



THE COURT OF APPEAL

UNAPPROVED

**Neutral Citation: [2022] IECA 108
Court of Appeal Record No.: 2019/75**

**Donnelly J.
Ní Raifeartaigh J.
Power J.**

BETWEEN/

MOEEN AKRAM

APPELLANT

- and -

**THE MINISTER FOR JUSTICE AND EQUALITY AND
THE COMMISSIONER OF AN GARDA SIOCHÁNA**

RESPONDENT

Judgment of Ms. Justice Ní Raifeartaigh delivered on the 12 May 2022

1. I agree with all of the conclusions expressed in the judgment of Donnelly J. save for one point. This is the decision to proceed to a conclusion that s. 7 of the 2004 Act did not authorise the retention of screenshots of the messages on the appellant’s phone after the immigration officer had made his decision to refuse permission to land and that the retention of messages was not “in accordance with law” within the meaning of article 8 of the Convention. In my view, the Court should not rule on the “retention” point by reason of the

manner in which this particular case was pleaded and how it evolved more generally. I will explain this in further detail below.

2. In order to explain my disagreement more precisely, I should perhaps preface this explanation with some points of clarification:

- (1) I do not disagree that, in general terms, there may be cases where the *exercise* of a power pursuant to a legislative provision may breach Convention requirements even though the legislative provision containing the power itself does not. In this regard, the discussion in the recent decision of *Corcoran* [2002] IECA 98 is instructive, as are the judgments in *CRH v Competition Authority* [2018] 1 IR 521.
- (2) I also accept the proposition that the first limb of article 8(2) (“in accordance with law”) offers protection against arbitrariness as well as containing a requirement that the restriction upon privacy must be formally stated in law in a manner that is clear, sufficiently precise, and accessible. Thus, I agree that the absence of pleading by the appellant of the “necessary in a democratic society” limb of article 8(2) of the Convention does not limit the Court’s consideration as much as the respondent sought to argue.
- (3) I also accept that the appellant might have been successful if he had pleaded the case to include either or both of the following: (a) a challenge to s.7 of the 2004 Act on the basis that it lacks safeguards concerning copying and retention which would be necessary to render such a legislative provision compliant with article 8 of the Convention; (2) a challenge to the exercise of the search which clearly focused upon the retention of the messages on his phone. However, he did neither. Instead, he challenged (1) the search itself and not the legislative

provision; and (2) the focus of the case as brought was upon the legality of searching the phone *in the sense of accessing the messages* upon it. In my view, when one reads the pleadings as a whole and takes into account the appellant's submissions, what was in the plain sights of the appellant when leave was obtained and, even later, when the statement of grounds was amended, was a challenge to a search of the appellant's phone *in the sense of the accessing of the information on his phone* (and no more than that).

- (4) There is in my view a distinction, important in this case, as between searching a phone in the sense of accessing and reading messages displayed on that phone, on the one hand, and retaining copies of those messages, on the other. While one might speak in general terms about a "search power" in a manner that encompasses all aspects of a search and what follows, in my view more precision is needed when mounting a challenge in a judicial review concerning search and seizure. A generic plea that a "search" breaches article 8 of the Convention does not open the door to all possible complaints which may come into the case in legal argument late in the day and which were not in view at the outset of the case. It is of course a question of degree where one draws the line between an argument arising in connection with a case pleaded, and a case not pleaded at all. It is on this judgment call where I disagree with Donnelly J. In my view, the way this case was pleaded and argued related merely to issues concerning access the phone and not to what happened in terms of the retention of the messages.

3. I am reluctant to shut a litigant out on a mere pleading point, but I do think it is important in cases such as this, not only because it is a judicial review where the parameters of leave are very important, but because cases involving searches can be very nuanced. In

the present case, I am not persuaded that the respondent has had an adequate opportunity to consider and respond to the precise point which underpins my colleagues' conclusion that the retention of the messages following the search in this particular case was in breach of article 8 of the Convention. While litigants are entitled to some degree of flexibility in their arguments, I believe that to proceed to this particular conclusion in this case is a bridge slightly too far. I wish to explain further my reasons for this view.

Cases involving search powers, searches, and Convention challenges

4. In the area of searches and search warrants, when a court is being asked to consider whether a particular power or legislative provision, or the particular exercise of the power on a given occasion, was unlawful, it seems to me that it is important that the pleadings set out with some specificity what precisely is being challenged and how it is being challenged. This is an area of considerable complexity for a variety of reasons.

