[2020] IEHC 275

THE HIGH COURT
JUDICIAL REVIEW

Record No: 2017/529JR

BETWEEN

WILLIAM KANE

APPLICANT

AND

THE REVENUE COMMISSIONERS, PATRICK ROCHE & THE DIRECTOR OF PUBLIC PROSECUTORS

RESPONDENT

JUDGMENT of Ms. Justice Murphy delivered on the 4th day of June, 2020

1. This is an application for judicial review of a District Court Order of 311st March 2017 authorising the continued detention of cash seized from the Applicant on the 9th July 2015 pursuant to section 38 of the Criminal Justice Act 1994 as amended by the Proceeds of Crime (Amendment) Act 2005

2. The Applicant, on the 10th July 2017, was granted leave to seeks the following reliefs:-

   (i) An order of *certiorari* by way of application for Judicial Review to quash an order of Dublin Metropolitan District Court on the 31st of March, 2017 made pursuant to section 38 of the Criminal Justice Act 1994 as amended, permitting the further detention of the Applicant's property;

   (ii) A Declaration by way of application for Judicial Review that the order and further detention of the Applicant's property made at Dublin Metropolitan District Court in respect of the application presented by Mr Patrick Roche is invalid and has no effect;

   (iii) An Order of Prohibition prohibiting the Respondent from prosecuting or otherwise taking any further steps in the forfeiture proceedings entitled the Director of Public Prosecutions v William Kane on bill DUR v 0517/17; and

   (iv) An Order pursuant to Order 84 Rule 20(8) of the Rules of the Superior Courts 1986 (as amended) staying the Forfeiture proceedings the subject matter of this application pending the determination of the application herein.

Grounds Upon Which Relief was Sought:

3. The grounds upon which the Applicant claimed to be entitled to an Order of Certiorari and a declaration that the Order of the District Court was invalid are;

   i. Failing to comply with the principles of natural and constitutional justice, basic fairness of procedures pursuant to law, the Constitution, the European Convention on Human Rights and acted unlawfully by:

      a. Failing to apply the appropriate statutory standards to the facts of the application in this case in a proper manner having regard to the fact that the provisions identified within section 38 had not been met;

b. Erred in law in its interpretation of the appropriate statutory test for meeting the threshold in further extending the detention of the Applicant's property;
c. Erred in law in finding that the further detention of the Applicant's property was necessary and justified while its origin and derivation was further investigated; &
d. Erred in law in finding that the further detention of the Applicant's property was justified while consideration was given to the institution of criminal proceedings against any person for an offence with which the cash was connected.

4. The grounds upon which an Order of Prohibition and a stay on the forfeiture proceedings were sought were that the forfeiture proceedings pursuant to section 39 of the Criminal Justice Act 1994 (as amended), were founded on the section 38 detention order of the District Court of the 31st March 2017, and that in the event that the said order was invalid, the forfeiture proceedings stemming from the invalid order were themselves invalid.

Affidavit grounding the Application

5. On the 10th July 2017, the Applicant was granted leave to seek the reliefs set out at (i) (ii) and (iii) above and the forfeiture proceedings entitled *The Director of Public Prosecutions -v- William Kane* on bill DURV 0517/17 were stayed pending the determination of this application.

6. The affidavit grounding this application was sworn by the Applicant's solicitor, who made averments as to facts surrounding the seizure of cash from the applicant, presumably based on his client's instructions. The Applicant did not swear an affidavit on his own behalf, even for the purpose of verifying the averments as to facts made by his solicitor. In these circumstances, where there is conflict as to those facts, the court prefers the account given on affidavit by the second Respondent which is reflected in the evidence which he gave to the District Court on the making of the impugned Order. Of greater significance to the court is the fact that there are material inaccuracies in the grounding affidavit. At paragraph 11 the deponent avers that the second respondent, Officer Roche gave evidence to the District Court that his investigation into the origin and derivation of the cash seized from the applicant was complete. He further avers that Officer Roche gave evidence that no further consideration was being given to the institution of criminal proceedings against the applicant for an offence with which the cash was connected. Neither of these averments is true. Officer Roche gave no such evidence. Fortunately, the court has before it a transcript of the proceedings in the District Court which reveals what actually occurred.

Statement of Opposition

7. The Respondents filed what might be described as a 'full defence' to the Applicant's claims. *Inter alia* they pleaded that the statutory proofs required by section 38 had been satisfied; that even if there was an insufficiency of evidence (which was denied) such error was made within jurisdiction and was therefore not amenable to judicial review; that the order was not bad on its face and furthermore that leave had neither been sought nor

granted to seek judicial review on that ground; that the section 39 forfeiture application had been made during the currency of a valid section 38 detention order.

Background

8. On the evening of Thursday 9th July 2015 Customs Officers encountered the Applicant at Dublin Port when he and his wife disembarked in their vehicle from the 'MS Stena Adventure' a car ferry which had arrived from Liverpool. A Customs dog was deployed and gave a 'positive indication' on the centre console of the vehicle. Later when a fixed portion of the console was removed, six thousand, six hundred and fifty pounds, sterling (£6,650) was found concealed in that area. The initial explanation proffered by the Applicant is that the cash was his and was the proceeds of the sale the previous month, in Birmingham, of a British registered Mercedes 200, for the sum of £8,000. Later on, through his lawyers, the Applicant proffered a second explanation, namely, that the cash derived from the sale of jewellery approximately two years earlier.

9. Officer Griffin, the Officer of Customs and Excise who dealt with the Applicant at Dublin Port, suspecting that the cash represented the proceeds of crime or was intended for use in connection with criminal conduct seized it under section 38 of the Criminal Justice Act. He detained the sum of £6,650 noting that it was being lawfully seized pursuant to section 38 of the Criminal Justice Act 1994 (as amended). It was detained on the suspicion that it represented the proceeds of crime or was intended for use in connection with criminal conduct.

10. On the 10th July 2015 Officer Griffin by information on oath in writing, sworn before the District Court, applied to the Dublin Metropolitan District Court for the further detention of the cash for a period beyond the 48 hours provided for by section 38(2) of the 1994 Act. The section permits a further period of detention, not to exceed 3 months. An order was granted on the 10th July 2015, permitting further detention until 9th October 2015.

11. The detention Order was granted pursuant to section 38(2) of the 1994 Act as the Court was satisfied that the detention of cash was justified whilst its origin and derivation were further investigated and whilst consideration was given to the institution of criminal proceedings against any person for an offence with which the said cash was connected.

12. Further detention Orders were made on the following dates: 8th October 2015, 7th January 2016, 6th April 2016, 5th July 2016, 4th October 2016, and 3rd January 2017. On each occasion notice of the application was served on the Applicant. Each application was successful as each was held to have met with the statutory requirements. The statutory framework provides that the continued detention of the cash is justified whilst its origin and derivation are under further investigation or whilst consideration is given to the institution of criminal proceedings against any person for an offence with which the said cash is connected.

13. On the 31st March 2017 an application was presented before the Dublin Metropolitan District Court by the second Respondent, Inspector Patrick Roche, seeking the further detention of the cash in question.

