CASE NOTE

Independent issuing of search warrants: *Damache* v *DPP*

By Yvonne Marie Daly[*]
Lecturer in Law, School of Law and Government, Dublin City University

Keywords Search warrant; Policing; Independence; Inviolability of the dwelling

While, thankfully, the days of serious violence and unrest in Northern Ireland have come to an end as a result of the peace process, the legacy of draconian laws enacted during the so-called 'Troubles' remains in the Republic of Ireland. One such law, allowing for senior members of the police force to issue search warrants in certain circumstances, was successfully challenged as being unconstitutional in the Irish Supreme Court in February 2012, 36 years after its 1976 enactment.

The relevant provision, which allowed for search warrants to be issued by senior members of the Garda Síochána (the Irish police force) rather than a peace commissioner or the District Court, was s. 29(1) of the Offences Against the State Act 1939, as amended by s. 5 of the Criminal Law Act 1976. It read:

> 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

* PhD, Law, Trinity College, Dublin; email: yvonne.daly@dcu.ie.

doi:10.1350/ijep.2013.17.1.420

> 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.[1]

In Ireland, search warrants are usually issued either by a peace commissioner or by a judge of the District Court.[2] Similarly, in England and Wales, search warrants must usually be issued by a Justice of the Peace (a magistrate) or a Circuit judge.[3] There are, however, exceptional circumstances in which the equivalent of a warrant might be issued by a police officer of high rank in that jurisdiction, for example under the Terrorism Act 2000.[4]

The obvious risks of allowing gardaí (police officers) to issue search warrants to other gardaí, particularly where the issuing garda is involved in the relevant investigation, were raised by Justice Morris, the chairperson of the Tribunal of Inquiry into complaints concerning some Gardaí of the Donegal Division[5] in 2008. He considered that:

> … the danger exists that a warrant would be issued automatically and without proper investigation of the matter by the superintendent to whom the application is made if he or she is heading the investigation. There is a danger that the power to issue a section 29 warrant thereby becomes a mere formality in which the investigating

1 The original s. 29 had allowed for only documentary evidence to be collected in this manner, with the warrant being issued to a member not below the rank of inspector, by a member not below the rank of chief superintendent.
2 A general power to issue search warrants in respect of evidence relating to the commission of an arrestable offence is set out in s. 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997, as amended by s. 6 of the Criminal Justice Act 2006. However, more specific powers to issue search warrants are contained in individual statutes relating to specific offences, e.g. the Misuse of Drugs Act 1977, as amended.
3 Under the Police and Criminal Evidence Act 1984, s. 8.
4 Under the Terrorism Act 2000, Sched. 5, para. 3(1) a police officer of at least the rank of superintendent may give written authorisation for entry and search of certain specified premises (within a designated 'cordoned' area) and a police officer who is not of that rank may issue such authorisation 'if he considers it necessary by reason of urgency'. Schedule 5, para. 15 of the same Act also allows for a police officer of at least the rank of superintendent to give to any constable 'the authority which may be given by a search warrant', if he has reasonable grounds for believing that the case is one of great emergency, and that immediate action is necessary. Paragraph 15(3) provides that where the para. 15 power is used the Secretary of State must be notified of the particulars of the case as soon as is reasonably practicable. This suggests that the power is to be used only in exceptional circumstances.
5 Established pursuant to the Tribunal of Inquiry (Evidence) Act 1921–2002.

> Sergeant might as well be empowered to issue a search warrant to himself.[6]

This is the very issue which arose before the Supreme Court in *Damache* v *DPP*.[7] The appellant was initially suspected by the Gardaí of involvement in a conspiracy to murder Lars Vilks, a Swedish cartoonist who had depicted the Islamic prophet Mohammad with the body of a dog. He was also suspected of making a threatening telephone call to an individual in the United States. Following approximately six months of investigation, the Gardaí decided to search the appellant's dwelling and Detective Superintendent Hayes, who had been involved with the investigation over the course of a number of months, issued a search warrant for that dwelling pursuant to s. 29(1), as amended. The warrant was executed the following day.

The appellant argued before the Supreme Court that it was unconstitutional to allow a search warrant to be issued by a person connected with the investigation, contending that a warrant should only be issued by an independent, impartial person.