5. First of all, while lawyers sometimes speak of 'search and seizure' generically, the reality is that the overarching concept of 'search and seizure' encompasses a large number of distinct component actions or tasks by the searching party. This is particularly so in the modern context of digital information storage as a result of technological advances in the last number of decades. Information may now be stored on, and accessed from, a wide range of digital devices. The original paradigm of physically taking possession of a document and reading it no longer applies where digital information is in issue. The reality is that the broad concept of 'search and seizure' might involve some or all of the following individual steps (and no doubt this list is itself incomplete):

- (i) Entry onto premises (whether a dwelling or other premises);

- (ii) Search of a person;
- (iii) Search of an object connected with a person, such as an item of luggage or clothing;
- (iv) Reading paper document(s);
- (v) Reading information on a smartphone or laptop which is not password protected, such as messages or emails;
- (vi) Taking possession of devices such as smartphones or laptops which are password protected;
- (vii) Taking possession of other forms of digital storage such as hard drives, CD-ROMs, USB sticks and the like;
- (viii) Taking copies of the entirety of the digital information on a device (such as copying a hard drive);
- (ix) Taking copies of individual pieces of information on a device (such as taking a screenshot of individual messages on a phone);
- (x) Sorting potentially relevant material from potentially irrelevant material (by “relevant”, I mean relevant to the task in hand or the purpose for which the search and seizure was carried out, e.g. a fraud investigation, a drugs investigation, an immigration decision, and so on);
- (xi) Sorting potentially legally privileged material from non-privileged material;
- (xii) Retaining information/copies of information thereby obtained or devices;
- (xiii) Destroying information;
- (xiv) Returning information or devices.

6. In that context, a pleading which simply challenges a ‘search’ is not a helpful starting point when it does not elaborate more precisely on the specific aspect of the search that is

being challenged. I accept that this was merely a case of searching a phone, and not something more elaborate such as a search of business premises and the copying of hard drives, but nonetheless, a search may involve different component parts as described.

7. Secondly, the precise nature of the legal challenge varies from case to case. There can be complex relationships between different sources of law – the statute containing the power, the Constitution, and the Convention. The provision containing the power itself may be challenged on the basis of it being *ultra vires*, or repugnant to the Constitution, or incompatible with the European Convention on Human Rights, or a combination thereof. The case may, involve a challenge to the *exercise* of a statutory power (such as the manner in which a search was executed), rather than a challenge to the statutory power itself; or it may involve both types of challenge. There may be questions of statutory interpretation; and it may be submitted that a provision or power which is capable of more than one interpretation should be given a constitutionally-compliant or Convention-compliant interpretation.

8. Thirdly, as is well-known, the Convention is not of direct effect in this jurisdiction and a litigant must avail of the various provisions of the 2003 Act (see *McD v. L* [2010] 2 IR 199), an issue not without its own complexities. Further, the correct sequencing of constitutional and Convention challenges to legislation, or how a court should deal with a Convention claim when the Constitution has simply been bypassed in the pleadings, is not always straightforward. (see *Carmody* [2010] 1 IR 635, and *McDonagh v. Clare County Council* [2022] IESC 2).

9. Fourthly, the factual and legislative contexts in which searches take place are myriad in number. Legislative search provisions arise in a wide variety of contexts, e.g. stop and search on the street, search in the context of a particular type of criminal investigation, search in the context of immigration control, search in the context of terrorist/security concerns at airports, and so on. That these different contexts are highly relevant to the analysis that is required is manifest, not only in domestic law, but also in the Convention jurisprudence. Also, there is an underlying and important distinction between searches pursuant to warrant and searches without warrant; questions of the impartiality of the issuer of the warrant and the level of information that must be supplied by the applicant or the evidential threshold that must be reached before the warrant should issue loom large in ‘warrant’ cases.

