

## ATTORNEY-GENERAL v PODLIPNY

(2011) SLR 176

D Esparon for the applicant  
C Lucas for the respondent

### **Ruling delivered on 10 June 2011 by**

**RENAUD J:** The applicant, through the Financial Intelligence Unit (FIU) had seized Euro 100,000 from the respondent Lubomir Podlipny of Trysova, Czechoslovakia on 14 March 2009 at the Seychelles International Airport and had detained the said amount for a period of 14 days in terms of section 34(2) of the AMLA.

### **Application for further extension of detention of cash**

That application and notice of motion was supported by the affidavit of Mr Declan Barber, Director of the FIU and the grounds upon which the extension of time for the detention of the said cash was sought were set out in an affidavit supporting that notice of motion.

### **Affidavit of Mr Declan Barber, Director of the FIU**

The beliefs of Declan Barber, Director of the FIU under section 9 of the Act, are:

- (i) That the respondent is in possession or control of specified property to wit Euro 100,000 and that the property constitutes, directly or indirectly, benefit from criminal conduct; or
- (ii) That the respondent is in possession or control of specified property that is Euro 100,000 and that the property was intended for use in criminal conduct within the Seychelles.
- (iii) That the total value of the property referred to in (i) and (ii) above is not less than R 50,000.

The criminal conduct set out in that notice of motion was stated as being:

- (i) The stated intention of the respondent to use the Euro 100,000 seized to illegally purchase land in the Seychelles contrary to section 4 of the Immovable Property (Transfer Restriction) Act 1961 as updated in 1991.
- (ii) The intention to launder the Euro 100,000 is contrary to the Act of 2006/2008.

In an affidavit in support of the notice of motion Mr Declan Barber deponed on behalf of the applicant that that he is the Director of FIU duly appointed by the President pursuant to section 17(3) of the AMLA.

The FIU was conducting investigations pursuant to its statutory remit in cooperation with the National Drugs Enforcement Agency (herein NDEA) and the Seychelles

Customs Authority regarding criminal conduct, being suspected money laundering and suspected breaches of section 4 of the Immovable Property (Transfer Restriction) Act 1963 (herein the Property Act) by a number of persons including Lubomir Podlipny being the respondent, and Martin VLK, Jan Poupa, Marketa Kuehn (nee Skrcena) and Klaus Martin Kuehn.

The criminal conduct in question is the importation into Seychelles of Euro 100,000 with the intention of using this money to illegally purchase property, being subdivided property located at site No12 at Takamaka, Mahe, Seychelles, and identified in the map which shows the subdivision of plots T2670 and T2671. Furthermore it is believed that this attempted purchase of land is contrary to the money-laundering provisions contained in the Act of 2006/08.

Mr Barber also deponed that on Saturday 14 March 2009 at Mahe International Airport, Lubomir Podlipny bearing a Czechoslovakian Passport No 35423704 arrived on board Flight HM007 from Paris. His ticket indicated that he had departed initially from Prague on route to Mahe via Paris and that it was his intention to stay overnight on Mahe and return to Prague via Paris the following day Sunday 15 March 2009. On his arrival at Mahe, Lobomir Podlipny was routinely stopped and checked by a customs official. During that check a search of his luggage was conducted within the terms of the Seychelles Customs Act. In the course of the said search of Lubomir Podlipny's luggage a considerable sum of cash amounting to Euro 100,000 was found concealed within his travel bag. As a result of the discovery of the Euro 100,000 the FIU and the NDEA were alerted and agents from same interviewed Lubomir Podlipny at the airport.

Mr Barber added that during that interview he formed a belief that the funds of Euro 100,000 had suspicious origins and represented benefit from criminal conduct and/or were intended to be used in connection with criminal conduct. He stated that he formed part of his belief on the basis that Mr Podlipny was unable and unwilling to tell him where he had obtained the Euro 100,000 or to offer any reasonable explanation on how he acquired the said Euro 100,000. In the course of Mr Podlipny being interviewed by the FIU and NDEA agents Mr Podlipny stated that he had recently obtained money as he had just sold a company and that he kept the proceeds from the sale of that business in a safe in his house in Prague. Mr Barber stated that Mr Podlipny was however unable to explain how the money came to be wrapped in bank wrappers which bore 2007 date stamps or how it came to be changed from Czechoslovakian currency to Euro. Further support of his belief that the money was illegally obtained was allegedly because Mr Podlipny requested the deponent that he should not contact the Czechoslovakian Police or Czechoslovakian authorities to seek information about him and his possession of Euro 100,000. The deponent added that Mr Podlipny did not offer any reasonable reasons regarding why he did not want the police contacted.

Mr Barber further deponed that it is his belief that pursuant to section 35(5) of the Act of 2006/2008 he believed that the Euro 100,000 in cash seized from Mr Podlipny was intended to be used by him in connection with criminal conduct, specifically the illegal purchase of property contrary to section 4 of the Property Act. Mr Barber added that during the interview Mr Podlipny had stated that the cash was to be used by him to purchase land at Takamaka, Mahe, Seychelles, and that the said purchase

of the land had already been negotiated with a Martin Vlk whilst the latter was in Prague and that he had given Martin Vlk an advance of Euro 30,000 on the said land purchase.

The deponent added that during that interview Mr Podlipny also stated that Martin Vlk, believed to be a citizen of Czechoslovakia, was selling land located in the Seychelles on behalf of a German man named Klaus but that he did not know his full name. He said that during that interview Mr Podlipny also stated that he was to be met at the airport by another Czechoslovakian national whom he identified as Jan Poupa and whom he stated was acting as a real estate agent for Klaus.

Mr Barber went on to further depone that during the said interview Mr Podlipny stated that he believed that Jan Poupa was in partnership with Martin Vlk in the business of selling land in Seychelles.

Mr Barber also deponed that a decision was made to seize the Euro 100,000 within the terms of section 34 of the Act 2006/2008 and that money was subsequently lodged in a bank account within the terms of section 34. Written permission authorizing the seizure of the Euro 100,000 was granted by Chief Superintendent of Police M Bastienne as per section 34 of the Act 2006/2008.

It is also the further deposition of Mr Barber that investigations to date (27 March 2009) have indicated that:

- (a) Lubomir Podlipny had never received sanction to purchase immovable property being land in Seychelles; and
- (b) That Jan Poupa and/or Martin Kuehn are not licensed or registered as real estate agents and as such are not authorized to complete land transactions in Seychelles; and
- (c) That Klaus Martin Kuehn is the owner of the land referred to above being plots T2670 and T2671; and
- (d) That Jan Poupa and Martin Vlk have residency status in Seychelles and Markets Kuehn (nee Skrcena) and Klaus Martin Kuehn are citizens of Seychelles.
- (e) That there is no evidence of the deposit of Euro 30,000 being made to a bank account located in Seychelles in the name of Martin Vlk.