14. On hearing the application and facts as presented by the Respondents, and having considered submissions from the Revenue Solicitors Office and submissions and objections made by counsel for the Applicant, the Court acceded to the application of Inspector Roche further authorising the detention of the cash for 3 months until 29th June 2017. This is the order which the Applicant impugns in these proceedings. It was the last possible application for the continuation of the detention, because the Act provides at section 38(3)(b), that the total period of detention shall not exceed two years from the first detention order, and that period expired on the 9th July 2017.

15. On the 6th April 2017 the DPP directed that forfeiture proceedings pursuant to section 39 of the 1994 Act be initiated, and same were duly issued, bearing record number - DURV0517/17, on the 8th June 2017, returnable before the Dublin Circuit Court on the 16th June 2017. On the return date the forfeiture proceedings were adjourned on consent to the 4th October 2017. They have been adjourned from time to time since then, pending the determination of the within proceedings.

16. The Applicant moved the application for leave to seek judicial review on the 29th June 2017 and 3rd July 2017 and leave was granted by Noonan J. on the 10th July 2017. Noonan J. also placed a "stay" on the further prosecution of the forfeiture proceedings, pending the determination of these proceedings.

17. The Applicant's proceedings were listed before this Court on the 10th October 2017. On that date the Respondents sought permission of the court to take up the Digital Audio Recording ("DAR") of the District Court proceedings dated the 31st March 2017, Noonan J. ordered the release of the DAR.

18. The Respondent applied to have proceedings further adjourned on the 21st November 2017 and the 16th January 2018 because the DAR had not been recovered despite an Order of the High Court directing same. Noonan J demanded an explanation be provided by the Respondent's solicitor on the adjourned date, being the 23rd January 2018.

19. On the 23rd January 2018 a hearing date of the 6th July 2018 was set. The Respondents filed their statement of opposition and the grounding affidavit of Officer Patrick Roche on the 26th January 2018. On the 28th June 2018 the hearing date was adjourned because the Applicant had not yet been provided with a record of the DAR from the District Court hearing. A new hearing date of the 25th January 2019 was set.

20. The Circuit Court proceedings have been adjourned from time to time. In the meantime the cash seized from the Applicant on the 9th July 2015, stands lodged to the interest-bearing account of the Collector of Customs in accordance with the provisions of Section 41 of Criminal Justice Act 1994.

Relevant Statutory Provisions

21. Sections 38 and 39 of the Criminal Justice Act 1994, which are in issue in these proceedings, form part of the statutory code for the search, seizure, and disposal of money gained from, or for use in, criminal conduct. These provisions are contained in

Part VI of the Act which has eight sections in total. Section 38 provides for the search, seizure and detention of cash. Section 39 provides for the forfeiture by Order of the Circuit Court of cash seized and detained under section 38. Section 40 provides for an appeal to the High Court of an order made by the Circuit Court. The remaining provisions are primarily administrative in nature and are not of concern to the court on this application.

22. Section 38 of the Criminal Justice Act 1994, as amended by Section 20 of the Proceeds of Crime Act 2005, provides:-

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

(1A) A member of the 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 persons for use in any criminal conduct.

(2) Cash seized by virtue of this section shall not be detained for more than forty-eight hours unless its detention beyond forty-eight hours is authorised by an order made 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 forty-eight 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.

(3) Any order under subsection (2) of this section shall authorise the continued detention of the cash to which it relates for such period, not exceeding three months beginning with the date of the order, as may be specified in the order, and a judge of the District Court, if satisfied as to the matters mentioned in that

subsection, may thereafter from time to time by order authorise the further detention of the cash but so that –

(a) no period of detention specified in such an order, shall exceed three months beginning with the date of the order; and

(b) the total period of detention shall not exceed two years from the date of the order under subsection (2) of this section.

(3A) Where an application is made under section 39(1) for an order for the forfeiture of cash detained under this section, the cash shall, notwithstanding subsection (3), continue to be so detained until the application is finally determined.

(4) Any application for an order under subsection (2) or (3) of this section may be made by a member of the Garda Síochána or an officer of customs and excise.

(5) At any time while cash is detained by virtue of the foregoing provisions of this section a judge of the District Court may direct its release if satisfied –

(a) on an application made by the person from whom it was seized or a person by or on whose behalf it was being imported or exported, that there are no, or are no longer, any such grounds for its detention as are mentioned in subsection (2) of this section, or

(b) on an application made by any other person, that detention of the cash is not for that or any other reason justified.

(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.

23. Section 39 of the 1994 Act is the forfeiture section and it provides: -

"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 person for an offence with which the cash in question is connected."

Evidence

24. Evidence of what transpired in the District Court is to be found in the seven page transcript of the Digital Audio Recording of those proceedings produced, pursuant to an Order of the High Court, on foot of an application by the Respondents. This evidence was not before the High Court when leave to seek judicial review was granted. The transcript which was produced without the benefit of logging notes, has a number of typographical errors. For example, the Revenue solicitor is named 'Cannon' in the transcript, when his actual name is Callinan. The term 'derivation', referred to in section 38 of the Criminal Justice Act 1994, sometimes appears as 'derogation' in the transcript. That said, both parties accepted that it is a true account of what occurred in the District Court and both parties sought to rely on portions of the transcript in support of their respective arguments. For completeness, the court has appended a copy of the transcript to this judgment.

25. The transcript records Officer Patrick Roche's application before District Judge Halpin on 31st March 2017 for an order authorising the further detention of the £6,650 stg. cash seized from the Applicant at Dublin Port on 9th July 2015 as it was suspected to be *the proceeds of crime or for use in criminal conduct*. The Judge was informed that a file had been submitted to the DPP and that directions were awaited. It was noted that previous applications for detention had been made to the same District Judge. The Officer confirmed in cross-examination that he was satisfied that the cash either directly or indirectly represented the proceeds of crime or was for use in criminal conduct and when asked why he had sent a file to the DPP the Officer stated:-

> *"Judge, the main factors in this case why the file was sent to the DPP was, at the time Mr. Kane was stopped, a detection dog had searched the car and indicated on the centre console of the car. Mr Kane gave no indication as to why this might be.*
>
> *When the car was brought back and subsequently searched, there was a deep concealment found in the centre console of the car where the cash was found. Further on from that, Mr Kane stated that the —- when asked about the source of this cash, he said that he was in the business of buying and selling cars and that this cash was the proceeds of a vehicle sold in the UK the previous month. Further on from this, when legal representatives of Mr Kane wrote in to give an explanation when asked, they said that this cash derived from the sale of jewellery some two years before that."*

26. It was suggested to Officer Roche that the file was sent to the DPP *'for them to validate that you can seek forfeiture of these funds.'* He responded: *Judge, it's part of the due process in the court. We make our recommendation to the DPP and the DPP will then rule to direct for a section 39 forfeiture application, or to release the cash back.'* It was then

put to him that the only reason the DPP had the file is for consideration of a section 39 forfeiture. He responded: *'Consideration and the…request any further information on matters at hand Judge.'* On the conclusion of the evidence, the Applicant raised an issue as to compliance with section 38(2)(b) which provides:

> *"..detention of the cash is justified while its origin or derivation is further investigated or consideration is given to the institution……of criminal proceedings against any person for an offence with which the cash is connected."*

27. Essentially, he submitted to the District Judge that because Officer Roche was satisfied that the cash was the product of criminality or intended for criminality then there was no basis for any further detention for the purpose of the investigation of the origin or derivation of the cash. However, Officer Roche clarified that whereas he was satisfied that the cash had a criminal source or purpose, he had not yet identified that source or purpose. Secondly it was submitted that there was no evidence before the Court that consideration was being given to the institution of criminal proceedings. The Applicant suggested that there was some significance in the fact that there was nobody present on behalf of the DPP to *"identify that there are charges coming from (the investigation of the funds)"* In those circumstances the Applicant submitted that the statutory requirements of section 38(2)(b) had not been met and that a further detention order should not be made.

