

**Neutral Citation No. [2011] NIQB 94**

*Ref:* **TRE8140**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

*Delivered:* **28/3/2011**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**Donnelly's (Kevin) Application [2011] NIQB 94**

**IN THE MATTER OF AN APPLICATION BY  
KEVIN DONNELLY FOR JUDICIAL REVIEW**

**BETWEEN:**

**KEVIN DONNELLY**

**Applicant**

**and**

**POLICE SERVICE OF NORTHERN IRELAND**

**First Respondent**

**and**

**NORTHERN IRELAND COURT SERVICE**

**Second Respondent**

**TREACY J**

**Introduction**

[1] By this judicial review the applicant challenges two decisions (i) the seizure of cash by the PSNI ("the first respondent") pursuant to Section 294 of the Proceeds of Crime Act 2002 ("POCA") and (ii) the subsequent order by the Magistrates Court pursuant to Section 295(2) authorising the extended detention of the said cash.

**Background**

[2] On 21 August 2007, as a result of a planned police operation, searches were conducted at premises belonging to the applicant at 204, 236 and 240 Dublin Road

Newry. Under POCA cash was seized from two of these addresses, 204 and 240 Dublin Road as it was reasonably suspected to be recoverable property.

[3] On 22 August police attended the applicant's home at 204 Dublin Road. He was not present. Two notices of application for continued detention of seized cash pursuant to Section 295(2) were left for his attention. One of these related to the cash seizure at 204 Dublin Road and the other to the cash seizure at 240 Dublin Road.

[4] Such an application was necessary because of the strict time limits imposed by POCA in respect of cash seized by the police using under Section 294. Pursuant to Section 295(1) cash seized under Section 294 may be detained initially for a period of 48 hours. Section 295(2) provides that the period for which cash can be detained may be extended by order of the Magistrates Court. The initial application for an order for continued detention pursuant to Section 295(2), having been duly notified to the applicant, was then brought before the Resident Magistrate at Newry Magistrates Court before the expiration of the 48 hour time period prescribed by 295(1).

[5] The purpose of the hearing was to seek an order from the Court enabling the first respondent to continue to detain the cash, which there were reasonable grounds for suspecting was recoverable property, in order to establish its origins.

[6] Two sums of cash, namely €5,515.26 and £674.43, which had been seized at 204 Dublin Road on 21 August, had been placed *in error* on the documents relating to the seizure for 240 Dublin Road. The RM made an order in respect of the seizure but reduced the amounts for 240 Dublin Road by the said amounts and stated that this cash would have to be "formally" returned to the applicant. [I am not clear why a simple amendment application was not made in order to cure this mistake.]

[7] On 24 August 2007 the police returned to the applicant's home address. Nobody appeared to be present and a letter was left addressed to the applicant explaining to him the outcome of the proceedings the day before. The letter referred to the cash seizure on 21 August at 204 Dublin Road and stated that the said cash was not ordered to be retained by police due to a "discrepancy" with the order furnished to the Court and that as a direct result of this the money was to be returned to the applicant. It also recorded that police had attempted to contact him at his home address to no avail and requested the applicant to make contact with the police at his earliest convenience in order to have the money returned to him.

[8] On 26 August DC McAllen received a phone call from the applicant's solicitor stating that the applicant would not be making contact with the police and that if they wished for any clarification in any matter or to return the monies that they would act on his behalf. The police were further informed that all contact with the applicant should be made through his solicitors. DC McAllen made contact with the applicant's solicitors and arrangements were made for the monies to be collected by his solicitor from Banbridge Police Station on 3 September 2007 at 3.00pm. On that date at 3.30pm a solicitor attended informing the police that she was there to collect

the money on his behalf. DC McAllen avers that he invited the solicitor into the interview room, produced to her the seized cash [still in police exhibit bags] and she confirmed, as requested, that she was attending to collect the money on the applicants behalf. He then handed over the cash to the solicitor which she accepted. At this point he recorded a written statement from her confirming the amount of cash and the fact that she had received it from the police on behalf of the applicant. The solicitor read the statement, agreed with its content and signed it accordingly. That statement is exhibited to the second affidavit of DC McAllen and confirms that she “received” the seized cash and confirms that the amounts are correct.

[9] DC McAllen states that as the solicitor went to leave the interview room, holding the cash, he informed her that he would be immediately seizing it in accordance with POCA, that she handed the cash back to him, made no further representations and then left the police station.

[10] Consequent to the re-seizure of the cash a further application for continued detention of seized cash pursuant to Section 295(2) of POCA was, on 4 September 2007, served on the applicant’s solicitor and at the home of the applicant. This notice informed them that a cash seizure hearing was to be heard at Newry Magistrates Court on 5 September 2007.

[11] On that date, after a contested hearing when both sides were represented by Counsel, the order sought was made for the continued detention of the seized cash.

