Judgment Title: Damache v DPP

Neutral Citation: [2012] IESC 11

Supreme Court Record Number: 253/11

High Court Record Number: 2010 1501 JR

Date of Delivery: 02/23/2012

Court: Supreme Court

Composition of Court: Denham C.J., Murray J., Hardiman J., Fennelly J., Finnegan J.

Judgment by: Denham C.J.

Status of Judgment: Approved

THE SUPREME COURT

[Appeal No: 253/2011]

Denham C.J.
Murray J.
Hardiman J.
Fennelly J.
Finnegan J.

Between/

Ali Charaf Damache

Applicant/Appellant

and

The Director of Public Prosecutions, Ireland,

and the Attorney General

Respondents

Judgment of the Court delivered on the 23rd day of February, 2012 by Denham C.J.

1. This is an appeal by Ali Charaf Damache, the applicant/appellant, referred to as "the appellant", from the decision of the High Court (Kearns P.) given on the 13th May, 2011, refusing the appellant's application.

Judicial Review

2. The appellant brought an application by way of judicial review seeking, *inter alia*:-

> (a) A declaration that s. 29(1) of the Offences against the State Act, 1939 (as inserted by s. 5 of the Criminal Law Act, 1976), and referred to as s. 29(1) of the Act of 1939, is repugnant to the Constitution;
>
> (b) a stay on any further step being taken in the prosecution presently before Waterford Circuit Criminal Court entitled D.P.P. v. Charafe Damache (Bill No. CT0041/10), pending the determination of these judicial review proceedings.

3. The application for judicial review was grounded on an affidavit of Caroline Egan, Solicitor for the appellant. She deposed that she is in possession of a book of evidence relating to the prosecution of the appellant and that part of her information is taken from the statement of Detective Superintendent Dominic Hayes in the book of evidence.

4. Caroline Egan, basing her affidavit on the statement of Detective Superintendent Hayes, deposed that it would appear that:-

> "In September 2009, Detective Superintendent Hayes who is attached to the South Eastern Garda Region based at Waterford Garda Station, commenced an investigation into an alleged conspiracy to murder Mr. Lars Vilks, a Swedish cartoonist who had depicted the Islamic prophet Mohammad with the body of a dog, thereby provoking serious unrest in several Muslim countries.
>
> It was suspected that the Applicant was involved in the said conspiracy along with other individuals resident in Ireland. It was also subsequently suspected that on the 9th January 2010, the Applicant made a threatening phone call to an individual in the United States.
>
> During the course of the investigations, D/Superintendent Hayes personally received from D/Superintendent Peter Kirwan, of the Crime and Security Section of An Garda Síochána, intelligence reports from the FBI and phone recordings made in the United States. D/Superintendent Hayes personally applied to Chief Superintendent Kevin Donahue for

> telephone billing relating to a mobile phone connected to the investigation.
>
> On the 5th and 8th March 2010, D/Superintendent Hayes conducted briefings at Waterford Garda Station and heard from D/Inspector Michael Leahy in relation to the progress of the investigation.
>
> On the 8th March 2010, D/Superintendent Dominic Hayes granted a search warrant under s. 29(1) of the Offences Against the State Act 1939 (as inserted by s. 5 of the Criminal Law Act 1976) to D/Sergeant David Walsh. The search warrant was granted in relation to 1 John Colwyn House, High Street, Co. Waterford, the Applicant's dwelling at the time, and was executed on the 9th March 2010."

5. Ms. Egan deposed that the appellant, his wife and child, were present at the time of the search, that the appellant was arrested for the offence of conspiracy to murder contrary to s. 71 of the Criminal Justice Act, 2006, and that items of property were removed from the appellant's home as evidence, including a mobile phone.

6. The appellant has been charged with an offence, but not the offence on which he was arrested. Ms Egan deposed that the appellant was subsequently detained at Waterford Garda Station and charged with an offence contrary to s. 13 of the Post Office (Amendment) Act, 1951, as amended, that he did on the 9th January, 2010 send a message by telephone which was of a menacing character to Madjid Moughni. Ms. Egan deposed that it is alleged that the appellant made the said phone call on a Nokia mobile phone which was seized during the search.