The deponent in conclusion went on to depone that the grounds for his beliefs are:

- (i) The manner in which the money was imported, that is, concealed in Lubomir Podlipny's luggage; and
- (ii) The failure of Lubomir Podlipny to declare his possession of Euro 100,000 when boarding the plane in Paris or on his arrival here; and
- (iii) The bank wrapping bands used to hold the said Euro 100,000 were dated 2007 indicating that it was over 1 year since the money had been counted and packaged in a bank which is in contrast to the statements made by Lubomir Podlipny; and

- (iv) The failure of Lubomir Podlipny to offer any reasonable or rational explanation as to the origin of the Euro 100,000; and
- (v) Other statements supplied by Lubomir Podlipny in the course of the aforementioned interview; and
- (vi) The fact that he was only intending to remain in the country less than 24 hours; and
- (vii) The request by Lubomir Podlipny that no contact is made with the Czechoslovakian Police and that his possession of this money would cause him further problems if they became aware of it; and
- (viii) The failure of Lubomir Podlipny to produce any evidence that there existed a prior sanction of the relevant Minister as to the purchase of the said land as required in law; and
- (ix) The findings to date as detailed in the previous paragraph above.

Mr Barber deponed that the above facts, opinion and information are true and correct and consist of sufficient evidence to support his belief that the Euro 100,000 constitutes, directly or indirectly the benefit of criminal conduct or is intended to be used by the respondent or with his association or other person in connection with criminal conduct.

In conclusion, the deponent Mr Barber, prayed this Court to grant the FIU an order as per section 34(2) of the Act of 2006/2008 extending the detention of the Euro 100,000 for six calendar months in order to allow the FIU and other law enforcement to complete their criminal investigation of all of the issues raised and to provide sufficient time to determine the origin or derivation of the Euro 100,000 and while the institution of criminal proceedings against the above mentioned persons or other persons for an offence with which the cash is connected is considered.

Following the ex parte hearing by the then Chief Justice AR Perera, an order was made on 26 March 2009 extending the detention period of Euro 100,000 held by the applicant for a further period of 6 months effective from 26 March 2009. The order was made in terms of section 34(2)(a) and (b) of the Anti-Money Laundering Act 2006 as amended by Act No 18 of 2008.

(There seems to be a mistake in the date stated on the Court order where 26 March 2009 is stated instead of 27.)

In that same order the Court stated –

Copy of this order to be served on the respondent at the given address in Czechoslovakia, together with an advise of delivered card, returnable on 1 July 2009 at 1.45 pm, when this matter will be mentioned to enable him to show cause, if any, against this order.

The respondent did not make any reply by the due date so the order stood unchallenged.

### **Response of Respondent and Application for Release of Funds**

On 25 September 2009 counsel for the respondent entered:

1. Reply to the notice of motion under section 34(2) of the Anti-Money Laundering (Amendment) Act 2008; and
2. Application for the release of funds of the respondent pursuant to section 35(5)(6)&(7) of the Act.

The respondent contended that he is aggrieved by the seizure of his personal funds by the FIU on 14 March 2009 and replied to the allegations that source of the funds seized were not of criminal origin and that they were not intended for the use of any criminal conduct or use in any transaction contrary to the law as per affidavits, official bank documents and other related exhibits that were attached to the reply.

The respondent invited the Court to take notice that by the affidavit of the respondent, the documents he relies on and written arguments submitted by counsel on his behalf, the respondent applies to this Court for the release of the respondent's funds into the hands of his counsel.

The reply was supported by an affidavit deposed to by the respondent in Prague on 26 August 2009, which was duly "apostilled" and certified. The respondent also appended various documents in support of the facts contained in his deposition.

Mr Charles Lucas, counsel for the respondent also made written submissions on behalf of the respondent purporting to show that the cash was not the proceeds of or benefit from criminal conduct and was also not intended for any use in connection with any offence.

Mr Lubomir Podlipny set out in his affidavit how he came to have the Euro 100,000 in his possession on the material date.

He stated that he is Czech National and a former owner of shares in a company known as Nordigas which he together with his brother sold to Mr Zdenek Vacek in December 2005 in Prague for CZK 50,000,000 which is equivalent to approximately Euro 2,000,000. A portion of these funds has been remitted to CSOB and a portion to E-banka a.s. (currently Raiffeisenbank a.s.). The consideration for one of the tranches of the sale was for Czech Crown fourteen million one hundred and ninety thousand (C2K 14,190,000). This sum was wire-transferred to his bank account on 16 December 2005, in bank CSOB.

Mr Lubomir Podlipny also stated that he lives with his parents and family. They are engaged in business amongst which they buy and sell shares. His bank account with CSOB bank is accessible by internet.

In Autumn 2008 when the worldwide credit crash started to indicate itself, on 15 October 2008 he withdrew C2K 10,000,000 and added that his account statement shows the movement of his bank account which was well in excess of CZK 10,000,000. The exchange rate to the EUR was CZK 25 for EUR 1. Thus it was approximately EUR 400,000 in value. Whilst he feared the drastic devaluation of the Czech currency and after discussion with his father, he gave his father the money to

change into Euro currency from the money market. All the proceeds were placed in the family safe in their house where they keep their money and their personal documents.

Mr Lubomir Podlipny went on to depone that he had previously seen documentary programmes on Seychelles which on television looks like a paradise in the sea. Earlier in the year, he had met Mr Martin Vlk, a Czech National who told him that he lives in Seychelles. He wanted to travel there and perhaps buy a house for their holiday. Their meeting was at a party. Mr Vlk also introduced him to one of his friends, Jan Poupa, who lives in Seychelles. Mr Podlipny stated that he did not see Mr Poupa again until he reached Seychelles in March 2009. Mr Podlipny went on to state that he met Mr Vlk after January 2009, and he expressed his desire and asked for Mr Vlk's assistance. That was how their relationship began. Mr Vlk sent him plans of the land of Mr and Mrs Kuehn who are of Czech and German origin. In that way he thought he would be nearby Czech friends if he buys part of Kuehn's land.

On 20 February 2009, Mr Lubomir Podlipny paid Euro 30,000 in Czech Republic to Mr Vlk. He (Mr Podlipny) said that he started to organize a trip to look and inspect the land of Mr Klaus that was for sale.

His trip, he said, was not for holiday but a quick visit to secure the land for which they would, at another holiday trip, organize all formalities for sale through official sale deed. He added that his trip was for one weekend only due to his commitments. March 2009 was also the time that he was due for hospitalization on the following week that he was in Seychelles.

Mr Lubomir Podlipny also deponed that he had never met Mr Klaus before 14 March 2009. He said that Mr Vlk informed him that he would arrive in Seychelles on 15 March. He further said that he could not travel with him because he could not secure a return flight with Emirates Airline from Seychelles, therefore his only option was Air Seychelles from Paris and back again, which he secured.

Mr Podlipny further deponed that since it was his first trip to Seychelles, Mr Vlk telephoned his friend Mr Jan Poupa for the latter to pick him (Podlipny) up at the airport to take him to the place of Mr Klaus and to find accommodation for him. He alleged that Mr Vlk asked Mr Poupa to send him an invitation letter to facilitate his entry visa which letter he received on 10 March 2009. According to him, he and Mr Poupa exchanged text messages on their telephone because they had both forgotten the face of each other when he told Mr Poupa which clothes he would be wearing on arrival for the purpose of identification.