28. Judge Halpin was satisfied that the Applicant had misconstrued section 38(2)(b). He ruled:-

> *"Well, actually I think we're overcomplicating this section. It's actually a very well written section, because it's a section that's easily understandable and it's not couched in legal jargon, it's couched in terms that could not offend one's sensibilities in relation to the interpretation of this section.*
>
> *Officer Roche has given evidence to this Court that cash was detected in a motor vehicle with the aid and assistance of a trained dog who alerted them to the existence of this cash and on searching of this vehicle, cash was found concealed in the vehicle.*
>
> *I have no doubt whatsoever the concealing of anything must give rise to a reasonable suspicion as to why it is being concealed. Is it being concealed because one wants to safeguard one 's property, or is it being concealed to avoid detection? But whatever the reason is, Officer Roche is an experienced customs and excise officer and he brings the weight of his training, skill, education and experience to these matters and he is mandated to investigate matters such as the matter before this Court.*
>
> *Section 38 of the Criminal Justice Act 1994, as amended by section 20 of the Proceeds of Crime (Amendment) Act 2005 sets out two criteria and counsel is quite correct in saying that those criteria must be complied with. I have no doubt in*

respect of the first criteria that Officer Roche satisfies me that he had reasonable grounds for the suspicions that he holds and secondly, the second criteria, that the detention of the cash is justified while its origin or derivation is further investigated. Officer Roche is not satisfied as to the origin of this cash. They used a conjunction(sic) in this subsection, "or consideration is given to the institution of criminal proceedings." The conjunction, "or", is seminal in the interpretation of the second criteria. Officer Roche, at the minute, is tasked with the investigation of it. His office is mandated before criminal proceedings are instituted by virtue of a direction of the DPP and that's contemplated within this section by the use of the conjunction "or".

Officer Roche has made out a prima facie case to this Court and this Court is satisfied with the evidence he has given and the Court is minded to grant the application."

While the District Court Judge described the word "or" in section 28(2)(b) as being a conjunction it is in fact disjunctive and was used by the District Court Judge in that sense.

29. The Order authorising the further detention of the cash seized, was duly made by Judge Halpin. There are a couple of typographical errors in the recital section of the Order. It reads:

> *"Whereas an order was made by the Court at Dublin District Court on the 3rd January 2017 Day of October 2016 authorising pursuant to subsection (3) of section 38 of the above mentioned Act of 1994 (as amended) the detention for a period of three months until the 2nd Day of March 2017…." (emphasis added)*

30. The reference to 'Day of October 2016' is surplusage. The reference to '2nd Day of March 2017' is an error, since three months from the 3rd of January 2017 is the 2nd April 2017.

Applicant's Submissions

31. The Applicant case may be summarised as follows:

The Order granted on the 31st of March 2017 pursuant to section 38 is and was invalid because:

i. The Statutory proofs required under section 38 were not met in full in that the second limb of s. 38(2)(b) was not satisfied;

ii. The evidence provided by the Respondents was in direct conflict with and cannot support the determination of the District Court;

iii. The impugned order was made ultra vires;

iv. The Order is bad on its face;

v. A section 39 Application may only be made during the tenure of a valid sectoion 38 detention order;

vi. The section. 39 Application was made without a valid section 38 detention order in being; and

vii. The section 39 Application is invalid having regard to the absence of the necessary or required statutory pre-requisites being in place – in that there was not in existence an appropriate or valid section 38 detention Order.

The Statutory proofs were not met in full – submissions i, ii & iii

32. The Applicant submits that the District Court erred in law and misapplied the facts in its determination of the 31st March 2017, authorising the further detention of the cash pursuant to section 38(2) of the Criminal Justice Act 1994 (as amended).

33. The Applicant submits that the criteria mandated by section 38(2) are clear, unambiguous and as expressly identified by the Court. As a measure that deprives the Applicant his monies, they cannot be broadly construed. The District Court Transcripts shows this:-

> *"It's actually a very well written s., because it's a s. that's easily understandable and it's not couched in legal jargon, its couched in terms that could offend ones sensibilities in relation to the interpretation of this s."*

34. Section 38(2) sets out the criteria of which a District Court Judge must be satisfied prior to acceding to an application to extend the time for detention of funds. These require both criteria in section 38(2)(a) and section 38(2)(b) to be complied with.

35. The first limb as per section 38(2)(a) was not an issue of controversy at and requires only that the Court to be satisfied that: *"(a) that there are reasonable grounds for the suspicion mentioned in subsection (1) of this section…"*

36. The Applicant's issue was specifically with the second limb, and more importantly the individual and distinct criteria therein which requires the District Court to be satisfied that:

> *"(b) that detention … is justified while its origin or derivation is further investigated or consideration is given to the institution … of criminal proceedings against any person for an offence with which the cash is connected."*

37. As identified within section 38(2)(b) when granting a detention order the Court must be satisfied that the detention is justified:-

i. while its origin or derivation is further investigated; or

ii. consideration is given to the institution (whether in the State or elsewhere) of criminal proceedings against any person for an offence with which the case is connected.

38. No issue arises in relation to the District Court identification that the *'or'* between criteria (i) and (ii) is disjunctive. Once the Court is satisfied there are reasonable grounds (limb

1) it is then necessary thereafter to consider limb 2 and that one of the elements therein, either (i) or (ii) detailed above (in the preceding paragraph) has been satisfied.

39. Evidence was elicited in cross-examination of the Respondent that he was satisfied that the origin and derivation of the funds were the proceeds of crime or used in criminal conduct. In effect, this was concluded.

40. The Transcript shows this exchange:-

"Q: And I think you've already provided evidence in relation to your suspicion that the funds that were seized are either from the proceeds of crime or for criminal acts: is that correct?

A. That they either directly or indirectly represent the proceeds of crime or for use in criminal conduct, Judge that's correct.

Q. So, you have – your evidence is that you're satisfied that the origin and derogation of those funds are either from one or the other that you've identified?

A. That's correct Judge."

41. Counsel for the Applicant further addressed the Court for the purposes of clarity noting:-

"Now, it's that the second limb of that test which must be met that we are objecting to, to be honest. (a) Garda Roche has given firm evidence that the derivation or origin of the money is not in question. His evidence is that he's happy it derives from either the proceeds of crime or from criminal conduct. The second limb of the test again has not been met. The file has been sent to the DPP for consideration of forfeiture not criminal proceedings."