7. Ms. Egan further deposed that the appellant was served with a book of evidence in relation to the charge at Waterford District Court on the 24th May, 2010. She deposed that she was unaware of the date he was returned for trial, as she came on record in relation to the appellant's case on the 17th November, 2010, and that the appellant was previously represented by a different solicitor.

8. In her affidavit Ms. Egan sets out the grounds for the application for judicial review. These include:-

> (a) I say and believe that the said search warrant was issued by a member of An Garda Síochána who had directed the investigations relating to the appellant for approximately 6 months prior to the appellant's arrest.
>
> (b) I say that D/Superintendent Hayes has asserted that the warrant was issued

because he was satisfied that he had reasonable grounds for believing that evidence relating to the unlawful possession of firearms within the State would be found at the home of the appellant. I say it is not clear from the Book of Evidence to what this is alleged to relate.

(c) I say that while I am not in possession of all relevant information in relation to the said investigation, it would appear that an impartial decision-maker might have refused to issue a search warrant for the dwelling in relation to the possession of firearms within the State.

(d) I say that in any event, the appellant was entitled as a matter of natural and constitutional justice to have the decision in relation to the said search warrant made by a judicial personage or, at the very least, by someone impartial and unconnected with the investigation.

(e) I say and believe, however, that having regard to the decision of the Court of Criminal Appeal in **D.P.P. v. Birney & Others** [2007] 1 I.R. 337, the wording of s. 29(1) cannot be understood to mean that the member of An Garda Síochána who issues the search warrant must be independent of the investigation to which the search warrant relates.

(f) I say that, accordingly, s. 29(1) of the Offences Against the State Act, 1939 (as inserted by s. 5 of the Criminal Law Act 1976) is repugnant to the Constitution as it permits a member of An Garda Síochána who has been actively involved in a criminal investigation to determine whether a search warrant should issue in relation to the said investigation. […].

Delay

9. There was delay by the appellant in seeking judicial review. The background facts include the following:-

(i) On the 8th March 2010 D/Superintendent Dominic Hayes granted a search warrant under section 29(1) of

the Offences Against the State Act 1939 (as inserted by section 5 of the Criminal Law Act 1976) to D/Sergeant David Walsh.

(ii) The search warrant was granted in relation to 1 John Colywn House, High Street, Waterford.

(iii) The warrant was executed on the 9th March 2010.

(iv) The appellant was present at the time of the search, along with members of his family.

(v) The appellant was arrested for conspiracy to murder contrary to s. 71 of the Criminal Justice Act 2006. The appellant was later charged with an offence contrary to s. 13 of the Post Office (Amendment) Act 1951, alleged to have been committed on 9 January 2010.

(vi) The appellant was charged on the 15th March 2010 with the offence contrary to s. 13 of the Post Office (Amendment) Act, 1951.

(vii) On the 24th May 2010 the appellant was served with the Book of Evidence.

(viii) The appellant sought and obtained leave to bring the within judicial review proceedings on the 2nd December 2010.

(ix) The High Court (Peart J.) granted leave to apply by way of an application for judicial review for a declaration that s. 29(1) of the Offences Against the State Act, 1939 (as inserted by s. 5 of the Criminal Law Act 1976) is repugnant to the Constitution.

(x) The prosecution was listed for trial on the 25th January 2011 at Waterford Circuit Court.

10. No explanation has been given for the delay in seeking judicial review until the 2nd December, 2010. The consequent effect of this order was that the trial of the appellant was postponed pending the determination of the judicial review. The High Court held:-

> “The [appellant] had other legal advisors prior to those presently engaged. In circumstances where no explanation has been given by those former advisors for the delay in moving the leave application, the Court at the outset is compelled to conclude that the application has not been launched with the necessary degree of promptitude which is appropriate to the remedy of judicial review. It is also an application brought well outside the three month time period provided for by the Rules of the Superior Courts. A period in excess of six months was allowed to elapse before any challenge to the propriety of the search warrant got off the ground. Quite apart from the fact that this delay is fatal to the [appellant’s] claim for the declaratory relief sought, it also reinforces an unfortunate impression that the judicial review process in this (as in a number of other criminal cases) is being deployed in such a fashion as to delay the ordinary course of criminal trials in this jurisdiction. In recent years a number of judges, myself included, have commented unfavourably about the bringing of very late applications of this nature and it is a practice which must stop if due respect for our criminal process is to be maintained.”