Mr Podlipny further deponed that when he left home his father gave him the equivalent of Euro 100,000 from their family safe for an attempt to secure a deposit to Mr Klaus if he liked the land. It was his intention to leave this sum "in escrow" perhaps with a lawyer as security to prevent Mr Klaus from selling it to a third party. In the meantime all legal formalities could be done via the proper channel to secure the sale.

According to him, he did not conceal the money or wish to contravene any law whatsoever. He added that the money was in his hand luggage together with his

computer. He also said that he had the plan of the land, receipt of payment from Mr Martin Vlk and a form of written arrangement for the proposed sale of the land in order to ensure that he would have some security should they proceed with the formalities. He said that he also had a draft loan agreement with Mr Vlk who wanted to borrow some money from him and his father, but would return it by funding the construction etc.

Mr Podlipny stated that he travelled from Prague to Paris and from Paris he took the Air Seychelles flight to Seychelles where he was stopped and searched by two Englishmen. He added that they searched his luggage and found all the items referred to below. By that time he had travelled altogether for 16 hours.

It is also the deposition of Mr Podlipny that the man with grey hair, whom he later learnt was Liam Hogan, was particularly rude and threatened to put him in jail for 15 years without airconditioning if he (Podlipny) did not tell them what he wanted to do with Euro 100,000 in Seychelles. He stated that Mr Hogan also asked him where he got the money and according to him Mr Hogan wanted him to give a statement to say that he was transporting illicit cash. Mr Podlipny said that he refused all of this for another 6 hours without water or food at the airport where they detained and questioned him. He said that his English is very poor and that he had no interpreter present and that their (Hogan/Barber) accent was very difficult to understand. He also stated that they refused that he get a lawyer or perhaps the assistance of Mr Poupa who was waiting for him outside.

Mr Podlipny further deponed that he had all the data in his computer to show how he had the money. They refused him access to it and they confiscated the computer. He could not access his computer to show them when he withdrew the money which amounted to Euro 400,000 far in excess to what he took to Seychelles. He added that they also confiscated his mobile phone, all documents related to the land of Mr Klaus and his proposed transaction with Mr Martin Vlk and that they would download the information on his computer for their investigation. The following day Mr Hogan returned everything except the money which he said would be cleared by April 2009 if everything goes well.

In response to paragraph 4 of the affidavit of Mr Declan Barber, Mr Podlipny averred that Euro 100,000 was not "concealed" or "discovered" by FIU or NDEA in his travel bag, but that it was he himself who was the one who volunteered the information to the customs officer when asked by the customs officer if he had anything to declare at the entry point at the airport. According to Mr Podlipny the money was not concealed, it was in his travelling bag and he showed it to him together with his computer and other belongings. The money was packed for his safekeeping.

In answer to paragraph 5 of the affidavit of Mr Declan Barber, Mr Podlipny averred that for 6 hours on that day, he repeatedly denied that the money was of "suspicious origins" and did not "represent benefit from criminal conduct or intended to be used for or in connection with criminal conduct." He claimed that from his understanding of their English, they wanted to confiscate all his personal items and money for investigation because he was laundering money and he wanted to buy land illegally together with Mr Vlk and Mr Klaus.

- (i) He wanted to show them his internet banking bank statement which would have cleared the whole issue of their concerns and suspicions but they refused him access to it. The online banking statement clearly indicates that.
- (ii) They refused his making an international telephone call to his father who could confirm that the money was in their safe and was taken from it when he travelled to Seychelles.
- (iii) The averment that the money bore 2007 dated stamps on the bank wrappers is inconsistent with the information that was given to Interpol in Czech Republic by the FIU of Seychelles. The Czech Police states that he had two packages of cash amounting to Euro 100,000 in notes of Euro 500. They said that the packages have wrappers from CSOB bank (Czech Commercial Bank) main safe dated 16 February 2009 and not 2007 dates like their affidavit. No action has been taken against him (Podlipny) or his father in this respect as no crime has been committed in his country by any one of them. Change from Czech Crowns to Euro is normal for them as citizens of a member state of the European community.
- (iv) Mr Podlipny deponed that he does not own a house in Prague. The money was kept with his father who is in charge of their family's finances and investments. When asked, he suggested that the Czech authorities be avoided because he had just been convicted of attempted tax evasion after a very psychologically and emotionally traumatic experience and should they again hear that he had in his possession Euro 100,000 on entry into a foreign country, they may become suspicious again on tax evasion attempts. However, they have decided against it but it is now not the subject-matter of his fears because upon professional advice in his country, the money confiscated by Seychelles was not the subject matter of investigation for tax fraud but was of clean source from his bank account.
- (v) It was a further averment of Mr Podlipny that there were serious communication problems between Messrs Barber and Hogan and him on Sunday 14 March 2009. Sometimes he did not understand them and at other times they did not understand him. Thus confusion, speculation and even wrong impressions were created on both sides.
- (vi) He averred that he had nothing to conceal. All documents, plans, receipts, computer and telephone were with him and he could explain everything had he been given the opportunity. According to Mr Podlipny these were denied by seizure of all his belongings except personal clothing and by the absence of an interpreter coupled by their attempt to bully him into conceding he was a criminal in money-laundering and buying illegal land with the money he had. He refused and his telephone and computer were seized by Mr Hogan to copy and study data therefrom as investigation. Mr Hogan returned all to him except the money on Sunday 15 March 2009 when he was leaving Seychelles.
- (vii) Mr Podlipny also averred that the FIU has all his personal data from:
  - (i) His IBM Thinkpad laptop computer;
  - (ii) Hard Disk pen drive;
  - (iii) Nokia E51 mobile phone;



(iv) Nokia mobile phone

which they kept on Saturday 14 March until 15 March 2009. Mr Podlipny contended that had they any adverse information therefrom or any suspicion of a crime he had committed, they ought to have arrested him and charged him. All the above items were returned and he was allowed to leave without his money.

(viii) Almost 5 months have elapsed without any charge related to section 34 of the Anti-Money Laundering Act having been proffered either in Seychelles or in his country. He verily believes that the FIU has exhausted its investigation against his source of funds which was at all times transparent.

Of paragraph 6 of the affidavit of Mr Declan Barber, Mr Podlipny deponed and averred that:

- (a) Mr Jan Poupa is not a real estate agent neither for Klaus, Martin Vlk or himself. He knows that he (Mr Poupa) is friendly with them as part of the Czech community residing in Seychelles. Mr Poupa was to pick him (Mr Podlipny) up at the airport because both Martin and Klaus were not in Seychelles at that time.
- (b) Mr Martin Vlk was interested in him (Mr Podlipny) buying land close to him (Martin Vlk) and Klaus so that they, as neighbours of the same social background be able to reside in proximity to one another. That also attracted him (Mr Podlipny) to consider visiting Seychelles to verify whether he would also like that arrangement but subject to completion of all transactions as per legal requirements of Seychelles regarding purchase of land and residence permit.
- (c) That according to Mr Podlipny there was no criminal conduct or illegal purchase of property contrary to property laws of Seychelles. The Euro 100,000 was meant for him to deposit with a lawyer should he like the land as deposit (escrow) pending the completion of legal formalities (sanctions etc).
- (d) Mr Podlipny further averred that he never had the intention of buying any illegal land from any unlicensed estate agent in a foreign country and if Mr Barber thinks he has told him that, he is definitely mistaken. Mr Barber and Mr Hogan had ample time to verify their suspicions and seek further information on him from the Czech Republic regarding his possession of Euro 100,000 which has been cleared by authorities in the Czech Republic on this matter.