42. Mr Cannon for the Revenue identified in addressing what criteria is required within section 38(2) states:-

"MR CANNON: …these proceedings in s. 38, District Court proceedings, that it's – the main grounds is the basis of the reasonable suspicion…

JUDGE: Yes.

MR CANNON: --that's been espoused by Inspector Roche. I don't believe that criminal proceedings have to be brought specifically. I think it's to do with the investigation of the offence and that more time is needed in relation to the investigation to the offence."

43. Mr Cannon identified the relevant applicable provisions relate to the reasonable suspicion aspect and the investigation of the offence. The investigation of the offence specifically limits that investigation to the determination of the origins or derivation of the funds – for which Inspector Roche, on his evidence was satisfied were the proceeds of crime or for use in criminal conduct.

44. The Applicant noted that following legal submissions Inspector Roche seems to have attempted to mend his evidence by a unilateral intervention; he opined that the source was in contention and he had not identified what that actually was. However, this was an unsolicited intervention following legal argument and ought not to be considered. In fact the Judge commented that he did not need that intervention. Insofar as those words may be considered, in the circumstances they must be strictly construed and it is notable that no evidence was given of ongoing or further investigation, which is the requisite criterion, thus, despite the inappropriate intervention, there remained no evidence pursuant to s 38(2)(b) upon which the Court could order the further detention of the Applicant's monies.

45. At no point during the hearing was it suggested or even relied upon by the Respondent that further detention of funds under section 38(2)(b) was necessary for the purposes of investigating the origin or derivation of the funds seized. As of March 31st 2017 there could not be a continuing basis for the application of section 38(2)(b) in this respect.

46. It has not been contended by the Respondents that the purpose of the section 38 application was for the consideration of the institution of *"criminal proceedings against any person for an offence…"*

47. The Officer of the Director of Public Prosecutions was not present to identify any position in respect to the issuing of such criminal proceedings for an offence. It is identified during the course by Inspector Roche that the rationale for the involvement of the DPP is to consider, rule or direct on section 39 applications. A section 39 forfeiture application cannot constitute criminal proceedings for an offence within the meaning of section 38(2) of the Act.

48. In its ruling the Court paid particular reference to its rationale for acceding to the Respondent application as follows:

> *"…s.38 of the Criminal Justice Act 1994, as amended by s. 20 of the Proceeds of Crime (Amendment) Act 2005 sets out two criteria and counsel is quite correct in saying that those criteria must be complied with. I have no doubt in respect of the first criteria that Mr Roche satisfies me that he had reasonable grounds for the suspicions that he hold and secondly, the second criteria, that the detention of the cash is justified while its origin or derivation is further investigated. Mr Roche is not satisfied as to the origins of the cash."*

49. The Applicant submits that neither criteria of limb 2 – either (i) or (ii) was satisfied and the Order is invalid and made without any legal basis.

50. The Applicant submitted that the ruling of the Court with respect to the first criterion required by section 38(2)(b) is at variance with and contradicted by the evidence provided by Inspector Roche. Consequently the Impugned Order did not satisfy the statutory criteria. It is submitted the impugned Order was made without evidence to

satisfy the court that the proofs under section 38 had been made out, and was made *ultra vires*.

The Order is Bad on its Face - submission iv

51. The Applicant submitted the District Court Order of the 31st March 2017 is bad on its face. The Order details:-

> *"WHEREAS an order was made by the Court at Dublin District Court on the 3rd January 2017 Day of October 2016 authorising pursuant to subs. (3) of s.38 of the above-mentioned Act of 1994 (as amended) the detention for a period of three months until the 2nd Day of March 2017 of cash in the amount of £6,650 GBP cash approximately (being an amount not less than the sum prescribed by the Minister for Justice, Equality and Law Reform, for the purpose of the said Act, as the prescribed sum) seized and detained on the 9th Day of July 015 at Dublin Port in the court (area and) district aforesaid from one William Kane in exercise of powers under subs. (1A) of s. 38 of the above-mentioned Act of 1994"*

52. The Applicant submitted the details provided are conflicting, erroneous and ambiguous in that the Order purports to identify a previous section 38 order.

> *"made by the Court at Dublin District Court on the 3rd January 2017 Day of October 2016 authorising pursuant to subs. (3) of s. 38 of the above-mentioned Act of 1994 (as amended) the detention for a period of three months until the 2nd Day of March 2017 of cash in the amount of £6,650 GBP cash…" [Emphasis added]*

53. The Order clearly identifies an error on its face in that it purports to identify an order made on the (i) *"3rd January 2017 Day of October 2016"* and (ii) *"until the 2nd Day of March 2017"*.

54. No such Order exists with these details, if such Order did exist the details identified would have alerted the Court to the expiratory date as identified, and any such previous detention order would have expired.

55. It appears that the Order as provided to and signed by the District Court was an engrossed order, pre-prepared by the Respondents, and thus the errors have been visited upon the Court by the Respondents. No attempt has been made to amend or correct the Order.

56. The jurisdiction to detain funds must be clear upon a reading of the face of the relevant Order.

57. In *GE v Governor of Cloverhill Prison* [2011] IESC 41 Denham CJ referred to the judgment in *The State (Hughes) v Lennon* [1935] IR 128 at p. 142, where Sullivan P. stated:

> *"I did not think there could be any doubt upon that matter." And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court but that which specially appears to be so; and, on the contrary,*

nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged: Peacock v. Bell (2)." "In the case of special authorities given by statute to Justices or others acting out of the ordinary course of the Common Law, the instruments by which they act, whether warrants to arrest, commitments, or orders, or convictions, or inquisitions, ought, according to the course of decisions, to show their authority on the face of them by direct averment or reasonable intendment. Not so the process of Superior Courts acting by the authority of the Common Law," per Parke B.: Gosset v. Howard (1). This principle was recognised and reaffirmed by Palles C.B. in the course of his judgment in R. (Boylan) v. Londonderry JJ. (2), in which he refers (at p. 381) to "the more general rule that not only an order to imprison, but any order made by any authority, no matter how high, not known to the Common Law or although known to it, not acting in pursuance of it, must upon the face of it show the facts which give the jurisdiction to make it.""

58. In *Joyce v Governor of the Dochas Centre* [2012] 2 IR 666 the Applicant was committed to prison by the Circuit Court. The Committal Warrant detaining that Applicant was described by Hogan J. as a *"short form"* of Warrant. It did not recite the offence upon which the Applicant had been convicted, the only reference to the facts giving rise to the generation of the Warrant was reference to *"the above-mentioned criminal case"*. Hogan J. relied upon the judgment of Denham CJ in *GE* and highlighting the following passage:

> *"A document, such as in issue here, should contain clear information on its face as to the basis of its jurisdiction. This information is required so that it be available to, for example, (a) the person in custody, such as the appellant; (b) the Governor of the Prison or any other [person] who is holding a person in custody and (c) the Court which is requested to inquire into the custody pursuant to Article 40 of the Constitution.*
>
> *In this case the document of 2nd of August refers only to s. 5(2)(a) of the Immigration Act .... That is insufficient to show jurisdiction. The document is defective because it does not state on its face the reason for the arrest and detention of the appellant."*

59. Hogan J. held at p. 678 that: -

> *"36. If in GE the Supreme Court held that an arrest warrant did not show jurisdiction on its face by disclosing the reason for the arrest, this must be true a fortiori of a committal warrant which fails to give any details whatever of the offence of which the applicant stood convicted, not least given that this is required by the Gosset v. Howard principle which, as we have just seen, was in turn expressly approved of in GE. The position might well be different if there was in existence a separate conviction order which contained those details of the offence of which the applicant was convicted and which was offered as a justification for the detention. Where, however, as here, the only document forming the basis of the detention is a*

committal warrant of the kind we have just described, this must be adjudged to be defective and not forming a sound basis in law for the applicant's detention."