[12] The applicant has averred at para 4 of his affidavit that he understood from his *solicitor* that the cash had been seized once again “without it *ever* passing into her hands”. This contention is inconsistent with the RMs account, at para 11 of his first affidavit, of the unchallenged sworn evidence before him of the evidence given by DC McAllen as to what transpired at Banbridge Police Station; it is also inconsistent with the affidavit sworn by DC McAllen in these proceedings and, indeed, with the affidavit sworn by his own solicitor that she did receive the cash (albeit, she averred, momentarily).

[13] Mr Murphy RM states:

**“16. After considering the issues raised by the evidence and in the submissions before me, I give a brief extempore judgment in which I reflected upon the fact that the applicant had not called any evidence. I considered the provisions of Sections 294 and 295 of POCA and I found that on the evidence before me that police had lawfully seized the cash on the basis that they had reasonable suspicion that the cash was recoverable property, and that further detention of the cash of justified for the purposes of allowing an investigation to be conducted to determine its derivation. Accordingly,**

I made an order for the continued detention of the monies for a period not exceeding 3 months pursuant to Section 295(2) of POCA.

17. I have considered the applicant's Order 53 Statement. I note that it is said at para 1 that 'the money was not at any stage returned' and that 'the first named respondent obtained a receipt from the solicitor acting on behalf of the applicant without handing over any money and purported to re-seize the cash'.

18. This account is not consistent with the *uncontradicted* evidence which was given to me by Detective Constable McAllen. The evidence which I heard was that the cash was actually presented to [the solicitor]; a statement of receipt was then signed by her, before the cash was re-seized by police.

19. Accordingly, I believe that I was correct in law in holding that the cash had been seized and held by police for a period of less than 48 hours, that is from 3 September when it was seized from [the solicitor] until the time of the application before me."

[14] In a further affidavit he restated his position in the following terms:

"6. I emphasise that when I dealt with this application on 5 September 2007 the evidence of the police officer was *uncontradicted*. Counsel acting for Mr Donnelly was expressly invited by myself to call evidence, but he declined to do so. It is my clear recollection that Counsel did not challenge the sequence of events described by the police officer, nor did he cross-examine the police officer."

[15] The applicant's solicitor who attended at Banbridge Police Station on 3 September was Ashleigh Wildridge and in her affidavit she challenged DC McAllen's account of what transpired on that date. It is of note that at para 6 thereof she referred to para 4 of the applicant's affidavit which stated that the money had *never* passed into her hands. This was the account that the applicant gave based on what he said he had been told by his *solicitor*. She says that his account is "*incorrect*" as the seized cash had been "momentarily" placed into her hands. DC McAllen

swore an affidavit in response to the solicitor's affidavit disputing her account and restating his own account of which he said he had a very clear recollection.

[16] Mr Murphy in his second affidavit observed that this account was not put in evidence before him by the applicant when the opportunity was provided for so doing and that he fails to understand why this account is now given when it was not put before him at the hearing on 5 September. At para 9 he states:

**“For my part it would have been preferable if Ms Wildridge had been called to provide her version of events before I made an order for the detention of the monies, rather than giving it now as part of the applicant's judicial review challenge to my order where it is not subject to cross-examination.”**

### **The Parties Contentions**

[17] The applicant contended that what transpired at Banbridge Police Station on 3 September was an unlawful, bad faith exercise which was also contrary to the legitimate expectation that had been generated that the cash initially seized would be returned to the applicant. The re-seizure was, they contended, an illegitimate exercise which, if permitted, would drive a “coach and horses” through the strict statutory timetable enshrined in POCA in respect of seized cash. Insofar as the order made by the RM on 5 September was concerned this was sought to be impugned on the basis that it was contrary to the time limit provisions of POCA, that the RM had failed to take into account the fact that the cash had been “re-seized” [see Order 53 para 4(i)], was wrong in law and in fact in holding that the cash had been seized for a period of less than 48 hours and failed to take into account the applicant's legitimate expectation that the cash would be returned and that the re-seizure and subsequent proceedings were an abuse of process. The decisions of both respondents were also challenged on the basis of being *Wednesbury* irrational and as violating the applicant's rights under Art 1 of the First Protocol of the European Convention.

[18] The first respondent contended, relying in part on Section 12(1) of the Interpretation Act 1978<sup>1</sup> that Sections 294 and 295 of POCA provide for the exercise of such powers on more than a single occasion if required. They also submitted in reliance on the affidavit from the RM that he had considered that the application made to him on 5 September 2007 had been made in good faith and that the exercise of the power to re-seize the cash was both proper and lawful. In respect of the argument based on alleged violation of Art 1 of the First Protocol they submitted that the seizure and detention of the cash was in accordance with Sections 294 and 295 and as such lawful. Accordingly, Art 1 is not engaged or if it is engaged (which was not accepted) the deprivation was justified as being lawful, in the public interest

---

<sup>1</sup> “Where an act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires”.

and reasonably proportionate. Insofar as the complaint based on legitimate expectation was concerned they submitted that the applicant could expect only that the re-seized cash would be dealt with in accordance with the law and that no further legitimate expectation could arise from the letters sent on 24 August.