Mr Podlipny prayed this Court to declare that the money was not of illegal source and was not meant for any illegal activities as averred by the FIU as it was not money in the process of being laundered in terms of the Anti-Money Laundering Act 2008.

### **Order for Further Detention**

On 16 October 2009 the applicant entered another notice of motion supported by the affidavit of Mr Declan Barber praying this Court to grant a further detention of 3

months of the Euro 100,000 seized on 14 March 2009. A new ground was added to the grounds set out in the previous application for extension of time for the detention of the cash. The additional new ground was as follows:

(iv) The material as presented by Podlipny in response to the original Court order detaining the said cash was required to be lodged with the Court by 1 July 2009. This period was extended to 10 July without response. On 25 September 2009 Podlipny's responding material was most belatedly forwarded to the AG and it now requires comprehensive investigation and validation.

This application was again supported by the affidavit of Mr Declan Barber and contains the same depositions in addition to the following:

Para 9. The investigation has also established that the respondent was due to commence a six year term of imprisonment on 12 March 2009 within the Czech Republic and that avoidance of imprisonment was most likely his primary reason for requesting that the Czech police not be alerted to his presence within the Seychelles.

Para 11. He further avers that the FIU requires a period of three months to investigate all of the material very belatedly received from counsel acting on behalf of the respondent Mr Podlipny. This material, which was originally required to have been submitted some three months ago on 1 July 2009 by the respondent will require considerable investigation including verification and validation of official documents translated from Czech.

The Court after given due consideration to the notice of motion and its supporting affidavit, made the following order:

That period of extension is hereby granted and the applicant is allowed to detain the Euro 100,000 seized from the respondent on 14 March 2009 for a further period of 3 months up to 26 December 2009.

### **Submissions of Applicant**

Counsel for the applicant, in his written submissions dated 29 October 2009, submitted that the respondent has not established any nexus between the purported share transfers, the transferor being one Marek Podlipny, with the cash found in respondent's possession on 14 March 2009. In fact nowhere in Exhibit 1 is there a reference to the respondent. Furthermore, Exhibit 2 purporting to be a bank statement is a document downloaded from the internet and is not supported by any document as to its authenticity and therefore in the present format no evidential credence should be applied to same. It was submitted that the respondent has not furnished any credible explanation for the suspicious circumstances outlined upon which the detention order under section 34(2)(a) and (b) was granted.

The applicant also submitted that the application for the release of funds as per the application submitted by the respondent's attorney is made pursuant to section 6(6) of the Act. It was submitted that the Court should strike out this application on the basis that no such section exists under the Anti-Money Laundering Act 2006 as amended. In that regards the application does not make reference to any law known to the Seychelles jurisdiction.

It was further submitted that in the interest of justice that a further period of detention pursuant to section 34(2) of the AMLA be granted as per the applicant's application filed in the Supreme Court on 16 October 2009. Having regard to the material information which has been put before this Court, and the further material which are to be received by the FIU, that the further detention be granted.

The applicant submitted that the respondent admitted and it had also come out through information the FIU has obtained that the respondent was convicted of fraud and sentenced to six years imprisonment and that he is a fugitive from justice not having handed himself over to serve his term of imprisonment as he was obliged to do by 12 March 2009. Instead he travelled out of the Czech Republic to Seychelles arriving here on 14 March 2009. Documentation received from Interpol Prague to Interpol Victoria indicates that a warrant of arrest has been issued and that the Czech competent Regional Court in Prague is working on the issuance of an international arrest warrant (IAW) for the respondent. In fact, he added, according to the Interpol internal notice between Prague and Victoria National Central Bureau, the respondent has been described as a person of great interest for the Czech Authorities and to detain him if in Seychelles until the IAW is issued. According to the applicant, this fact gives credence to the affidavit in support to the application dated 27 March 2009 that respondent stated that he, Mr Declan Barber, should not contact the Czech Police or other authorities to seek information about him and his possession of the Euro 100,000. The applicant stated that an IAW is not issued arbitrarily, but that it is issued when a country is satisfied based on the evidence it has that the person whose arrest is sought is involved in very serious crime and cannot be found in his own country.

The applicant went on to submit that the FIU had been informed by the Czech authorities that the documents exhibited at 3 and 4 by the respondent, if genuine, are incomplete and that they have been unlawfully obtained. He submitted that the Court should take note that there has been no certified document produced as to their validity. In their present format no evidential credence should be applied to same as no evidence has been produced by the respondent as to the source of these documents. The existence of these documents is being further investigated by the Czech authorities.

It was also the submission of the applicant that the fact that as from 1 July 2009 up to 28 September 2009 when the respondent's attorney submitted to court material seeking the release of the funds, and the fact that no objections were raised by the plaintiff's attorney to the granting of additional time in order to facilitate the respondent's attorney, in such circumstances the respondent will not be prejudiced by a further short detention of the funds and justice will be done between the parties.

The applicant prays this Court to rule that the respondent has not satisfied this Court that the Euro 100,000 which were seized from him on 14 March 2009 at the Seychelles International Airport were not proceeds from criminal conduct or were not intended by him or any person for use in connection with criminal conduct.

According to the submission of the applicant the onus is on the respondent and he has failed to do so.

The applicant further prayed that a further detention of 3 months be granted and that within such a short time the FIU will bring an application under section 35 of AMLA to this Court so that this matter can be finally disposed of.

### **Submissions of Respondent**

On 13 November 2009, counsel for the respondent also made written submissions on behalf of the respondent. He submitted as follows:

1. The applicant is only attempting to confuse the Court by isolating Exhibit 1 which if read with Exhibit 2 the bank statements clearly shows that large sums were paid to Marek Podlipny and Lubomir Podlipny (the respondent herein) as per Exhibit 2 for the family transaction of sale of shares. It follows that read further with other exhibits it clearly established the source of funds and that it was not the proceeds of crime or any illicit dealings.
2. Section 36(6) of the Act which was cited is a typographical error and in the proceedings of that day counsel for respondent applied for amendment to be made in order to read section 35(5), (6) and (7).
3. The reasoning for further extension of detention of the funds is misconceived and exaggerated. The two constituents of the offence are:
  - a. Importing cash being benefit from criminal conduct; and
  - b. Is intended for use in connection with a criminal conduct.