60. The error on the fact of the Order renders it unlawful. The result of the Order, which lacks jurisdiction, would if enforced be the unlawful deprivation of the Applicant's property to which he enjoys a personal right under Article 40.3 of the Constitution.

Forfeiture Application brought while no lawful detention order in being - submissions v. vi & vii

61. The forfeiture application brought pursuant to section 39 of the Criminal Justice Act 1994 (as Amended) was an application brought during a period when there was an unlawful or unjustified detention order in being.

62. Further or in the alternative it is submitted the section 39 application was brought on foot of a section 38 detention order which is bad on its face.

63. The Respondents application seeking forfeiture pursuant to section 39 of the 1994 Act, as directed on the 6th April and issued on the 8th June, was an application made whilst the funds in question were not lawfully detained under a valid section 38 Order, the last lawful detention order having being issued on the 3rd of January 2016 which expired on the 2nd of April 2017.

64. The impugned Order was the last Order which could have been made pursuant to section 38(3)(2) as the two-year detention period mandated by section 38(3)(b) was due to expire post the term of the impugned order and it was therefore not open to the Respondents to apply for a further period of detention.

65. The section 39 forfeiture application was brought outside of the prescribed statutory regime and stands *ultra vires*.

The Law

66. Irish courts have for decades had a long-standing approach to statutory interpretation that endeavours to ascertain the objective intent of the legislature. This is achieved through a simple construction, by giving literal effect and meaning to the ordinary words and phrases used, as highlighted by Murray J in *Crilly v T & J Farrington Ltd* [2001] 3 IR 251:

"…what the courts in this country have always sought to ascertain is the objective intent or will of the legislature. This is evident for example from the rule of construction according to which when the meaning of the statute is clear and definite and open to one interpretation only in the context of the statute as a whole, that is the meaning to be attributed to it."

67. The intention of the legislature is primarily ascertained from the language or text chosen by the legislature to convey its intention, therefore, by necessity ascertaining the meaning of the words chosen by the legislature as identified by Murray J. in *Crilly*.

68. The plain meaning rule is often expressed to the effect that where the meaning of a provision is entirely plain and unambiguous, then the interpreter's job is at an end, and effect must be given to that plain meaning. The Plain meaning rule remains part of the Irish court's approach to interpretation.

69. The intent of the legislature is both section 38 and section 39 of the 1994 Act, as per the *dicta* of Hardiman J. in *The Director of Public Prosecutions v England* [2011] IESC 16:

> *"It is plain from the Statutory provisions cited above that the jurisdiction created by s. 39 to order forfeiture of cash seized under s. 38 requires that an application for such forfeiture be "made while the cash is detained under that section." [i.e. section 38]*

70. Finlay-Geoghegan J.'s decision in *Delaney v Judge Coughlan* [2012] IESC 40 follows the decision of Hardiman J in *England* that the 1994 Act is to be construed literally.

71. The clarity of the provisions of section 38 were expressly acknowledged by the District Court and consequently the Court was fully alive to what criteria it was to be satisfied of such as to justify the further detention of the cash involved. In making its determination the Court noted it was satisfied the criteria had been met such as to justify the further detention of the cash.

> *"I have no doubt in respect of the first criteria that Inspector Roche satisfies me that he had reasonable grounds for the suspicions that he holds and secondly, the second criteria, that the detention of the cash is justified while its origin or derivation is further investigated. Inspector Roche is not satisfied as to the origins of the cash".*

72. The time, within which a section 39 Application is to be made is clear: it must be presented whilst the cash is detained under a valid section 38 detention Order. This is necessary to protect the Applicant's property rights.

73. The Applicant submits that the section 38 Order granted on the 31st of March 2017 was made *ultra vires*, is bad on its face and therefore an invalid Order, and as a further consequence, the section 39 Application has been brought out of time and outside the statutory basis for same.

74. It is for these reasons that the Applicant submits that the Court should direct the reliefs as sought within the Applicant's Motion.

Respondents Submissions

75. The Respondents deny that the Applicant is entitled to any relief. Their submissions may be summarised as follows:

    i. The statutory proofs were met in full. Section 38 is satisfied. Even if not, which is denied, insufficiency of evidence it is not amenable to judicial review;

ii. There is no conflict The determination is supported by the evidence. Even if not, which is denied, it is not amenable to judicial review;

iii. The impugned order was made *intra vires*;

iv. The Order is not bad on its face and, in any event, leave was not granted to pursue this ground.

v. The section 39 application was made during the currency of a valid section 38 order.

vi. The section 39 order was made when there was a valid section 38 order in being. Leave was not granted to pursue this ground.

vii. The section 39 application is valid, the statutory pre-requisites are met. In any event it is the Circuit Court Judge seized of that application who should determine any legal issues that arise.

General Submission on the Nature of the Statutory Scheme

76. The focus of the legislative scheme is *in rem* rather than in *personam*. It focuses upon the nature, the origin and purpose of the seized cash rather than upon the individual from whom it was seized. Although forfeiture applications fall to be considered against a background of alleged criminality, by analogy with proceeds of crime cases regularly determined by this Honourable Court, they are more properly viewed as civil proceedings in rem and determined on the civil standard of proof. Ref: - *Gilligan v Criminal Assets Bureau* [1998] 3 LR. 185, *FMcK v G. WD* [2004] 2 LR. 470 and *CAB v Murphy* [2016] IECA 40 and specifically in relation to section 39 applications; *DPP v Filice*, Feeney J. ex tempera, 13/02/12) and also *DPP v Bieliauskas and Ors*. (unrep High Court 07/07/16).