The court noted, generally, that the issuing of search warrants is an administrative act, but it must be exercised judicially.[8] It was observed that the principle that a person issuing a search warrant should be an independent person is well established.[9] The Chief Justice, Denham CJ, contended that this is an important aspect of the issuance of a warrant, as is the requirement that the issuing person must be satisfied on receiving sworn information that there are reasonable grounds for issuing the warrant.[10] The court drew support for these safeguards from cases in other jurisdictions including *Camenzind* v *Switzerland*[11] and *Hunter* v *Southam Inc.*[12]

The Chief Justice emphasised the importance of the protection of the dwelling under both common law[13] and under Article 40.5 of *Bunreacht na hÉireann*, the Irish

6 Justice Frederick Morris, *Report on the Arrest and Detention of Seven Persons at Burnfoot, County Donegal on the 23rd of May 1998 and the Investigation relating to same* (Government Publications Office: Dublin, 2006) para. 6.22.
7 [2012] IESC 11.
8 Ibid. at [34].
9 Ibid. at [27]. The court cited *Ryan* v *O'Callaghan*, unreported, 22 July 1987, High Court, Barr J, and *Byrne* v *Grey* [1988] 1 IR 31.
10 [2012] IESC 11 at [36].
11 (1999) 28 EHRR 458.
12 [1984] 2 SCR 145.
13 Citing *Semayne's Case* (1604) 77 ER 194 and *Blackstone's Commentaries on the Laws of England* (1768).

Constitution. She noted that the Oireachtas (the Irish Parliament) may interfere with constitutional rights, but only where such interference can be said to be proportionate. The respondents in the instant case argued that the interference with the inviolability of the dwelling provided for under s. 29(1) was proportionate because of the risk to society posed by offences against the state.[14] The Supreme Court did not agree with this assessment.

The court held that s. 29(1), given a literal interpretation, did not preclude a superintendent who was actually involved in an investigation issuing a search warrant for the purposes of that investigation.[15] No proviso to this could be implied by the court and this proved fatal to the provision.[16] It was held that s. 29(1) was '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'.[17]

An obvious question which arose in the aftermath of *Damache* is what impact this finding would have on other previously decided cases: is a finding of unconstitutionality retrospective?

Without straying too far from the law of evidence into the realm of constitutional law, relatively recent experience in the Irish courts suggests that a declaration of constitutional invalidity has retrospective effect, but only in a limited manner. In *CC* v *Ireland*[18] the Supreme Court held that s. 1(1) of the Criminal Law (Amendment) Act, 1935 was repugnant to the Constitution as it allowed for no defence of reasonable belief as to age to be raised on a charge of unlawful carnal knowledge of a girl under the age of 15. At the time, a man identified as 'A' was serving a sentence following conviction under s. 1(1) and sought to be released on the basis of this finding of unconstitutionality. He was initially released by the High Court, but the Supreme Court, in *A* v *Governor of Arbour Hill Prison*,[19] ordered his rearrest and upheld the validity of his original conviction. The court refused to accept that it is a principle of Irish constitutional law that cases which have been finally

14 [2012] IESC 11 at [31].

15 A similar approach to the construction of the provision had previously been adopted by the Court of Criminal Appeal in *People (DPP)* v *Birney* [2007] 1 IR 337. The constitutionality of the provision could not be and had not been addressed by that court, however.

16 Notably, in England and Wales, there is no requirement that an officer authorising a search under the Terrorism Act 2000, Sched. 5, para. 15 be independent of the relevant investigation. However, where para. 15 is implemented, the Secretary of State must be notified of the particulars of the case as soon as is reasonably practicable.

17 [2012] IESC 11 at [59].

18 [2006] 4 IR 1.

19 [2006] 4 IR 88.

decided and determined before the courts on foot of a statute which is later found to be unconstitutional must invariably be set aside as null and of no effect. Murray CJ held that when an Act is declared unconstitutional a distinction must be made between the making of such a declaration and its retrospective effects on cases which have already been determined by the courts. This was said to be necessary in the interests of legal certainty, the avoidance of injustice and the overriding interests of the common good in an ordered society.