The onus being on the respondent to prove that the cash were not proceeds of crime, he has provided sufficient proof of the source of his funds and the authorities in Czech Republic have cleared the source of the funds (Exhibits 3 and 4) at page 001524 and 001525 which shows clearly that they did not suspect any confiscation on account of any offence "according to the standpoint of Judr. Kuzej, confiscation of financial funds within this case is out of question. The action was qualified as an attempt to commit a crime, damage was calculated hypothetically and factually did not originate" (Page 001524 last sentence).

Page 001525 "it is possible to consider that the owner is Lubomir Podlipny and that the cash will be confiscated maximally up to 14.09.2009."

There are no indications that any action has or will be taken against the respondent for the money he had in possession from the Czech Republic save for disclosure as per request of FIU through Interpol that he was previously convicted for attempt to declare the price of a machine which was exported abroad at a higher price than the real value. This was for tax evasion but not for illegal possession of the funds concerned. (Page 001524 last paragraph).

4. The respondent has not been convicted of fraud but of attempt to evade tax in 2003. Being sentenced to six years for that offence does not make him guilty of any criminal activity in 2009 for legitimate possession of his assets (Euro 100,000). FIU is only attempting to vilify the respondent by associating his previous conviction to this transaction. Note that any proceedings that occur unrelated to this case in Seychelles ought not to be considered as merit for proving reasons for further detention of funds.

Counsel for the respondent submitted that FIU had enough time (6 months) to investigate locally any alleged criminal activity regarding illegal purchase of land which it failed to do. The respondent has in paragraphs 6(ii) and (iii), 7, 8 and 9 of the submission in writing dated 25 September 2009 clearly exculpated himself from any criminal activity about purchase of land. Note Exhibits 5 and 6 of the respondent more particularly contents of paragraph Article III of Exhibit 6 which clearly states that sanction duty payable by the foreigner will be charged for the approval of the transfer and for sanction. This indicates the intention of legally buying land should the respondent be satisfied with the site visits at which stage he would have instructed counsel to commence the process.

## **CONCLUSION**

The respondent has fully satisfied the Court on the balance of probabilities that his funds were legitimate, his short visit to the Seychelles was for the purpose of inspecting the property and if satisfied he would deposit funds in escrow to secure the land which has to be sub-divided and sanction to be applied for in order to purchase the property. There were no illegal dealings in that process, thus, the request to refund the funds to the respondent's counsel.

At the sitting of the Court on 13 November 2009 and after hearing counsel for the respective parties, the Court adjourned this matter for its ruling and the parties were advised that they will be informed of the date for the delivery of the ruling.

## **Notice of Motion for Forfeiture Order**

In the intervening period before the Court delivered its ruling, on 12 March 2010, the applicant entered a notice of motion supported by an affidavit containing 30 paragraphs in 13 pages, praying this Court for the following:

1. A forfeiture order pursuant to section 35(1) of AMLA authorizing the

forfeiture of the sum of Euro 100,000 which was seized on 14 March 2009 at Mahe, Airport from the respondent.

2. The grounds on which the forfeiture order is sought are -
  - (1) The belief of Liam Hogan, Deputy Director of the FIU under section 9 of the Act:
    - (i) That the respondent is in possession or control of specified property to wit Euro 100,000 and that the property constitutes, directly or indirectly, benefit from criminal conduct; or
    - (ii) That the respondent is in possession or control of specified property that is Euro 100,000 and that the property was intended for use in criminal conduct within the Seychelles.
    - (iii) That the total value of the property referred to in i) and (ii) above is not less than R 50,000.
    - (iv) That the failure of the respondent to prove the legitimacy of the Euro 100,000, ie the legitimate origins of the funds and his legitimate ownership of same.
3. The criminal conduct described in the affidavits filed in support of this notice of motion namely -
  - (a) The stated intention of the respondent to use the Euro 100,000 seized to illegally purchase land in the Seychelles contrary to section 4 of the Immovable Property (Transfer Restriction) Act 1961 as updated in 1991.
  - (b) The intention to launder the Euro 100,000 is contrary to the Act of 2006/2008.
  - (c) The deliberate destruction of evidence contained on a laptop computer with criminal intent to delay, obstruct, impede and interfere with an investigation being conducted by members of the FIU who are asset agents within the definition of the AMLA 2006 amended by the AMLA (Amendment) Act 2008 contrary to section 21(3) of the said Act.

The application was stated to be grounded on the affidavit of Liam Hogan sworn on 12 March 2010, such further affidavits or other evidence as shall be submitted, the nature of the case and the reasons to be offered.

This application for a forfeiture order was to be served on Mr Charles Lucas, counsel for the respondent.

This matter came up before the Court on 1 April 2010 and the Court noted that the respondent having not been served, ordered that the application be so served on the counsel of the respondent and the matter to be mentioned on 6 May 2010 at 9 am.

At the sitting of 6 May 2010 Mr Lucas, counsel for the respondent, informed the Court that the motion of 12 March 2010 was not drawn to his attention until after the

date that the matter had appeared before Court. He said that he had previously replied to 2 issues - one being an objection *in limine* and the other one on merits and that he had served it on counsel for the applicant and the Court at the sifting of 6 May 2010.

In this case file there was a matter that had been adjourned for the ruling of the Court. I enquired from both counsel whether that ruling is still called for in view of the latest motion for forfeiture order. I invited the comments of both counsel.

Mr Lucas submitted that there was no change in the situation as the notice of motion of 12 March 2010 is the second application that the State has made of behalf of FIU seeking the confiscation of his client's money permanently under section 35. He said that FIU had already done that in 2009 and this year they are repeating the same procedure after the parties had already canvassed all their arguments and had already submitted all their legal reasoning before the Court and that after all pleadings had been closed and the case had been adjourned for ruling.

He stated that the applicant has now come back with the same application containing the same affidavit or perhaps with a few variations that third parties have done and that are unconnected to this case. Mr Lucas was of the view that the FIU was abusing the services of the Attorney-General into repeating the procedure thus wasting the Court's time and as the Court is guided in this case by the Civil Procedure Code to the effect that once pleadings are closed, all arguments are closed, the applicant ought not to file anything further especially because the Court had already fixed that case for ruling.

In his view, Mr Lucas said, the matter had been concluded and the ball was no longer on the Bar's side, but it is now with the Bench. When the parties are waiting for the Court's ruling, there can be no other proceedings other than the judgment. He added that his client was here only once, his money was seized once over a year ago; he left the country, the applicant returned his computer to him but they seized the money and since the parties have exchanged so many papers, and having done that, everything was closed.

Mr Lucas claimed that what the applicant was doing is not known to court procedure and he very strongly objected to that course of action. He concluded by arguing that that he had filed his reply under protest and that he is on record for that purpose.

Mr Esparon, counsel for the applicant who had taken the matter over from his colleague Mr Labonte, submitted that what the applicant had done was not an abuse of process of the Court.

He said that previously the application was for an extension of time for the detention order. He said that the applicant had a few difficulties since there was delay on the part of the respondent to file his reply.

At a point in time when the applicant found that the Court's ruling was to be delivered at a later date, it wondered whether an extension order should be applied for as otherwise the applicant would be out of time to proceed to the second stage to ask for forfeiture of the sum of money.