[19] As to the suggestion of *mala fides* on the part of the police, and in particular DC McAllen, it was contended that his actions were in accordance with the law at all times, that he fully and properly informed the RM of all relevant facts under oath at the hearing on 5 September and that the RM, having considered all of the evidence and the submissions and having reviewed the provisions of Section 294 and 295 considered that the conditions were satisfied and accordingly granted the order for continued detention of the cash. It was therefore submitted that all that the applicant could legitimately expect was the lawful exercise of the seizure and continued detention powers.

[20] The second respondent did not dispute that strict compliance with the statutory time limits is required. They however emphasised that the RM did not preside over a situation where the time limits were sidestepped. The time limits, they submitted, were complied with. They pointed out that the first application for continued detention was made before a Magistrate within 48 hours of the initial seizure. The police were clearly well aware that they had no lawful authority to detain the cash after failing to secure an order in respect thereof and they therefore took active steps to ensure its return to the applicant. Having returned it to the applicant's representative police re-seized the cash on 3 September and complied with the 48 hour time limit by making a fresh application on 5 September. The second respondent therefore submitted that the real issue was not whether there had been any failure to comply with the statutory time limits but whether the police were entitled to effect a re-seizure of cash in the manner described and whether Magistrates are entitled to grant detention orders in such circumstances, having first satisfied themselves that any re-seizure was carried out in good faith, that it was carried out for the proper statutory purpose and that the statutory conditions were satisfied. They submitted that having satisfied themselves of these matters that the Magistrate was acting lawfully and not unreasonably in deciding to grant the police their application.

## **Discussion**

[21] Sections 294 and 295 of POCA deal with the seizure and detention of cash. Section 294(1) of POCA provides police with powers to seize any cash where there are reasonable grounds for suspecting that the cash is either recoverable property, or that it is intended for use in unlawful conduct. Whilst this reasonable suspicion persists a constable who has seized cash may initially retain it for a maximum of 48 hours [see Section 295(1)].

[22] The powers contained within POCA are draconian in nature and accordingly careful judicial supervision is often necessary. All parties acknowledged that strict

compliance with the time limits is required primarily because the detention of cash may amount to an interference with a person's right to the peaceful enjoyment of his possessions; see **Part 3 4.22-4.33 of Smith Owen & Bodnar on Asset Recovery**.

[23] Though likely to be very rare there is, in principle, no reason why the powers provided by Section 294 and 295 of POCA cannot be exercised on more than a single occasion if required. No contrary intention appears in the Act and accordingly such an interpretation is consistent with Section 12(1) of the Interpretation Act which provides:

"12 Continuity of powers and duties England and Wales, Scotland and Northern Ireland

(1)Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires."

[24] Had there not been an error in the documents the orders sought would have been made at the first application on 23 August.

[25] The principle object of the legislation is the investigation of and the seizure and removal of the proceeds of crime. There is a real danger that this object could be compromised if mere administrative errors could not be cured. Where, as in the present case, the error was merely technical or administrative I am satisfied that the police were entitled to seize the cash, the character of which had not altered, *provided* they acted in good faith and that any re-seizure satisfied the requirements of the legislation. No bad faith or illegality has been established.

[26] While the applicant was informed that the police wished to return the cash to him it was made clear in the same letter (24 August) that the cash was not ordered to be retained because of a "discrepancy" with the order furnished to the Court. Whilst this may have caused the applicant to believe that the money was to be permanently returned it is plain that the police were not acting in bad faith but were intending to promote the objects of the legislation by curing a technical error and bringing the matter back before the Court where the applicant could exercise his rights to challenge the legality and seizure of the continued detention if he so chose. Nor, in my view, did the applicant have any enforceable legitimate expectation that the cash would not be re-seized. The proper ambit of any legitimate expectation was that if a re-seizure is permissible under the law, that any re-seizure would be conducted in accordance with the law (see **Judicial Review Handbook, Michael Fordham, 4<sup>th</sup> Ed, para 41.1.12**).

[27] The applicant has failed to establish that the re-seizure of the cash on 3 September was unlawful on any ground. When the application for continued detention of the cash came before the RM on 5 September it was made within 48

hours of the re-seizure. The RM was satisfied that the cash had been lawfully seized by the police on the basis that they had reasonable suspicion that it was recoverable property and that further detention of the cash was justified for the purposes of allowing an investigation to be conducted to determine its derivation. The RM said at para 20 of his first affidavit that while the events of 3 September were somewhat unconventional he could not find that they were unlawful, or that they were such as to undermine the basis for the application before him. I agree there is in these circumstances no basis for impugning the order.

[28] As far as Art 1 of the First Protocol is concerned it does not prohibit the seizure of property under statutory schemes such as POCA. It does require that any seizure of the property be proportionate and in accordance with the law. But for the reasons that I have already given I do not consider that there was anything unlawful about the re-seizure or order for continued detention of the cash.

### **Conclusion**

[29] Accordingly, for the reasons given, the application is dismissed.