The Court would affirm and adopt the opinion of the President of the High Court.

11. The learned President proceeded to determine the appeal, as has this Court. The core issue on this appeal is the constitutionality of s. 29(1) of the Act of 1939. If these proceedings were dismissed on the basis of the delay of the appellant, it is clear that new proceedings would be instituted by way of plenary summons, thus involving more delay and cost. In all the circumstances, the Court determined that the core issue be decided on these proceedings, and counsel were not heard on the issue of delay. It is most unfortunate that the proceedings were not brought correctly, by way of plenary proceedings, but to minimise delay and cost the Court decided to determine the issue on this appeal.

Premature

12. This case is brought in advance of a trial. No evidence has yet been given. This is well illustrated by the grounding affidavit in these proceedings, deposed by the appellant’s solicitor, based on a statement in the book of evidence of a member of An Garda Síochána. This is an unsatisfactory basis for analysis. However, the appellant has been affected by the section: his home was searched pursuant to a warrant issued under the section. This is not a case about the validity of the warrant. The sole issue is the constitutionality of s. 29(1) of the Act of 1939. In the circumstances the Court did not require to hear counsel on the issue of prematurity.

Constitutionality of s. 29(1)

13. Thus, the issue in the appeal is the constitutionality of s. 29(1) of the Act of 1939.

14. The unamended provision in s. 29(1) of the Offences Against the State Act, 1939 provided:-

> "(1) Where an officer of the Garda Síochána not below the rank of chief superintendent is satisfied that there is reasonable ground for believing that documentary evidence of or relating to the commission or intended commission of an offence under any section or sub-section of this Act or any document relating directly or indirectly, to the commission or intended commission of treason is, to be found in any particular building or other place, the said officer may issue to a member of the Garda Síochána not below the rank of inspector a search warrant in accordance with this section."

15. By s. 5 of the Criminal Law Act, 1976 the following section was substituted for s. 29(1) of the Act of 1939:-

> "Where a member of the Garda Síochána not below the rank of superintendent is satisfied that there is reasonable ground for believing that evidence of or relating to the commission or intended commission of an offence under this Act or the Criminal Law Act, 1976, or an offence which is for the time being a scheduled offence for the purposes of Part V of this Act, or evidence relating to the commission or intended commission of treason, is to be found in any building or part of a building or in any vehicle, vessel, aircraft or hovercraft or in any other place whatsoever, he may issue to a member of the Garda Síochána not below the rank of sergeant a search warrant under this section in relation to such place."

16. The amendment, *inter alia*, permits a member of the Garda Síochána, not below the rank of superintendent, instead of a chief superintendent as under the Act of 1939, to issue a warrant to a member of the Garda Síochána not below the rank of sergeant, instead of an inspector as under the Act of 1939.

17. The issuing of a search warrant is an administrative act, but it must be exercised judicially. It was accepted that the full panoply of rights do not apply to the issuing of search warrants. Obviously, the law does not require that suspects be put on notice of applications to apply for a search warrant. But, it was submitted on behalf

of the appellant, there should be independent and impartial supervision of the issuing of a warrant.

18. In most cases that impartial supervision is exercised by a District Judge, when issuing a search warrant, or by a Peace Commissioner. Thus, third party scrutiny and supervision is built in.

19. It was accepted, on behalf of the appellant, that under a limited number of statutes, relating to serious investigations, members of An Garda Síochána have been granted statutory power to issue search warrants, but, it was submitted, these examples arise in urgent situations, or if immediate action is needed, and as a last resort. Also, such a warrant is required to be executed within a short time, usually 24 hours, while under s. 29(2) the warrant remains valid for a week.