The Chief Justice concluded:

> In a criminal prosecution where the State relies in good faith on a statute in force at the time and the accused does not seek to impugn the bringing or conduct of the prosecution, on any grounds that may in law be open to him or her, including the constitutionality of the statute, before the case reaches finality, on appeal or otherwise, then the final decision in the case must be deemed to be and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it, is unconstitutional. That is the general principle.[20]

This has had a significant bearing on the cases arising in the aftermath of *Damache*: *People (DPP)* v *Cunningham*,[21] *People (DPP)* v *Kavanagh*,[22] and *People (DPP)* v *Barry O'Brien*.[23] In each case the Court of Criminal Appeal overturned the original conviction, secured on the basis of evidence obtained under a s. 29(1) search warrant, and ordered retrials. All three of these cases were still in the process of appeal when the *Damache* judgment was handed down and there had been no acquiescence to prosecution through the use of s. 29(1) evidence in any of the cases. While the issue of what might occur in an already finalised case was not directly addressed in these cases, it seems likely that the decision in *Damache*

20 Ibid. at 143. An interesting feature of the case was that A had pleaded guilty and indeed no defence of reasonable belief as to age would have been likely in his case as the victim was his 12-year-old daughter's friend.

21 [2012] IECCA 64. In *Cunningham*, gardaí executing a search pursuant to a s. 29(1) warrant found £3,010,380 sterling, which was alleged to have come from a robbery at the Northern Bank Centre in Belfast.

22 [2012] IECCA 65. In *Kavanagh*, the appellant, along with two others, had been charged with false imprisonment and robbery following the completion of a so-called 'tiger raid'. Following a search of his dwelling pursuant to a s. 29(1) warrant, the appellant was arrested and later the same superintendent who issued the search warrant authorised the taking of bodily samples from the appellant while in garda detention.

23 [2012] IECCA 68. In *O'Brien*, the appellant was convicted of membership of an illegal organisation, following a s. 29(1) search of his dwelling, during which time he was arrested within the dwelling.

would have no effect as reopening all relevant cases decided over the course of the past 36 years would be chaotic.

Under the title 'Potential arguments relating to catastrophic effects' Hardiman J in *Cunningham* stated that:

> … we are not unmindful of the fact that there may well be circumstances where (quite independently of questions such as estoppel, waiver, acquiescence, res judicata and the like) the consequences of the full or even partial retroactive application of a finding of unconstitutionality might be so catastrophic for organised society that they could not be accepted. While … the first duty of the Courts is to provide redress to those whose constitutional and legal rights have been infringed, there may also be circumstances where this is simply not feasible or practicable.[24]

For the future, the Oireachtas has enacted amending legislation by way of the Criminal Justice (Search Warrants) Act 2012, which provides, amongst other things, that a superintendent (or garda of higher rank) issuing a search warrant under s. 29(1) must be independent of the relevant investigation.[25] An amendment is also made to s. 8 of the Criminal Justice (Drug Trafficking) Act 1996, which contained a similar, though not identical, provision.[26]

Section 8 of the 1996 Act was listed in *Damache* as an example of another provision on the Irish statute book which purported to allow for the issuance of a warrant by a member of the Garda Síochána not below a certain rank. While the independence issue in that regard has now been legislatively addressed, there are other similar provisions which have not been, for example s. 14 of the Criminal Assets Bureau Act 1996 and s. 7 of the Criminal Justice (Surveillance) Act 2009. These were also listed in *Damache*, but it is unclear what effect the decision in that case has on their ongoing application. Denham CJ, in *Damache*, seemed at pains to confine the decision to the factual scenario therein, whereby the issuing garda had been involved in the relevant investigation for some time. However, neither of the remaining provisions specifies that the issuing garda must be unconnected with the relevant investigation.

24 [2012] IECCA 64.
25 Criminal Justice (Search Warrants) Act 2012, s. 1.
26 Criminal Justice (Search Warrants) Act 2012, s. 3.

One saving grace that those provisions do have, however, is the requirement that a circumstance of urgency or need for immediate action is in place prior to their execution. This was not required under s. 29(1)[27] and Denham CJ emphasised this on a number of occasions in her judgment.[28] The requirement of urgency or immediate action in the other provisions listed within the case may save them from falling foul of the Constitution, rendering their interference with rights proportionate, though we will have to await an appropriate case for clarification of this matter.

Furthermore, the warrant issued under those other provisions must generally be executed within a short period of time, usually 24 hours, while that issued under s. 29(1) could subsist for up to one week.[29] This might be another saving for the remaining provisions, though it is not fully clear that the length of time in which a warrant can be executed in any way cures a lack of independence in its issuance.