10. Fifthly, legislative search provisions have been enacted at different stages of technological development in society at large, which may affect the language and concepts used in the enactment. For the same reason, provisions may differ in the degree to which they address with specificity some of the different steps set out in the list above. For example, some statutes provide mechanisms for “sorting” privileged from non-privileged information from the mass of what has been seized; and/or relevant from non-relevant material. For example, the question of “sorting” as between privileged and non-privileged information was at the heart of the decision in *CRH*, and it is necessary to read the judgments in the High Court and Supreme Court carefully in that case in order to separate out the conclusions as to (a) whether the actual seizure of the pool of materials as a whole was unlawful; and (b) what should be done in terms of “sorting” the material (relevant from non-relevant) *after* it had been seized and removed from the premises, and in what circumstances the failure to do so adequately would render the process unlawful. I use the word ‘process’ here deliberately because I draw that distinction between the initial seizure of the material as a whole and the

subsequent “sorting” within the pool of material seized, even though the word “search” is often generically used to encompass both.

11. Having regard to the above points, it seems to me that when one seeks to bring a challenge to the execution of a search, and particularly when it is brought with reference to the Convention, an applicant should take care to plead his or her case precisely and carefully. The area of search and seizure is not suitable for broad-brush analysis and cases may sometimes turn on important nuances of context, statutory language, and details of evidence. The respondent should be given the opportunity to know precisely what is being alleged so as to be able to respond appropriately with evidence (if necessary) and legal argument.

12. This is why I am not prepared to go quite as far as my Donnelly J. in the present case. Where I respectfully dissent from her in this case is in her that the Court should rule on the question of whether the *retention* of certain messages on the appellant’s phone was lawful. In my view, the issue of copying and retention, as distinct from the issue of whether it was lawful to search the appellant’s phone in the sense of accessing and reading the messages on it, was not pleaded nor addressed by the appellant in such a manner as to render it appropriate for decision by this Court on appeal. To explain my views on this issue, I would like to recapitulate on what was pleaded and submitted, and what was not.

The evolution of the appellant’s case

13. Initially, the appellant sought to challenge his detention and the decision to refuse him entry into the State. He appeared initially to be complaining as to the conditions of detention. As we know from the judgment of Donnelly J., he was also complaining (and still is) about the decision itself, i.e. the refusal of permission to land, on the basis of inadequate reasons, and taking into account irrelevant matters/not taking into account relevant matters. He

subsequently amended his statement of grounds to include a claim for “*a declaration that the Respondent’s search of the [Appellant’s] phone was a breach of his rights under Article 8 of the European Convention on Human Rights*”, which as I have said, is a rather uninformative generic pleading. The only ground concerning the latter relief is: “*The search of the [Appellant’s] phone was not in accordance with law as required by Article 8(2) of the European Convention on Human Rights and, consequently, Section 3 of the European Convention on Human Rights Act 2003*”.

14. I pause to observe what has *not* been pleaded:

- a) There is no explicit suggestion that the search as executed was *ultra vires* s.7 of the Act;
- b) There is no challenge to s.7 of the Act or any part of it, whether by reference to the Constitution to the Convention;
- c) There is no reference to the Constitution at all;
- d) There is no reference to the second limb of article 8(2) of the Convention (the “necessary in a democratic society” limb);
- e) There is no explicit reference to copying or retention of information resulting from the search of the phone.

15. As regards what *has* been pleaded, what is challenged is “the search” of the phone and that it was not in accordance with law. As noted, there is no explicit reference to the *copying* of information or the *retention* of information from the phone. Nor were these issues complained of in the various affidavits sworn by the appellant or his solicitor.

16. Thus, in a very spartan pleading, what appears to be set up is a challenge to the execution of a search with reference to the first limb of article 8(2) of the Convention only (“in accordance with law”), and without any reference to the ‘retention’ issue.

17. It may be noted that the statement of opposition does not mention the issue of copying or retention either. It is pleaded that the search of the phone was lawful and/or made pursuant to valid statutory authority (paragraph 12); that the search of the phone did not constitute a breach of article 8 “*as it occurred in a public airport where the State, to the knowledge of all, maintains border controls and carries out immigration and security checks on a routine basis*” (paragraph 13); and that “*in the specific setting in which it was carried out, the search in question was in accordance with law and was necessary to achieve the following objectives; to preserve the interests of national security, public safety and the economic well-being of the country; for the prevention of disorder or crime; for the protection of the rights and freedoms of others* (paragraph 14)”. For what it is worth, therefore, it appears that the respondent did not interpret the case being made by the appellant as involving a complaint about the retention of the messages on his phone.