20. The examples opened to the Court of statutes by which the Garda Síochána have power to issue search warrants were as follows:-

(i) Section 16 Official Secrets Act 1963 (allows a search warrant to be issued by a District Judge or, if immediate action is necessary, by a Chief Superintendent or higher);

(ii) Section 14 Criminal Assets Bureau Act, 1996 (allows a search warrant to be issued by a District Judge or, if immediate action is necessary, by a Superintendent or higher);

(iii) Section 8 Criminal Justice (Drug Trafficking) Act 1996 (allows a search warrant to be issued by a District Judge or, if immediate action is necessary, by a Superintendent or higher);

(iv) Section 5 Prevention of Corruption (Amendment) Act 2001 (allows a search warrant to be issued by a District Judge or, if immediate action is necessary, by a Superintendent or higher).

(v) Section 7 of the Criminal Justice (Surveillance) Act 2009 provides that in cases of urgency a surveillance warrant can be issued by a Garda Superintendent, a Colonel in the Defence Forces, or a Revenue Principal Officer.

21. It was submitted, on behalf of the appellant, that the person making the decision at to whether to issue a search warrant, or not, must be independent, impartial and have no material interest in the decision to be made. It was submitted that the

issuing of the warrant should be by somebody who is unconnected with the controversy and who can make a decision in an independent and detached manner of whether it is necessary to issue the search warrant.

22. There are echoes in the submissions before this Court and the submissions and decision in **The People [Director of Public Prosecutions] v. Birney** [2007 1 I.R. 337. In that case, at p. 370, it was stated that it had been contended on behalf of the first named applicant that the warrant was invalid because it was not issued by a superintendent independent of the investigation, that the issue of the warrant was in breach of the principle *nemo iudex in causa sua*. It was submitted that the issuance of the warrant by the superintendent offended against two principles, namely: (a) the guarantee of the inviolability of the dwelling under Article 40.5 of the Constitution, and, (b) the guarantee of fair trial enshrined in Article 38 of the Constitution, in that in issuing the warrant the superintendent was acting as a judge in his own cause, namely as head of the investigation.

23. In **The People (D.P.P.) v. Birney** the Court considered s. 29(1) of the Act of 1939, as amended, under which authority the search warrant had been issued.

The Court held:-

> "The Court was not persuaded that s. 29 of the Offences Against the State Act, 1939 precludes the Superintendent, who is in charge of the investigation from issuing such a warrant in the course of the investigation in which he is involved. The Court went on to conclude that on a literal interpretation of the section there was no such prohibition."

24. This Court agrees with that analysis of the words of s. 29(1) of the Act of 1939. The literal interpretation of the words do not preclude the superintendent in charge of an investigation issuing the warrant.

25. Reference was made to two previous cases where the issue had been raised that if s. 29 of the Act of 2003 did not require that such a warrant be issued by an independent authority, then the section was unconstitutional. In **The People (D.P.P.) v. Birney** the Court of Criminal Appeal concluded:-

> "This Court is likewise satisfied that the wording of s. 29(1) of the Offences Against the State Act is clear and unambiguous. For the applicant's contention to be correct it would be necessary to read into the words of the statute a proviso that the Superintendent concerned should not be one involved in the particular investigation. This Court can see no basis for so doing. Accordingly this Court does not accept the submissions on behalf of the first named applicant in this regard."

26. The issue of constitutional validity, which could not be addressed in the Court of Criminal Appeal or the Special Criminal Court, is before this Court. The Court concurs with the analysis that the literal meaning of the words of s. 29(1) of the Act of 1939 do not contain a requirement that the Superintendent should not be involved in the investigation, nor could such a proviso be inferred.