77. Further to the above, in *Delaney v Coughlan* [2012] IESC 40, the Supreme Court held that the purpose of section 38 of the 1994 Act should not be defeated:-

> *"In conclusion, seen in the round, to construe the provisions in question as suggested by the appellant would defeat the objective of the legislation itself; it would negate the intention of the Oireachtas; it would run counter to the forfeiture provisions actually contained elsewhere in the Act which reflect the legislative intention," it would give rise to absurdity; it would suggest the legislature acts in vain, it lacks logic. This is not a situation where the statute "catches" conduct not intended by the legislature.*
>
> *Of course, in interpreting a statute a court must take the greatest care to lean against the possibility of doubtful penalisation, but this is not such a case. If there is an issue here, it is simply one of unhappy drafting,- the error is very minor and the legislative purpose is clear. The court is permitted to and should read the Act in its proper construction."*

The Order made pursuant to Section 38 was made Intra Vires

78. The Applicant contends Judge Halpin through his misapplication of the facts, erred in law. That immediately raises a red flag in respect of the scope of judicial review. In light of the evidence and the Applicant's limited engagement with it, it was within the jurisdiction of Judge Halpin to authorise the further detention of the cash. The Applicant's complaints herein are not amenable to judicial review. As O'Higgins C.J. stated in *The State (Abenglen Properties) v Corporation of Dublin* [1984] I.R. 381:-

> *"It [i.e. certiorari] is not available to correct errors or to review decisions or to make the High Court a court of appeal from the decisions complained of. In addition it remains a discretionary remedy."*

79. In *Buckley v Kirby* [2000] 3 IR 431, Geoghegan J. stated:-

> *"It has long been established that certiorari will not be granted merely on the grounds of an absence of evidence to support a finding. In the well-known case of R (Martin) v Mahony [1910] Z I.R. 695, O'Brien L.C.J. said the following at p. 707:-*
>
> > *To grant certiorari merely on the ground of want of jurisdiction, because there was no evidence to warrant a conviction, confounds, as have said, want of jurisdiction with error in the exercise of it. The contention that mere want of evidence to authorise a conviction creates a cesser of jurisdiction, involves, in my opinion, the unsustainable proposition that a magistrate has, in the case I put, jurisdiction only to go right; and that, though he had jurisdiction to enter upon an inquiry, mere miscarriage in drawing an unwarrantable conclusion from the evidence, such as it was, makes the magistrate act without and in excess of jurisdiction."*

80. In *O'Neill v Judge McCartan* [2007] IEHC 83, Charleton J. reiterated that the function of the High Court in exercising its jurisdiction to ensure the proper application of constitutional and legal principles by lower tribunals is *"strictly limited"*.

81. In *Ryanair v Flynn* [2000] 3 IR 240 Kearns J. held:-

> *"It seems clear that the cases where the court can intervene by way of judicial review to correct errors of fact must be extremely rare.*
>
> *The court can only intervene to quash the decision of an administrative body or tribunal on grounds of unreasonableness or irrationality if it exhibits the characteristics identified by Henchy J. in The State (Keegan) v. Stardust Compensation Tribunal [1986] IR 642.*
>
> *There is no body of jurisprudence in this jurisdiction which suggests that it would be desirable for the courts to interfere where errors within jurisdiction are made."*

82. Without prejudice to the contention that the Applicant's argument under this head confuses a want of jurisdiction with an error of jurisdiction, such that judicial review does not lie, the simple fact of the matter is that there was no error. Contrary to the

Applicant's submissions, the District Judge did satisfy himself as to the relevant matters, there was ample evidence to support that determination.

83. In light of the foregoing and the transcript, the Applicant's contention to the effect that the ruling of the Court contradicts the evidence and points to a conclusion that it was made without evidence and is *ultra vires*, is neither factually nor legally correct. There was ample evidence to support the District Judge's *intra vires* determination. The Applicant seeks to *"cherry pick"* from parts of the transcript and in his submission he fails to recite the following exchange:-

> *"Q. And subsequent, I think the only reason the DPP has the file, is for consideration of a section 39 forfeiture application.*
>
> *A. Consideration and the — request any further information on matters at hand, Judge."*

84. It seems that the Applicant now also seeks to erase from the record Officer Roche's evidence before the District Court:-

> *A. I would just lie to address the point — where the source of the cash isn't in contention Yes I am of the belief that it is — that it was from the proceeds of crime or for use in criminal conduct but, Judge, 1 still haven 't identified what that actually is. I'm being given two different stories.*

85. The Applicant's counsel intervened in the District Court and sought to stop Officer Roche from providing any further information on the issue, he submits that such evidence should be discounted because it was unsolicited. It was clear from Officer Roche's evidence that further inquiries might be directed by the DPP. In any event forfeiture proceedings are not criminal proceedings, it is not unusual for investigations to continue even after the initiation of Circuit Court proceedings when replying affidavits have been filed.

The Application is Moot

86. Without prejudice to the submission that the "section 38 order" of 31st March 2017 was granted *intra vires* the power of the District Judge, and that it was valid at all material times, it is now spent. It was valid between 31st March and 29th June 2017 and it had already expired by the time the Applicant sought leave from this Honourable Court to bring the within proceedings on 10th July 2017. Thus, the Within application is moot and an order of certiorari would be futile.

87. In *Barry v Fitzpatrick* [1996] 1 I.L.R.M. 512 the Supreme Court held that orders of *certiorari* do not lie, in such circumstances, even if (unlike here) the orders concerned were made in excess of jurisdiction. Although in *Howard v Early* [2000] IESC 34 the Supreme Court granted the declaration sought, it did so in the very particular circumstances that pertained there, i.e. a "bad" remand in custody where a fine was the maximum penalty that could be imposed upon conviction. In *Joyce v Watkin* [2007] 3 IR 510 Clarke J. considered both of these cases and noted that it was the remand in custody in Howard as opposed to the remand on bail in Barry that was the significant

distinguishing feature between them, although there were other complicating factors in Howard that led to the grant of the declaration sought.

88. Clarke J. ruled that, because the orders were spent, the *certiorari* and declaration sought should not be granted, notwithstanding that the impugned orders in that case (and unlike here), had been made in excess of jurisdiction.

89. Therefore, although Judge Halpin's order was made *intra vires* on 31st March, and because of that is not amenable to *certiorari*, even if the position was otherwise, which is denied, as that order is now spent judicial review does not lie.

Error on the Face of the Record

90. The Applicant submits that the District Court Order of 31st March is "bad on its face". However, he did not raise this as an issue when he sought leave to bring the within proceedings and it is not a ground upon which he has been permitted to challenge the District Judge's order. Therefore it is outside the scope of this judicial review.

91. As Denham CJ. stated in AP v DPP [2011] IESC 2:-

> *"When an applicant seeks leave to apply for judicial review he does so on specific grounds stated in the statement required…*
>
> *A court, including this court, is limited in a judicial review to the grounds ordered for the review on the initial application, unless the grounds have been amended.*
>
> *A court, including this court, is limited in a judicial review to the grounds ordered for the review on the initial application, unless the grounds have been amended. In this case the grounds for review are limited, essentially that a fourth trial would be an abuse and unfair, and were not amended."*

92. Without prejudice to the foregoing contention, the alleged *"conflicting, erroneous and ambiguous details"* in the section 38 Order about which the Applicant complains, are contained in preliminary recitals to the document and they only relate to the dates upon which previous orders were granted. These typographical glitches are not such as to vitiate or impugn the section 38 order. The order is clear on its face and it authorises the continued detention of the seized cash for a further three months. As the Applicant points out in his own submissions, section 38 orders were granted inter alia on 31st October 2016 and 3rd January 2017.

93. Whereas the latter expired on 2nd April 2017, all of the details in the operative part of the section 38 detention order as granted on 31st March are correct and they are in accordance with the statute; The Applicant was legally represented in the District Court on 31st March and he and his counsel were aware of the previous applications and orders and the dates of their grant and expiry. In these circumstances he was fully aware that the application made on 31st March was within permitted parameters. Had he believed otherwise or that there was no authority to detain the cash it was open to him to apply for its release under section 38(5) of the 1994 Act.