Mr Esparon stated that the applicant then decided to go ahead with the second stage under section 35 of the Act and prayed for the forfeiture of the money. That, he said, was an *inter partes* process and as such there is no abuse of process of the Court, as it has happened in the past that due to difficulties from the respondent to file his reply, the applicant had to be forced after some time to file for extension of time and then finally the applicant was waiting for the ruling of this Court which would render the application for forfeiture order out of time.

Mr Esparon clarified that what is before the Court is the application for forfeiture order and this has superseded the previous application for extension of the detention order. He went on to confirm that in his view this Court is now not required to adjudicate on the application for an extension of the detention order and the Court is now invited to straightaway consider only the application for a forfeiture order under section 35.

Mr Lucas on behalf of the applicant strongly objected to the forfeiture order application and claimed that his client has a constitutional right to be heard as is entrenched in our Constitution. He argued that he has also made an application in 2009 for the release of the funds of his client pursuant to section 35(6) and the parties were awaiting the Court's adjudication. He added that if the Attorney-General had wished to move the Court at that time, for the present application, the Attorney-General could have done so way back in September 2009 when they were all before the Court.

Mr Lucas also argued that the present counsel for the applicant, who had inherited the case file, seems to be throwing the buck back on the respondent by saying that the reply was delayed, and that the applicant could not do anything at all. According to him that was not correct as the respondent had since September 2009 filed all documents, submitted all arguments and these were filed in a bundle, duly presented to the Court and with copy thereof served on the Attorney-General as to the legitimacy of the funds and to defend also an allegation of illegal purchase of land in Seychelles. Mr Lucas submitted that having done that the pleadings were closed and the Court had adjourned the case for the ruling and the Court had informed the parties that it would not give a definite date and that whenever the ruling was ready the parties would be called and the ruling would be delivered. While still awaiting the ruling he got another application and that is why he is saying that it is now an abuse of process.

Mr Lucas strongly insisted that as a matter that has been exhausted before the Court in terms of pleadings and affidavits now the Court has only to deliver its ruling and if the Court finds favour in his argument automatically the funds would be released. If it is in favour of the applicant, automatically the funds would be forfeited to the State.

Mr Lucas further argued that the Court must adjudicate on all the matters that have been filed before the Court as otherwise the parties would have no need to bother the Court with pleadings that are uncalled for. He added that the applicant can file motions only after the Court has given its ruling which may be subject to an appeal. He agreed that since this is a matter which is in the hands of the Court, it should be left there and let the Court adjudicate.



Mr Esparon on the other side reiterated the position of the applicant that it is not an abuse of process of the Court and that he had given the reasons why. He stated once again that the applicant has two different proceedings before the Court - the application for a detention order and an application of a forfeiture order and there are two different stages in the proceedings and these two are not related.

Mr Esparon agreed that the Court reserved its ruling on the above submissions of the parties on the procedural points raised.

## **Ruling**

The procedures under AMLA involve different stages before the matter is considered closed one way or the other.

Such a matter normally starts when the assets agents form the belief that they have intercepted a person whom they believe is in possession of cash which may be proceeds of crime. On the basis of their belief they seize the cash and start to investigate whether their belief is founded. They can initially detain the said cash for period of 14 days in terms of section 34(2) of AMLA.

Pursuant to section 34(10) of AMLA, when the court makes an order under section 34(2) of AMLA it shall provide for notice to be given to persons affected by the order.

After the initial detention period of 14 days, if they need to further detain the cash for them to have more time to complete their investigation, they have to obtain the sanction of the court to do so. The court may authorize the further detention of the said cash and issue a detention order for period or periods aggregating up to 12 months in terms of section 34(3)(a) of AMLA.

During and before the expiry of the periods of legal detention of the proceeds under section 34(2) of AMLA, the FIU may file an application under section 35(1) of AMLA to ask the court to formally order the forfeiture of the cash so detained. The court grants such order of forfeiture on being satisfied that there are reasonable grounds for suspecting that the cash directly and indirectly represents any person's benefit from, or is intended by any person for use in connection with any offence.

In the instant case the applicant seized the money from the respondent on 14 March 2009 and kept it in its possession for 14 days and thereafter proceeded under section 34(2) of AMLA. The Court heard the matter ex parte and granted a detention order permitting the further detention of the cash for a period of 6 months effective 26 March 2009 to allow for the continuation of the investigations.

When granting the 6 months extension, the Court also ordered that the respondent be served with that order to enable him to show cause, if any, against the detention order. The Court also ordered that the service be returnable on 1 July 2009 when the matter was mentioned.

Up to 1 July 2009, the respondent did not show cause against the detention order.

On 25 September 2009 the respondent filed his response to the original notice of

motion of the applicant dated 14 March 2009. He simultaneously applied for the release of the cash pursuant to section 35(5)(6)(7) of AMLA. He attached affidavits and other documents in support. Counsel for the respondent made written submissions as to why the cash should be released.

Counsel for the applicant replied by making a written submissions on 29 October 2009.

The Court at its sitting of 13 November 2009 reserved the delivery of its ruling on the matter and the parties were advised that they would be informed of the date for its delivery in due course.

It is noted that on 16 October 2009, the applicant had applied for a detention order for a further three months for the continuance of their investigation and the Court granted the further detention up to 26 December 2009.

This matter took a contentious turn when the applicant, before the delivery of the ruling of the Court, entered a notice of motion on 12 March 2010 applying for a forfeiture order pursuant to section 35(1) of AMLA. The contention of the counsel for the respondent is that such application can only be entertained by this Court after the Court had adjudicated on the matter before it and deliver its ruling. The matter before the Court is the response of the respondent to the original application of the applicant dated 14 March 2009 and the application of the respondent for the release of his funds.

The applicant being cautious to meet the statutory deadline for applying for a forfeiture order, had, on 12 March 2010, entered a notice of motion supported by affidavit.

It is my considered judgment that even if time has overtaken the procedure in this matter, the granting or not of the application for seizure and detention of the cash of the respondent in March 2009 at the international airport is not academic as it is a stage in the statutory process.

It must be borne in mind that the Court had ordered that the initial 6 months extension of time and also the further 3 months extension based an *ex parte* basis. The Court having now heard the parties has to adjudicate whether the seizure and detention of the cash was justified.

The continued holding of the cash by the applicant is deemed legal as it is legally held by the applicant at the instance of the Court pending its ruling. The matter being *sub judice*, I therefore hold the statutory time set out in the AMLA for the applicant to enter an application for forfeiture order will start to run again only after the Court has delivered its ruling on the application made on 14 March 2009.

The application for forfeiture order entered by the applicant on 12 March 2010 has been made, I believe, through abundance of caution in order to ensure that it will not be found to be out of time in terms of the Act. This is well recognised but this Court will not entertain it until it has disposed of the original application. The respondent will have to be given an opportunity to respond to the application for the forfeiture order.