Independent person

27. The principle that the person issuing a search warrant should be an independent person is well established.

28. In **Ryan v. O'Callaghan** (Unreported, High Court (Barr J.), 22nd July 1987), Barr J. considered the constitutionality of s. 42(1) of the Larceny Act, 1916, which empowered a Peace Commissioner to issue a search warrant in certain circumstances. He held:-

> "In light of Mr. Justice Henchy's definition of 'save in accordance with law' in the context of Article 40, Section 4 sub-section (1), does it follow that the procedure for obtaining a search warrant from a Peace Commissioner which is laid down in Section 42 of the 1916 Act is a method which ignores the fundamental norms of the legal order postulated by the Constitution? In my view it does no such thing. I am satisfied that it is in the interest of the common good that there should be a simple procedure readily available to the police whereby in appropriate cases they may obtain search warrants relating to premises, including the dwellings of citizens, so as to facilitate them in the investigation of larceny and other allied offences. The procedure laid down in Section 42(1) of the 1916 Act contains important elements for the protection of the public, including all those who might be found on the premises to be searched. The investigating police-officer must swear an information that he has reasonable cause for suspecting that stolen property is to be found at the premises to be searched and he must satisfy a Peace Commissioner, who is an independent person unconnected with criminal investigation *per se*, that it is right and proper to issue the warrant. I am satisfied that such warrants bona fide sought and obtained from a Peace Commissioner pursuant to the procedure laid down in Section 42 of the 1916 Act are not tainted with any constitutional

> illegality and provide lawful authority for the search of the premises to which they relate."

29. The above dictum was followed and applied by Hamilton P. in **Byrne v. Grey** [1988] 1 I.R. 31, who stated, at p. 43, that he agreed with Barr J.

30. It was submitted on behalf of the appellant that s. 29(1) of the Act of 1939 is invalid under the Constitution because it fails to reflect, and provide for, the essential balance between the requirements of the common good and the protection of the appellant's individual rights.

31. On behalf of the respondents it was submitted that s. 29(1) of the Act of 1939 is not repugnant to the Constitution, but rather is a legitimate part of the State's armoury to protect itself from offences against the State and against the justice system. In so far as s. 29(1) may provide a person with less protection than a search warrant that is issued by an independent person such as a Judge or a Peace Commissioner, it was submitted that any such diminution in rights is proportionate and lawful.

Presumption of Constitutionality

32. Section 29(1) of the Act of 1939 is entitled to the presumption of constitutionality. As Hanna J. stated in **Pigs Marketing Board v. Donnelly** [1939] I.R. 413 at 417:-

> "When the Court has to consider the constitutionality of a law it must, in the first place, be accepted as an axiom that a law passed by the Oireachtas, the elected representatives of the people, is presumed to be constitutional unless and until the contrary is clearly established."

Double Construction Rule

33. The double construction rule also applies when construing s. 29(1) of the Act of 1939. Thus, if in respect of s. 29(1) two or more constructions are reasonably open, one of which is constitutional and the other or others are unconstitutional, it would be presumed that the Oireachtas intended only the constitutional construction

Administrative Act

34. The issuing of a search warrant is an administrative act, it is not the administration of justice. Thus a search warrant is not required to be issued by a judge. However, it is an action which must be exercised judicially. As Keane J. (as he then was) stated in **Simple Imports v. The Revenue Commissioners** 2 I.R. 243 at 251:-

> "The District Judge is no doubt performing a purely ministerial act in issuing the warrant. He or she does not purport to adjudicate on any lis in issuing the warrant. He or she would clearly be entitled to rely on material, such as

> hearsay, which would not be admissible in legal proceedings."

Strictly construed

35. The legislation permitting the issuance of a search warrant should be constructed strictly. As Keane J. stated in **Simple Imports v. The Revenue Commissioners** [2000] 2 I.R. 243 at 250:-

> "These are powers which the police and other authorities must enjoy in defined circumstances for the protection of society; but since they authorise the forcible invasion of a person's property, the court must always be concerned to ensure that the conditions imposed by the legislature before such powers can be validly exercised are strictly met."

Two aspects

36. There are two aspects of the issuance of a search warrant which are important. First, that a search warrant be issued by an independent person. Secondly, that such a person must be satisfied on receiving sworn information, that there are reasonable grounds for a search warrant.

37. In exceptional circumstances, such as urgent situations, provision has been made in statutes for a member of An Garda Síochána to issue a warrant, which usually has a short duration. The requirement of urgency is an important factor in determining the proportionality of legislation which may infringe a constitutionally protected right.