One final thought which occurs is whether the decision in *Damache* is likely to have any collateral impact on provisions allowing for the extension of investigative detention periods on the authorisation of a member of the Garda Síochána not below a certain rank. Several of these provisions are in existence including s. 30 of the Offences Against the State Act 1939, as amended; s. 4 of the Criminal Justice Act 1984, as amended; s. 2 of the Criminal Justice (Drug Trafficking) Act 1996; and s. 50 of the Criminal Justice Act 2007. When any detention under these provisions reaches the 48-hour mark, authorisation for further extension (where provided for by legislation) must be sought from the courts. Prior to that point, relevant extensions may be granted by a member of the Garda Síochána not below a certain rank (for example, chief superintendent). There is nothing in any of the relevant provisions to require that the authorising garda should be independent of the relevant investigation, or that circumstances of urgency should exist.

In England and Wales, s. 40(1)(b) of the Police and Criminal Evidence Act 1984 provides that reviews of an individual's detention must be carried out periodically by the custody officer, if the individual has been arrested and charged, or by an officer of at least the rank of inspector who has not been directly involved in the investigation, if the individual has been arrested but not charged. By virtue of s. 36(5) the custody officer must be one who is not involved in the relevant investigation and, accordingly, the detention is reviewed only by officers independent of

27 Though urgency was required under s. 8 of the Criminal Justice (Drug Trafficking) Act 1996, which has now been amended.
28 For example at [2012] IESC 11 at [57] she stated that '[n]o issue of urgency arose in this case, and the Court has not considered or addressed situations of urgency'.
29 Pursuant to s. 29(2).

the investigation. Section 40(11) specifies that if an officer of higher rank than the review officer gives directions relating to a detained individual which are at variance with any decision made or action taken by the review officer in the course of his duties, the review officer shall refer the matter to an officer of the rank of superintendent or above who is responsible for the relevant police station. The position of 'member in charge' in Ireland[30] is largely equivalent to that of a 'custody officer' in England and Wales and, in order for an individual to be properly detained, the member in charge is usually required, at the time of the individual's arrival at the station, to have reasonable grounds for believing that his detention is necessary for the proper investigation of the relevant offence. If it appears to the member in charge that a direction given or action taken by a member of higher rank is inconsistent with the proper application of the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987, he must 'inform that member accordingly and, unless the matter is resolved, report it without delay to another member of or above the rank of superintendent'.[31]

The power of the custody officer or the member in charge to affect the decision of a higher ranking officer in relation to the length of detention is questionable, however. In the Irish context, Walsh has questioned the level of oversight provided by the courts in relation to the granting of certain extensions to detention requested by senior gardaí. He suggested that if the garda authorising the extended detention is of the opinion that a further period is necessary for the proper investigation of the offence the courts will generally be slow to second-guess him.[32] If this is true of the courts, then it is likely to be even truer of the member in charge, or the custody officer in England and Wales.

An argument could be made that the authorisation of further detention is an administrative act that must be exercised judicially, akin to the issuing of a search warrant, and the right to liberty is surely as important as the inviolability of the dwelling. In this context, it seems at least arguable that any authorisation of extended detention should at the very least only be granted by or sought from a garda of a certain rank unconnected with the relevant investigation.

30 See the Criminal Justice Act 1984, s. 4 and the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987, reg. 4.

31 Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987, reg. 5(3).

32 D. Walsh, *Criminal Procedure* (Thomson Round Hall: Dublin, 2002) 233.

Case law suggests that this is not necessarily the practice in Ireland. Indeed, in *Doody* v *Governor of Whitehall Garda Station*,[33] where an argument was raised in relation to the delay of the chief superintendent in recording in writing his oral instruction to extend the detention of the applicants, the excuse proffered for the delay was that the relevant chief superintendent was very busy choreographing the wide-ranging investigation of which the arrest and detention of the applicants was just one part. The operation involved huge complexity and manpower and it took place across counties Dublin, Cork, Wexford and Cavan. The relevant chief superintendent was in overall command and control of the operation as well as the conduct of the investigation and questioning of persons arrested. Although no constitutional issue relating to independence or impartiality arose in *Doody*, surely even common sense would dictate that decisions relating to the ongoing detention of suspects ought not to be made by the person in charge of the whole investigation.

Independence and transparency are essential to the integrity of the criminal justice system and the decision in *Damache* may force reflection on several corners of shadow in the decision-making processes therein.

33 [2010] IEHC 469.