It is now my considered ruling that the application for the forfeiture order will remain valid on record until after this Court has delivered its ruling on the original application of 14 March 2009 and the application of the respondent for the release of the cash. Depending on the outcome, the application/forfeiture for order will either become ineffectual or it will be accordingly processed and the respondent will be given time to respond thereto before the Court adjudicate thereon.

Having now disposed of the contentious matter of the application for a forfeiture order, this Court will proceed to adjudicate, firstly, on the original application of the applicant for seizure and detention of the cash in issue and, secondly, the application of the respondent for the return of that cash.

### **The Law**

The Anti-Money Laundering Act 2006, as amended by Act 18 of 2008 (hereinafter referred to as AMLA) is the statute applicable in this matter.

The applicant in its application by notice of motion dated 27 March 2009 applied to this Court for a detention order pursuant to section 34(2) of AMLA. The Court granted an *ex parte* detention order and further *ex-parte* detention under the provisions of section 34(2)(a) and (b) of AMLA.

That provision of the law reads as follows:

Cash seized by virtue of this section shall not be detained for more than 14 days unless its detention beyond 14 days is authorized by an order made by a judge of the Court and such order shall be made where the judge is satisfied —

- (a) That there are reasonable grounds for the suspicions mentioned in subsection (1) of this section, and
- (b) that detention of the cash beyond 14 days is justified while its origin or derivation is further investigated or consideration is given to the institution (whether in the Republic or elsewhere) of criminal proceedings against any person for an offence with which the cash is connected.

Section 34(3)(a) of AMLA reads thus:

- (a) Any order under subsection (2) of this section shall authorize the continued detention of the cash to which it relates for such period, not exceeding 12 months beginning with the date of the order, as may be specified in the order, and a Judge of the Court, if satisfied as to the matters mentioned in that subsection, may thereafter from time to time, by order authorize the further detention of the cash but so that no period of detention specified in such an order, shall exceed 12 months beginning with the date of the order.
- (b) Where an application is made under section 35(1) for an order for the forfeiture of cash detained under this section, the cash

shall, notwithstanding the foregoing, continue to be so detained until the application is finally determined.

As has been determined earlier above, the matter being adjudicated before Court is not the application for forfeiture but for an *inter partes* application for an interlocutory detention order. Effectively, from the quotes above, it is only the provision of section 34(3)(a) of AMLA which is relevant in the circumstances.

The respondent has also applied for the release of the cash pursuant to section 35(5)(6)(7) of AMLA. These provisions of law are as follows:

- (5) Where the Director or Deputy Director of the FIU states in proceedings under this section or section 34 on affidavit or, if the Court so permits or directs, in oral evidence, that he believes, that —
  - (a) The cash constitutes, directly or indirectly, benefit from criminal conduct; or
  - (b) Is intended by any person for use in connection with criminal conduct, then, if the Court is satisfied that there are reasonable grounds for the belief aforesaid, the statement shall be evidence of the matters referred to in paragraph (a) or in paragraph (b) or in both paragraphs (a) and (b), as may be appropriate and the Court shall make an order detaining the cash under section 34 or forfeiting the cash under section 35, unless it is shown to the satisfaction of the Court by or behalf of the person from whom it was being imported or exported that the cash did not constitute, directly or indirectly, benefit from criminal conduct; or was not intended any person for use in connection with any offence."
- (6) 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, to a Judge of the Court at any time, the judge may order the release of so much of the cash which is detained under section 34(2), as he considers essential to enable the applicant to meet his reasonable living expenses and reasonable legal expenses in connection with the seizure.
- (7) When hearing an application under this section or section 34 the Court may make such order as it considers appropriate.

Section 3(9) of AMLA defines "criminal conduct" as, inter alia -

**criminal conduct** shall also include any act or omission against any law of another country or territory punishable by imprisonment *for life or for a term of imprisonment exceeding 3 years or by a fine exceeding the monetary equivalent of R 50,000.00* whether committed in that country or territory or elsewhere and whether before or after the commencement of the relevant provisions of this Act, unless the Attorney-General shall certify in writing that it would not be in the public interest to take action in the Republic in relation to an act or omission as defined in this subsection. (emphasis added)

The definition of "proceeds of crime" in section 2 (interpretation section) of AMLA is as follows:

"proceeds of crime" means any money or property that is derived, obtained or realized, directly or indirectly, by any person from -

- (a) an act or omission against any law of Seychelles punishable by imprisonment for life or for a period exceeding 12 months or by a fine exceeding R6500;
- (b) an act or omission committed or done outside Seychelles which, if it were committed or done in Seychelles, would constitute an act or omission referred to in paragraph (a).

It is evident that AMLA is not a penal statute as such. The responding party is not charged with a criminal offence. AMLA is primarily intended only to deprive ownership, possession and control of property, including cash, which has been found to be derived from criminal conduct, from those that hold the property at the time of the initiation of court proceeding.

In the normal circumstances, orders made by court under AMLA are of a temporary and limited duration intended only to preserve the property in question pending further proceedings between the parties, when all the parties to the proceedings are given the opportunity to pursue their case in court before a final determination is made.

The onus and standard of proof in *inter partes* matters arising out of AMLA, is that the party who asserts must prove, and the proof so required is "on a balance of probabilities". Hence the burden of proof in the instant matter is on the applicant to first satisfy this Court that the Euro 100,000 that was seized from the respondent was derived from proceeds of crime or criminal conduct or it was intended to be used for a criminal conduct and that it should be detained.

The respondent is next given the opportunity to satisfy this Court that it should not make such a detention order as the cash so seized was not proceeds of crime and was not intended to be used for criminal conduct. If this Court is satisfied, on a balance of probabilities, it may then issue an interlocutory detention order.

In the case of *Gilligan v Criminal Assets Bureau* [1997] IEHC 106 (High Court of Ireland and confirmed by the Appeal Court of Ireland), it was stated that:

It is incumbent upon the petitioner in the first place to show to the satisfaction of the Court that the property in question is the proceeds of crime and that thus, prima facie the respondent has no good title to it.

The Court after hearing the other party, the respondent, may grant an interlocutory detention order or it may vacate the ex parte detention order. If the Court grants an interlocutory detention order, the applicant shall continue to hold the cash so seized and proceed to apply to court for a forfeiture order. The respondent must obviously be given the opportunity to be heard on the application. The onus and standard of proof is the same as in the case of an application for a detention order.

In this matter, reference has been made to the Immovable Property (Transfer Restriction) Act Cap 95. Section 4(1) and section 7 of that Act are the relevant

provisions and for ease of reference these are reproduced hereunder.

Section 4(1) of Immovable Property (Transfer Restriction) Act Cap 95 states –

A non-Seychellois may not -

- (a) *purchase* any immovable property situated in Seychelles or any right therein; or
  - (b) *lease* any such property or rights for any period; or
  - (c) *enter* into any agreement which includes an option to purchase or lease any such property or rights,
- without having first obtained the sanction of the Minister (emphasis added)

Section 7 of the Immovable Property (Transfer Restriction) Act Cap 95 provides that:

Any person who is knowingly a party to a transaction which is unlawful by virtue of the provisions of sections 4, .... shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term not exceeding two years or to a fine not exceeding fifty thousand rupees or to both such imprisonment and fine.