94. The Applicant also complains that no application has been made to "correct" the orders. He does not explain why he did not make such an application himself, if he considered it necessary, instead of bringing the within judicial review application. Furthermore his reliance upon jurisprudence that is concerned with the deprivation of personal liberty and unlawful detention of persons is in error. It is not a committal warrant. Even in the passage that he has selected from *Joyce v Governor of the Dóchas Centre*, Hogan J. expressly confirms that, if necessary, one can rely on other documents, to give the full picture:-

> *"The position might well be different if there was in existence a separate conviction order which contained those details of the offence of which the applicant was convicted and which was offered as a justification for the detention. Where, however, as here, the only document forming the basis of the detention is a committal warrant of the kind we have just described, this must be adjudged to be defective and as not forming a sound basis in law for the applicant's detention."*

95. The Motion booklet served on the Applicant containing the Respondent's section 39 application, which he had when he applied for leave, contains all of the section 38 orders and when read together, it is evident there can be no doubt about the dates upon which they were granted and their duration. There is no room for any *bona fide* confusion.

96. In *Freeman v Governor of Wheatfield Prison* [2016] IECA 1777 the Court of Appeal adopted the dicta of Kearns P. from *Moore v The Governor of Wheatfield Prison* [2015] IEHC 147 wherein he stated inter alia:-

> *"As already indicated in this judgment, this Court is most unhappy at the idea of a procedural technicality trumping substantive justice. The notion of justice being frustrated on a technicality is damaging to the concept of justice itself and gives rise to public unease and disquiet.*
>
> *Obviously - and as described by Denham C.J. in FX v. Clinical Director of the Central Mental Hospital [2014] IESC 01 (at para. 53), - the right to apply to court for release from detention under Article 40 may be seen as "the great remedy" which has "deep roots in the common law". It has a special place in our Constitution and is a right jealously - some might say zealously - fostered and protected in this jurisdiction.*
>
> *That should not however lead to a situation where technical errors on the face of the record, even errors of more than a trivial kind, can be relied upon in every instance to set aside committal orders in the absence of any prejudice or injustice being demonstrated by an applicant in circumstances where he has been properly tried, convicted and sentenced.*

97. The errors contended for by the Applicant herein are purely technical and trivial with no operative effect. They are not prejudicial and are so inconsequential, they were not even

adverted to when he applied for leave to bring the within proceedings, that in itself being a fatal flaw in his argument.

The Circuit Court

98. Further to the foregoing, there are extant forfeiture proceedings pending before the Circuit Court. In those proceedings the judge must be satisfied, on the balance of probabilities, that the seized cash represents the proceeds of crime or were intended for use in connection with criminal conduct. Whilst there is no obligation upon the Applicant to engage with that process, he is entitled, should he so desire, to put forward such evidence as he desires to seek to rebut the DPP's contentions.

99. In determining the application the Circuit Court will no doubt have regard to the decisions of this Court in *DPP v Giovanna Filice* (Feeney J. *ex tempore*, 13th February 2012) and *DPP v Bieliauskas* (Fullam J. unreported, High Court 7th July 2016) wherein this Court held that the person best qualified to give an account of large quantities of cash is the person in whose possession the cash was found, or alternatively the person who claims ownership of it, and the court will have regard to any explanations given and the circumstances surrounding its transportation and destination.

100. Even if there was an identifiable breach that might otherwise warrant *certiorari*, (and there is none), the fact that the Circuit Court is seized of the proceedings constitutes a further reason why the relief sought here should be refused. It would undermine the section 39 proceedings, and the forthcoming trial of the issue. This can be seen in the decisions in *Byrne v Grey* [1988] IR 31; *Berkeley v Edwards* [1988] I.R. 217; and *Simple Imports v Revenue Commissioners* [2000] 2 IR 243.

Alternative Remedy.

101. At all material times it has been open to the Applicant to apply to the District Court for the return of the seized cash pursuant to section 38(5) if he believed there was no basis for holding the cash. He didn't seek to invoke that possibility. Even if he was correct in any of his contentions made herein, which is denied, he singularly failed to explore a more suitable alternative remedy and could be refused relief on that basis.

Conclusion

102. Here, in accordance with section 38 of the 1994 Act, an officer of the Revenue Commissioners seized and detained cash in the sum of a sum of £6,650 being a sum not less than the then prescribed sum. It is not in dispute that he had reasonable grounds for suspecting that the cash directly or indirectly represents the proceeds of crime or was intended by any person for use in any criminal conduct. The continued detention of that cash was duly authorised *intra vires* by the interlocutory temporary section 38 orders granted by District Judges from time to time, on the basis of evidence tendered in open court. On 31st March 2017, the District Judge afforded the Applicant a fair hearing Section 39 forfeiture proceedings are now pending in the Circuit Court. That Court is the appropriate forum for the resolution of the pending *in rem* dispute and, in accordance with section 38(6) of the 1994 Act, the cash must be retained in the interim.

103. There was ample evidence before District Judge Halpin on 31st March 2017 to justify him in making the "section 38 Order" that the Applicant seeks to impugn. The judge acted *intra vires* and in accordance with constitutional justice and fair procedures in authorising that detention. There were valid grounds to justify the DPP's direction to institute the pending Circuit Court section 39 forfeiture proceedings, where the matter can be determined. The section 38 Order is now spent and the within application moot.

104. In all of the circumstances the Respondent submits that the Applicant should be refused the relief he seeks or any relief.

Decision

105. On consideration of the transcript of the District Court hearing, it is patently clear that the order made by the District Judge pursuant to section 38(2) of the Criminal Justice Act 1994, was made within jurisdiction. His succinct ruling first identifies the grounds for the suspicion held by the second respondent, Officer Roche, that the cash seized, directly or indirectly, represented the proceeds of crime or was intended by any person for use in any criminal conduct, as required by section 38(2)(a). He then identifies the basis on which the detention is justified as required by section 38(2)(b), namely that Officer Roche is not satisfied as to the origin of the cash and that its detention is justified while its origin or derivation is further investigated. He rejected the applicant's submission that an investigation concludes once a file is submitted to the DPP. On the question of consideration being given to the institution of criminal proceedings, which is another possible basis for justifying detention under section 38(2)(b), he pointed out that the use of the word 'or' in the subsection, made this an alternative ground upon which detention could be justified. The court finds no error either in the findings of fact made by the District Court Judge or in his application of the law to those facts.

106. In launching this application, the applicant regrettably, misstated the facts and misconstrued the law. At paragraph 11 of the grounding affidavit, it is averred on behalf of the applicant, that in the course of the District Court hearing, the second respondent, Officer Roche gave evidence that:

    (a) "He was satisfied the cash involved was from the proceeds of crime;

    (b) That his investigation into the Origin of the cash was complete;

    (c) His investigation into the derivation of the Applicant's cash was also complete and further confirmed that

    (d) No further consideration was been (sic) given to the institution of criminal proceedings against the applicant for an offence with which the cash was connected."