18. We move on to the High Court judgment and I note that the trial judge at paragraph 2 of his judgment of the 19 November 2018 summarised the appellant’s complaint with regard to the phone as “*that the taking of his phone from him and the perusal of the text messages thereon was unlawful*”. At paragraph 4, the trial judge examines the wording of s.7 of the Act and concludes that the search of the phone fell within its plain meaning. He then adds: “*At the hearing, counsel for Mr. Akram argued that there is a query as to whether s.7 allows the **retention** of documents produced/found pursuant to s.7(3)(b). No such argument appears*

in the statement of grounds or in the written submissions prepared by counsel for Mr. Akram.

So no such argument can properly be made at this time” (emphasis added).

19. At paragraph 8 of the judgment, in refusing each of the reliefs sought, the trial judge described the relief in respect of the phone search as “*a declaration that the search of his phone breached his rights under article 8 ECHR (at hearing his counsel in effect turned this into the challenge to s.7 of the 2004 Act)*”. It is not entirely clear what he meant by the latter observation as the trial judge did not (in his discussion at paragraph 4) treat it as a challenge to s.7 of the Act but rather as a question of whether the search of a phone fell *within* s. 7 of the Act. If he considered the case to amount to a challenge to s.7 itself, one might think it puzzling that he did not go on to consider this issue in his judgment. The most likely explanation in my view is that he considered that the “in accordance with the law” argument was confined to the issue of whether the power fell within s.7. In other words, I believe he thought that the article 8 case being made was confined to whether or not s.7 authorised the accessing of information on a phone; if s.7 did not authorise such access, there would be breach of article 8 whereas if it did, the article 8 argument fell away.

20. In any event, it is clear that the trial judge did not rule on the issue of whether the retention of information from the phone was lawful; he confined himself to a discussion of the accessing of the information on the phone and whether it was permitted by the wording of s.7 of the Act. There is therefore no first instance decision on the issue of copying or the retention of information acquired as a result of the search, as distinct from the searching of the phone in the limited (and I would suggest, ordinary) sense of accessing the information on it.

21. It is also instructive to look at the subsequent judgment of Barrett J. of the 29 January 2019. He decided to certify a question for appeal as to whether s.7 of the 2004 Act enables a search of a phone. He said that a second question added nothing to this question and, significantly, this question was whether the power was prescribed by law. This to my mind confirms what I said above, namely that he viewed the article 8 case as being confined to whether s.7 authorised a phone search in the senses of accessing the messages. If s.7 did authorise a phone search, the article 8 argument fell away. He did not envisage a case having been made that *if* s.7 authorised a phone search, what had happened in the present case was nonetheless in breach of article 8.

22. We turn next to the Notice of Appeal which, in relation to the phone search, listed two grounds of appeal: (1) that learned trial judge erred in law in finding that s.7 of the 2004 Act enables an immigration officer or a member of AGS to search the phone of a non-national landing or embarking in the State; and (2) that the trial judge erred in law in finding that any such power of search by an immigration officer or a member of AGS of the phone of a non-national landing or embarking in the State pursuant to s.7 of the 2004 Act is prescribed by law within the meaning of article 8 of the Convention. Again, neither of these explicitly refers to the issue of copying or retention. Similarly, the response of the Notice of Appeal again did not refer to the issue of copying or retention.

23. The appellant's written submissions to the Court, insofar as they deal with the phone search issue and not the decision to refuse, refer explicitly to the copying and retention in the present case only at paragraph 41. It is in my view instructive as to how and where this features in the submission. Here the appellant, having submitted that s.7 does not authorise search of a phone, and that it should be interpreted strictly, submits: "*In this case it is also*

clear that the Respondent considers that this provision justifies the copying and retention of the document and the detention and search of a mobile phone. This is incorrect". The submission then refer to s.2(1) of the 2003 Act, and some ECHR decisions (*Gillan, Beghal, and Ivaschenko*). There is general argument as to the various contexts for the conclusions in those cases, and observations about the need for powers not to be over-broad in scope. I accept of course that *Ivaschenko* specifically concerns a copying and retention issue, although I also note that the period of retention of data was considerably longer in that case (i.e. 2 years). At paragraph 47 of the submissions, the appellant submits that "*No procedural safeguards govern the use or extent of the power as contained in the Immigration Act or other legislation. The breadth of the power renders it unlawful. The use in this case is itself evidence of that breadth. Thus, there is no time limit to the each (sic). There is no oversight by an outside agency nor even a superior officer. There is no express basis for the copying and retention of the documents. It is not clear that it covers access to electronic devices*". In my view, this type of analysis is of a type that one would expect if s.7 itself had been challenged as being incompatible with the Convention; where a court would be required to look at the provision as a whole to decide whether or not it contained sufficient safeguards to render it Convention-compliant. Copying and retention was being mentioned by the appellant as one of several safeguards (reasonable suspicion being another) which should attend a power of search of digital devices set out in a statutory provision. But s.7 had not been challenged; and retention as a stand-alone issue was not being complained of. This was part of a larger argument, as I understand it, that the ECHR jurisprudence should lead to a strict reading of s.7 such that it did not authorise the search of a phone *at all*.