### **Findings and Conclusions**

I have very carefully and minutely reviewed, analysed and given due and diligent consideration of the contents of the affidavit of the petitioner as well as that of respondent which are before this Court, in addition to the documentary evidence tendered by them.

I also considered the contents of the affidavit of Mr Jan Poupa deponed by him on 27 September 2009. I find that the affidavit of Mr Poupa corroborates the relevant material parts of the affidavit of Mr Podlipny.

This exercise is fundamental if the Court has to establish whether the applicant has made out a *prima facie* case against the respondent to warrant the seizure and detention of the cash found on the respondent or if the respondent has discharged the onus to prove on a balance of probabilities that the money so seized is not proceeds of crime or that it was intended to be used in pursuance of a criminal conduct.

On the basis of affidavit evidence of the applicant this Court granted an *ex parte* detention order under section 3 of POCA and accordingly informed the respondent of that order and his right to challenge. By then he had left Seychelles and he did not make any representation.

The respondent has now entered an *inter partes* application for the release of his funds pursuant to section 35(5)(6)&(7) of the Act.

It is not in dispute that the respondent, Mr Lubonir Podlipny, had the sum of Euro 100,000 in cash in his possession when he entered Seychelles at the international airport on Saturday 14 March 2009. As a result of this, the FIU and the NDEA were alerted and their agents interviewed Mr Podlipny. What transpired at that interview is contained in the affidavit of Mr Declan Barber as substantially set out above.

There is no evidence to indicate that Mr Podlipny either purchased any immovable property situated in Seychelles or any right therein, or had leased any such property or rights for any periods. Therefore the only possible offence Mr Podlipny may have committed is under section 4(1)(c) of Immovable Property (Transfer Restriction) Act in that he being a non-Seychellois had entered into an agreement which includes an option to purchase or lease any such property or rights.

I will now proceed to consider the possible breach of the law by the respondent in light of the evidence before the Court.

Mr Podlipny admitted that he had previously seen documentary programmes on Seychelles which on television looks like a paradise in the sea. Earlier in the year 2009, he had met Mr Martin Vlk a Czech National at a party who told him that he lives in Seychelles. Mr Podlipny wanted to travel to Seychelles and perhaps buy a house here for his holiday. When he met Mr Vlk he expressed his desire and asked for Mr Vlk's assistance. Mr Vlk introduced him to one of his friends, Jan Poupa, who lived in Seychelles. Mr Vlk then sent him plans of the land of Mr and Mrs Kuehn who are now Seychellois citizens of Czech and German origin. The respondent thought that in that way he would be nearby Czech friends if he ever bought part of Kuehn's land. The respondent stated that on 20 February 2009, he paid Euro 30,000 in Czech Republic to Mr Vlk and he (Mr Podlipny) started to organize a trip to look at and inspect the land of Mr Klaus that was for sale. His trip was not for holiday but a quick visit to secure the land for which they would, at another holiday trip, organize all formalities for sale through official sale deed.

Does the act of Mr Podlipny as per this evidence constitute an offence contrary to section 4(1) of the Immovable Property (Transfer Restriction) Act?

The elements of an offence under that section are that being a non-Seychellois he:

1. had entered into any agreement, including an option to purchase or lease of any such property or rights,
2. without having first obtained the sanction of the Minister.

The mere uncorroborated statement of Mr Podlipny that he paid Mr Vlk Euro 30,000 is not supportive of a fact that he had entered into an agreement to either purchase or lease any property in Seychelles without first obtaining the sanction of the Minister.

Proof of an "option to purchase" property in Seychelles in terms of the Land Registration Act, ought to be in writing and attested by an attorney-at-law. Likewise is the requirement for a "lease agreement" for it to be of any evidential value. No such documentary evidence has been adduced by the applicant. Furthermore there is no evidence of a nature that can be considered as writing that may provide initial proof of such transactions. This Court cannot therefore make such finding and reach such conclusion even on a balance of probabilities.

It is my considered judgment that there is no evidence to establish on the balance of probabilities that Mr Podlipny had entered into any agreement, including an option to purchase or a lease of any such property or rights, on which a reasonable court would convict Mr Podlipny for an offence under section 4 of the Immovable Property (Transfer Restriction) Act.

I will now consider the other allegation as to the possibility that the Euro 100,000 found on the respondent is cash that constitutes, directly or indirectly, benefit from criminal conduct. In doing so I have considered only the affidavits of the applicant of 27 March 2009 and the further affidavit of 16 October 2009 as against the response of the respondent as contained in his affidavit of 26 August 2009.

In respect of the instant matter, criminal conduct includes any act or omission against any law of another country or territory punishable by imprisonment for life or for a term of imprisonment exceeding 3 years or by a fine exceeding the monetary equivalent of R50,000. Such criminal conduct is relevant to the present matter whether it was committed in that country or territory or elsewhere and whether it was before or after the commencement of the relevant provisions of this Act.

The applicant, in his affidavit of 26 October 2009, deponed that the investigation has also established that the respondent was due to commence a six year term of imprisonment on 12 March 2009 within the Czech Republic and that avoidance of imprisonment was most likely his primary reason for requesting that the Czech Police not be alerted to his presence within the Seychelles. This evidence would have been of beneficial assistance to this Court in my view, if only the applicant had established a nexus or causal relationship between the six year term of imprisonment and the Euro 100,000 that he had in his possession when he arrived in Seychelles on 14 March 2009. This Court, in the circumstances cannot reasonably come to the conclusion and make a finding on the balance of probabilities that the said Euro 100,000 was derived out of a criminal activity that was subject to his alleged imprisonment.

All the material averments contained in the affidavits of the applicant are based on circumstantial evidence. When this Court considers circumstantial evidence in any suit or matter before the Court, it must make a finding and conclude that the inculpatory facts were incapable of explanation upon any other reasonable hypothesis other than that of guilt. In his affidavit in reply the respondent stated –

that when he left home his father gave him the equivalent of Euro 100,000 from their family safe for an attempt to secure a deposit to Mr Klaus if he liked the land. It was his intention to leave this sum "in escrow" perhaps with a lawyer as security to prevent Mr Klaus from selling it to a third party. In the meantime all legal formalities could be done via the proper channel to secure the sale.

This explanation is both possible and probable and it serves to satisfactorily explain why the respondent was in possession of that amount of cash on the day.

For the reasons stated above, it is my considered judgment that the specific allegation of the applicant as to the respondent's having in his possession the



amount of Euro 100,000 cash on his arrival in Seychelles on 14 March 2009, cannot be sustained in law. I accordingly reject this allegation.

In the final analysis it is my ruling that the application made by the respondent for the release of his funds in terms of section 35(6) of AMLA has merit and is sustainable in law.

In the interest of fairness and justice, this Court hereby orders that all the cash, namely Euro 100,000 which is detained under section 34(2) of AMLA by the applicant, be released to the counsel of the respondent with interest and costs.