Wide area of search

38. Section 29(1) of the Act of 1939 provides that where a member of An Garda Síochána not below the rank of superintendent is satisfied that there is reasonable ground for believing that evidence of or relating to the commission or intended commission of an offence under the Act of 1939, or the Criminal Law Act, 1976, or a scheduled offence, or evidence relating to the commission or intended commission of treason, is to be found

> "in any building or part of a building or in any vehicle, vessel, aircraft or hovercraft or is any place whatsoever,"

he may issue to a member of An Garda Síochána not below the rank of sergeant a search warrant pursuant to this section in relation to such place. Thus, a search warrant issued under this section may be in relation to a number of places, including "any place whatsoever".

Home

39. The place for which the search warrant was issued in this case, and the place searched, was the home of the appellant. The dwelling is regarded as a place of importance which is protected under the Constitution. Thus, at the core of this case is to be found the principle of the constitutional protection of the home.

The dwelling

40. Article 40.5 of the Constitution of Ireland states:-

> "The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law."

Thus, the Constitution protects the inviolability of the dwelling.

41. There has been a long history of protection of the home under common law. In 1604, Sir Edward Coke in **Semayne's Case** 77 ER 194, stated:

> "That the house of every one is to him as his (a) castle and fortress, as well for his defence against injury and violence, as for his repose".

The principle was referred to by Sir William Blackstone, in his **Commentaries on the Laws of England** (1768), where he stated:-

> "For every man's house is looked upon by the law to be his castle of defence and asylum, wherein he should suffer no violence".

42. In Ireland the dwelling house is protected under the Constitution. The Constitution vindicates and protects fundamental rights. In **The People (Attorney General) v. O'Brien** [1965] I.R. 142 Walsh J. pointed out that:-

> "The vindication and the protection of constitutional rights is a fundamental matter for all courts established under the Constitution. That duty cannot yield place to any other competing interest. In Article 40 of the Constitution, the State has undertaken to defend and vindicate the inviolability of the dwelling of every citizen."

43. In **The People (Attorney General) v. Michael Hogan**, (1972) 1 Frewen 360 at 362 Kenny J. stated:-

> "Article 40.5 of the Constitution which is in that part of it which has the heading 'Fundamental Rights' and the sub-heading 'Personal Rights' reads: The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law. The guarantee is not against forcible entry only. The meaning of the Article is that the dwelling of every citizen is inviolable except to the extent that entry is permitted by law which may permit forcible entry."

44. In **The Director of Public Prosecutions v. Dunne** [1994] 2 I.R. 537 at p. 540 Carney J. stated:

> "The constitutional protection given in Article 40, s. 5 of the Constitution in relation to the inviolability of the dwelling

> house is one of the most important, clear and unqualified protections given by the Constitution to the citizen".

The Court would apply these statements, recognising the importance of the inviolability of the dwelling.

"Save in accordance with law"

45. In **Ryan v. O'Callaghan** (Unreported, High Court, Barr J., 22nd July, 1987)

a search warrant had been issued by a Peace Commissioner and the issue raised was whether the Peace Commissioner in exercising the power granted to him by s. 42 of the Larceny Act, 1916, authorising a search warrant of the dwelling house of a citizen was exercising a judicial power. Barr J. considered the phrase "save in accordance with law" in Article 40.5. He stated that the contemporary view of the Supreme Court was stated by Henchy J. in **King v. Attorney General** 1981 I.R. 233 at p. 257, when striking down as unconstitutional an offence created by s. 4 of the Vagrancy Act, 1824, for reasons, including:-

> "that it violates the guarantee in Article 40.4.1˚ that no citizen shall be deprived of personal liberty save in accordance with law – which means without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution …"

46. To pose the question in this case, as posed by Barr J. in the above case, in light of Henchy J.'s definition of 'save in accordance with law', does it follow that the procedure for obtaining a search warrant in this case, under s. 29(1) of the Act of 1939, is a method which ignores the fundamental norms of the legal order postulated by the Constitution?

47. The procedure for obtaining a search warrant should adhere to fundamental principles encapsulating an independent decision maker, in a process which may be reviewed. The process should achieve the proportionate balance between the requirements of the common good and the protection of an individual's rights. To these fundamental principles as to the process there may be exceptions, for example when there is an urgent matter.

