary to invade the privacy of a family home? Can the warrant be executed when children have left for school? Again these are questions that you are entitled to raise with the informant. Any factors which influence the exercise of your discretion whether or not to issue a warrant should also be clearly recorded in your notes.

Conclusion

These instructions are designed primarily to ensure the integrity and the robustness of the process by which search warrants are sought. Their observance will serve to uphold the rule of law and reinforce confidence in the administration of justice. They will protect the citizen's private life and home from arbitrary and unwarranted state interference. They will also protect you – and the lay magistracy generally – from potential criticism and embarrassment should your decision be challenged in the higher courts.