107. These averments which were made before the transcript of the hearing became available, constitute a serious misrepresentation of the evidence of Officer Roche. The transcript shows, that while Officer Roche in his testimony, did express the opinion that the cash seized was the proceeds of crime, he did not at any time give evidence that his

investigation into the origin of the cash was complete, nor that his investigation into the derivation of the cash was complete. He most certainly did not give evidence that no further consideration was being given to the institution of criminal proceedings against the applicant. These inaccurate averments as to fact were then used to underpin the applicant's legal argument that the provisions of section 38(2)(b) had not been met because the evidence showed that there was no ongoing investigation into the origin or derivation of the cash and that no criminal proceedings were under consideration. In the court's view this entire application was launched on false premises and even if the court were persuaded on some other ground of the merits of the application (which it is not), the court would be most reluctant to exercise its discretion in favour of the applicant in these circumstances.

108. The Applicant's submission that the criminal investigation in this case is ended and that there are no criminal proceedings under consideration, is based on a misconstruction of the provisions of the Act, in which he erroneously conflates and confuses potential criminal proceedings for an offence connected with the cash seized, with civil type proceedings for forfeiture contained in section 39. The statutory scheme set out in Part VI of the Criminal Justice Act 1994 as amended by the Proceeds of Crime Act 2005, creates a unitary and interconnected process for the search for, seizure and disposal of money gained from, or for use in, criminal conduct. S. 38 provides for the initiation of the process. S. 38(1) sets out the power to search; s. 38(1)(a) grants the power to seize; s. 38(2) grants conditional powers to detain cash seized for longer than the initial period of detention; s. 38(3) allows for further periods of detention to a maximum of two years from the date of seizure. It also provides that where an application for forfeiture is made pursuant to s.39,the cash shall remain detained until the conclusion of that application; s. 38(4) provides that the powers created by subsections (2) & (3) are exercisable by members of an Garda Síochana and officers of customs & excise ; s. 38(5) provides a remedy for those whose money is seized and allows for the return of the money by order of the District Court where the provisions of that subsection are satisfied; and finally, s. 38(6) allows for the continued detention of cash during either criminal proceedings or forfeiture proceedings.

109. The next provision enacted by the legislature relates to forfeiture applications pursuant to s.39. Such an application is required to be initiated during the currency of a section 38 detention order. The power to bring a forfeiture application is vested in the DPP. Forfeiture applications are expressed to be independent of and without prejudice to any criminal proceedings for an offence with which the cash is connected. The standard of proof for applications for forfeiture is the civil standard of proof i.e. the balance of probabilities. If, at any stage in the investigation of the cash seized, the DPP considers that there is sufficient evidence to prove on the balance of probabilities, that the cash seized is directly or indirectly the proceeds of crime or is intended by any person for use in connection with any criminal conduct, then she is entitled to bring an application for forfeiture pursuant to section 39. The fact of an application for forfeiture does not mean that the investigation of the origin or derivation of the seized cash is at an end. Nor does it signify that criminal proceedings are not under consideration. The initiation of a

forfeiture application merely signifies that the DPP considers that she is in a position to prove to the civil standard that the seized cash is criminal in origin. Under the provisions of the Act, a forfeiture application can run parallel to the criminal investigation. They are distinct processes with different burdens of proof, one being on the balance of probabilities and the other, beyond reasonable doubt.

110. The fundamental misconception at the root of this application is that the submission of a file to the DPP recommending a forfeiture application, marks the end of the criminal investigation and the possibility of criminal proceedings. This is clearly not so. Indeed, as pointed out during submissions, the forfeiture hearing, if contested, can itself give rise to additional leads in the criminal investigation.

111. The Court for the foregoing reasons rejects the applicant's submission that the order of the District Court of the 31st March 2017 is invalid. The order was made within jurisdiction and in accordance with law.

Errors on the face of the Order

112. As noted earlier in this judgment, there are two typographical errors on the face of the Order. They appear in the recitals section. Having recited that the previous order was made on the 3rd January 2017 the words *'Day of October 2016'* immediately follow. This appears to the court to be a 'cut and paste' type error. The recital goes on to recite that the previous order authorised the detention of the cash until the 2nd March 2017 instead of the correct date, which was the 2nd April 2017. The applicant submitted that the details on the face of the order are conflicting, erroneous and ambiguous and that the jurisdiction to detain the cash seized must be clear on the face of the order. The applicant cited two of the leading cases on the arrest/committal of persons, in support of his argument, *GE v Governor of Cloverhill Prison* [2011] IESC 41 and *Joyce v Governor of the Dochas Centre* [2012] 2 IR 666.

113. The respondents countered that the applicant had not raised this issue when he sought leave to bring these proceedings and that this is not a ground upon which he has been given leave to challenge the District Judge's order. They relied on the finding of Denham C.J. in *AP v DPP* [2011] 1 IR 729 in support of their position that the applicant is and should be restricted to the specific grounds set out in his statement of grounds. (see excerpt quoted at para 91 above). The court is satisfied that the applicant is precluded from advancing grounds other than those specifically relied on in his statement of grounds. Those grounds relate exclusively to the conduct of the section 38 hearing in the District Court, and do not seek to challenge the terms of the order made on the conclusion of that hearing. In this context, the court notes that the applicant was in possession of the relevant order at the time of his application for leave and in fact, exhibited it in the grounding affidavit.

114. That said, were the court to consider this ground of challenge, it would reject it. The court is satisfied that there was no confusion or ambiguity caused by the typographical errors in the recitals to the order. This was the last of eight applications for authorisation for the further detention of the seized cash. Notice of each order was served on the

applicant as is required by section 42 of the Act. All of the orders were exhibited in the applicant's grounding affidavit. The immediately previous order made on the 3rd January 2017 clearly states that detention is authorised until the 2nd April 2017. On the evidence, it is also clear that the applicant was legally represented at the application in January 2017 as well as at the application in March 2017. The court agrees with and in so far as is necessary, adopts the respondent's submissions on this issue.

115. For the reasons set forth herein, the court holds that the order made by Halpin J in the District Court on the 31st March 2017 is a valid order made within jurisdiction. It follows that the forfeiture application issued on the 8th June 2017 was issued while the cash was detained under section 38 and is accordingly, properly before the Circuit Court.

116. Finally, while in light of the court's findings, it is not necessary for the court to rule specifically on the issue of mootness raised by the respondents, for completeness, the court observes that had it been persuaded that the section 38 application was in fact, invalid, then it would have rejected the submission that the application was moot on the grounds that the section 38 order was spent. As per the dicta of Hardiman J. in *The Director of Public Prosecutions v England* [2011] IESC 16:

> *It is plain from the statutory provisions cited above that the jurisdiction created by s.39 to order forfeiture of cash seized under s.38 requires that an application for such forfeiture be "made while the cash is detained under that Section" (i.e. s.38)*

The Court agrees with the assessment of Hardiman J. that jurisdiction to order forfeiture is dependent on an application for forfeiture being made during the currency of a valid section 38 detention. In the event of an invalid section 38 detention there would be no jurisdiction to seek forfeiture.