48. Analysis and application of such fundamental principles may be illustrated from cases in other jurisdictions.

49. In **Camenzind v. Switzerland** [1999] 28 EHRR 458 at 476 paragraph 46 it was stated:-

> "In the present case the purpose of the search was to seize an unauthorised cordless telephone that Camenzind was suspected of having used contrary to section 42 of the Federal Act of 1922 regulating telegraph and telephone communications. Admittedly, the authorities already had some evidence of

the offence as the radio communications surveillance unit of the Head Office of the PTT had recorded the applicant's conversation and Camenzind had admitted using the telephone. Nevertheless, the Court accepts that the competent authorities were justified in thinking that the seizure of the corpus delicti – and, consequently, the search – were necessary to provide evidence of the relevant offence.

With regard to the safeguards provided by Swiss law, the Court notes that under the Federal Administrative Criminal Law Act of 22 March 1974, as amended, a search may, subject to exceptions, only be effected under a written warrant issued by a limited number of designated senior public servants and carried out by officials specially trained for the purpose; they each have an obligation to stand down if circumstances exist which could affect their impartiality. Searches can only be carried out in 'dwellings and other premises … if it is likely that a suspect is in hiding there or if objects or valuables liable to seizure or evidence of the commission of an offence are to be found there'; they cannot be conducted on Sundays, public holidays or at night 'except in important cases or where there is imminent danger'. At the beginning of a search the investigating official must produce evidence of identity and inform the occupier of the premises of the purpose of the search. That person or, if he is absent, a relative or a member of the household must be asked to attend. In principle, there will also be a public officer present to ensure that '[the search] does not deviate from its purpose'. A record of the search is drawn up immediately in the presence of the persons who attended; if they so request, they must be provided with a copy of the search warrant and of the record. Furthermore, searches for documents are subject to special restrictions. In addition, suspects are entitled, whatever the circumstances, to representation; anyone affected by an 'investigative measure' who has 'an interest worthy of protection in having the

> measure … quashed or varied' may complain to the Indictment Division of the Federal Court. Lastly, a "suspect" who is found to have no case to answer may seek compensation for the losses he has sustained.
>
> As regards the manner in which the search was conducted, the Court notes that it was at Camenzind's request that it was carried out by a single official. It took place in the applicant's presence after he had been allowed to consult the file on his case and telephone a lawyer. Admittedly, it lasted almost two hours and covered the entire house, but the investigating official did no more than check the telephones and television sets; he did not search in any furniture, examine any documents or seize anything."

The European Court of Human Rights held at paragraph 47:-

> "Having regard to the safeguards provided by Swiss legislation and especially to the limited scope of the search, the Court accepts that the interference with the applicant's right to respect for his home can be considered to have been proportionate to the aim pursued and thus "necessary in a democratic society" within the meaning of Article 8. Consequently, there has not been a violation of that provision."

50. In **Hunter v. Southam Inc**. [1984] 2 S.C.R. 145 at 146 to 147 Dickson J. of the Supreme Court of Canada held:-

> "First, for the authorization procedure to be meaningful, it is necessary for the person authorizing the search to be able to assess the conflicting interests of the state and the individual in an entirely neutral and impartial manner. This means that while the person considering the prior authorization need not be a judge, he must nevertheless, at a minimum, be capable of acting judicially. Inter alia, he must not be someone charged with investigative or prosecutorial functions under the relevant statutory scheme. The significant investigatory functions bestowed upon the Restrictive Trade Practices Commission and its members by the Act vitiated a member's ability to act in a judicial capacity in authorizing a s.

> 10(3) search and seizure and do not accord with the neutrality and detachment necessary to balance the interests involved.
>
> Second, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard consistent with s. 8 of the Charter for authorizing searches and seizures. Subsections 10(1) and 10(3) of the Act do not embody such a requirement. They do not, therefore, measure up to the standard the Charter. The Court will not attempt to save the Act by reading into it the appropriate standards for issuing a warrant. It should not fall to the courts to fill in the details necessary to render legislative lacunae constitutional. In the result, subss. 10(1) and 10(3) of the Combines Investigation Act are inconsistent with the Charter and of no force or effect because they fail to specify an appropriate standard for the issuance of warrants and designate an improper arbiter to issue them."