24. At the oral hearing, counsel for the appellant made the following points clear:

1. He submitted that s.7 did not encompass a search of the phone.

2. He accepted that he had not pleaded that s.7 of the Act was incompatible with the Convention and the limitations which flowed from this;
3. He submitted that his challenge was to the *exercise* of the power of search.
4. He accepted that he had not pleaded the second limb of article 8(2) of the Convention (i.e. “necessary in a democratic society”) and was confined to the “in accordance with law” limb.
5. He submitted that the first limb (“in accordance with law”) was not confined to mere formal prescription by law but also encompassed concerns such as foreseeability and certainty and protections and safeguards against arbitrariness. In the course of his submissions, he repeatedly emphasised that there was no requirement in the Act of a “reasonable suspicion” as a precondition to the power to search. As in the written submissions, copying and retention was touched on without being heavily emphasised, and in the context of a submission that article 8 of the Convention requires a series of safeguards to protect persons from arbitrary searches.
6. He argued that he was relying on s.3 of the 2003 Act and the obligation placed therein upon organs of the State, which included the Minister and therefore immigration officers carrying out their functions under the Act and exercising the power pursuant to s.7.

25. Counsel for the respondent did not, in my view, address the question of copying or retention specifically. He emphasised points such as the fact that the appellant had not challenged s.7 itself and that the second limb of article 8(2) had not been pleaded. My view is that the reason he did not specifically address whether the retention of the messages was itself unlawful was because he did not understand that to be the case being made; instead,

the absence of retention was being put forward as one of the absent safeguards (along with reasonable suspicion) which should lead to a narrow reading of s.7 such that it did not authorise the search of phones.

26. In my view, the question of retention of information arose only in the context of the appellant's discussion of the Convention jurisprudence which was concerned with the totality of safeguards concerning search powers in various contexts, including matters such as the necessity (or otherwise) of a "reasonable suspicion" and mechanisms concerning retention and/or destruction of information obtained, but in circumstances where the appellant had neither challenged s.7 itself (insofar as it lacked safeguards) nor the retention of the information, the Court should not now take the step of ruling that the retention of the messages was itself unlawful, on a "stand-alone" basis, as it were. His case had always been that either the accessing of information on a phone was not encompassed within s.7 or, if it was, that this was too broad a power to be "in accordance with law" in the article 8 sense, because of the absence of certain safeguards. The High Court judge specifically held that the issue of retention was not within the pleadings. The Court now proposes to find in favour of the appellant on a case that he *did not* plead, although it may well be one that he *could have* successfully pleaded. The issue of retention has ceased to be a factor in the overall assessment of whether there was lawful search of the phone and has been elevated to a stand-alone basis for granting a declaration of unlawfulness. In my view, this is, as I said earlier, a bridge too far for an appellate court to cross.

27. I have carefully considered the view of Donnelly J. that there is no prejudice to the respondent because the issue turns on a matter of legal interpretation of the statute. Tempted though I am to adopt this approach, I am not entirely happy to reach a conclusion in

circumstances where the issue of retention was not properly pleaded, was not dealt with by the respondent in any detail, nor the subject of a first instance decision. It is difficult to envisage the respondent successfully resisting the argument that the retention went beyond the period authorised by statute; but the respondent did not argue the point and, importantly, I am not surprised that the respondent did not think this was a case it had to meet, which is why it did not argue the point specifically. The trial judge did not think it was in the case either.

28. For the reasons I have set out above, I would not agree with the judgment of Donnelly J. insofar as it proceeds to a conclusion in respect of the retention of the text messages, but I agree with all other aspects of her judgment.