This sets an appropriately high standard for a search warrant process.

51. The Court applies the following principles. For the process in obtaining a search warrant to be meaningful, it is necessary for the person authorising the search to be able to assess the conflicting interests of the State and the individual in an impartial manner. Thus, the person should be independent of the issue and act judicially. Also, there should be reasonable grounds established that an offence has been committed and that there may be evidence to be found at the place of the search.

Proportionality

52. The Oireachtas may interfere with the constitutional rights of a person. However, in so doing its actions must be proportionate. The proportionality test, adopted from Canada, was first declared clearly in Ireland by Costello J. in **Heaney v. Ireland** [1994] 3 I.R. 593 at p. 607:

> "The objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:

(i) Be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations ;

(ii) Impair the right as little as possible;

(iii) Be such that their effects on rights are proportionate to the objective …"

53. The **Morris Tribunal** [Report of the Tribunal of Inquiry set up pursuant to the Tribunal of Inquiry (Evidence) Acts 1921 – 2002 into certain Gardaí in the Donegal Division] (Government Publications 2006) considered the proportionality of s. 29(1). The conclusions and recommendations of chapter 6 'The Burnfoot Module' at paragraphs 623 – 624 stated:-

"The Tribunal is satisfied that it is preferable that the power to issue a warrant should be vested in a judge. With modern technology and rapid communications, there is no reason why a judge cannot be easily contacted by telephone, facsimile or e-mail or personally, for the purpose of making an application to him/her for a search warrant. A record can thereby be created, whether by tape or by the recording of the message received by facsimile or e-mail, or indeed by the prompt furnishing of a grounding information to the judge within a limited period after the application of, say, 24 hours, verifying the basis upon which the application was made, which record can then be filed for future reference. The judge can then make an independent decision.

Such a decision as to whether to grant the warrant would involve a balancing of the

> interests of An Garda Síochána and the investigation of the criminal offence and the constitutional or legal rights of the person whose premises is to be the subject of the warrant. There are very limited occasions upon which time would be so pressing as to make it impossible to follow such a procedure. In any event, a residual power for such eventuality could, perhaps, still be vested in a senior officer of the Garda Síochána to be used in exceptional circumstances.
>
> The Tribunal, therefore, recommends that urgent consideration be given to vesting the power to issue warrants under section 29 in judges of the District or Circuit court. This, the Tribunal believes to be in keeping with best modern practice in this regard as exemplified in judgments of the European Court of Human Rights and judicial trends in Canada and New Zealand."

Decision

54. This case is decided on its own circumstances. These circumstances include the fact that the warrant was issued by a member of a Garda Síochána investigating team which was investigating the matters. A member of An Garda Síochána who is part of an investigating team is not independent on matters related to the investigation. In the process of obtaining a search warrant, the person authorising the search is required to be able to assess the conflicting interests of the State and the individual person, such as the appellant. In this case the person authorising the warrant was not independent. In the circumstances of this case a person issuing the search warrant should be independent of the Garda Síochána, to provide effective independence.

55. The circumstances of the appellant's case also includes the fact that the place for which the search warrant was issued, and which was searched, was the appellant's dwelling house. The Constitution in Article 40.5 expressly provides that the dwelling is inviolable and shall not be forcibly entered, save in accordance with law, which means without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution. Entry into a home is at the core of potential State interference with the inviolability of the dwelling.

56. These two circumstances are at the kernel of the Court's decision.

57. No issue of urgency arose in this case, and the Court has not considered or addressed situations of urgency.

58. The Court points out that it is best practice to keep a record of the basis upon which a search warrant is granted.

59. This Court would grant a declaration that s. 29(1) of the Offences against the State Act, 1939 (as inserted by s. 5 of the Criminal Law Act, 1976) and referred to as s. 29(1) of the Act of 1939, is repugnant to the Constitution as it permitted a search of the appellant's home contrary to the Constitution, on foot of a warrant which was not issued by an independent person.