APPENDIX E

United Kingdom case judgement details regarding the reverse burden of proof in confiscation

R v KARL ROBERT BENJAFIELD (2002)

[2002] UKHL 2

HL (Lord Slynn of Hadley, Lord Browne-Wilkinson, Lord Steyn, Lord Hope, Lord Hutton) 24/1/2002

CRIMINAL LAW - CRIMINAL PROCEDURE - HUMAN RIGHTS

CONFISCATION ORDERS : DRUG TRAFFICKERS : PROPORTIONATE RESPONSES : INTERFERENCE : PROTECTION OF PUBLIC : REAL RISK OF INJUSTICE : CRIMINAL OFFENCES : REVERSAL OF BURDEN OF PROOF : COMPATIBILITY : RETROSPECTIVITY : PROPORTIONALITY : S.4 DRUG TRAFFICKING ACT 1994 : CRIMINAL JUSTICE ACT 1988 : HUMAN RIGHTS ACT 1998 : EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 1950 : EUROPEAN CONVENTION ON HUMAN RIGHTS : ECHR : ART.6 : RIGHT TO A FAIR TRIAL : ART.6(2) : PRESUMPTION OF INNOCENCE : PROTOCOL 1 ART.1 : PEACEFUL ENJOYMENT OF POSSESSIONS

Confiscation proceedings under s.4(3) Drug Trafficking Act 1994 were not incompatible with an offender's rights under the European Convention on Human Rights. A judge had to avoid any real risk of injustice when considering an application for a confiscation order.

Appeal against a decision of the Court of Appeal on 21 December 2000 (see R v Benjafield & Ors (2001) 3 WLR 75) dismissing the appellant's appeal against a confiscation order in the sum of £327,971 imposed under s.4(3) Drug Trafficking Act 1994 after the appellant pleaded guilty to two counts of conspiring with others to supply class A and B drugs. The Court of Appeal considered the compatibility of the powers to make confiscation orders contained in the 1994 Act and the Criminal Justice Act 1988 with the Human Rights Act 1998. The Court of Appeal found that neither Act contravened Art.6 European Convention on Human Rights. The following issues arose for this court's consideration: (i) whether a defendant who was the subject of criminal proceedings before the 1998 Act came into force could rely on an alleged breach of Convention rights on appeal; (ii) whether a person against whom a confiscation order was sought was charged with a criminal offence within the meaning of Art.6(2) of the Convention; (iii) if so, whether the reverse burden assumptions in s.4 of the 1994 Act were compatible with Art.6 and/or Protocol 1 Art.1 of the

Convention; and (iv) whether it had been appropriate and just to make a confiscation order in the circumstances of this case. For the House of Lords judgment on the 1988 Act, see R v Rezvi (2002) UKHL 1.

HELD: (1) The appellant had pleaded guilty, had been sentenced and had had the confiscation order imposed on him before the 1998 Act came into force. Following R v Kansal (2001) UKHL 62, it was clear that the appellant's Convention rights were not engaged. However, this court would consider the position on the assumption that the Convention did apply. (2) Relying on McIntosh v Lord Advocate (2001) 3 WLR 107, confiscation proceedings did not constitute a criminal charge under Art.6(2) of the Convention. Article 6(2) did not apply to confiscation proceedings but the appellant had the full protection of Art.6(1) of the Convention. (3) The 1994 Act pursued an important objective in the public interest and the legislative measures were rationally connected with the furtherance of that objective. The procedure enacted by Parliament was a fair and proportionate response to the need to protect the public interest. The critical point was that the judge had to be astute to avoid injustice. If there was or might be a serious or real risk of injustice, a confiscation order should not be made. Further, any interference with Protocol 1 Art.1 was justified for the reasons given in Rezvi (supra). (4) The appellant had not given evidence at the confiscation hearing. While the judge had misdirected himself by finding that it had "not been shown on the balance of probabilities that there was any risk of injustice", the Court of Appeal had carefully reviewed the case and this court was satisfied that no injustice or prejudice resulted from the misdirection. When considering an application for a confiscation order, a judge had to avoid any real risk of injustice.

Appeal dismissed.

Charles Miskin QC and Danny Friedman instructed by Stewarts for the appellant. David Perry and Kennedy Talbot instructed by the Crown Prosecution Service for the Crown.

LTL 24/1/2002 : (2003) 1 AC 1099 : (2002) 2 WLR 235 : (2002) 1 All ER 815 : (2002) 2 Cr App R 3 : (2002) 2 Cr App R (S) 71 : (2002) HRLR 20 : (2002) Crim LR 337 : Times, January 28, 2002

R V JOHN THOMAS BARNHAM (2005)

[2005] EWCA Crim 1049

CA (Crim Div) (Gage LJ, Morison J, Judge Zucker) 28/4/2005

CRIMINAL PROCEDURE - CRIMINAL EVIDENCE - HUMAN RIGHTS

BURDEN OF PROOF : CONFISCATION ORDERS : DRUG TRAFFICKING : PROCEEDS OF CRIME : REALISABLE PROPERTY : RIGHT TO FAIR AND PUBLIC HEARING : VALUATION : HIDDEN ASSETS : VALUE OF ASSUMED BENEFIT OBTAINED FROM DRUG TRAFFICKING OPERATIONS : BURDEN OF PROOF TO CIVIL STANDARD ON DEFENDANT TO ESTABLISH HIS REALISABLE ASSETS AT SECOND STAGE OF CONFISCATION PROCEEDINGS : TWO STAGE CONFISCATION PROCEEDINGS : SERIOUS RISK OF INJUSTICE : ASSUMED BENEFIT : STATUTORY ASSUMPTIONS : FAILED CONSPIRACIES : CONSPIRATORS : PERSUASIVE BURDEN : RISK OF INJUSTICE : DOUBLE-COUNTING : Art.6 EUROPEAN CONVENTION ON HUMAN RIGHTS 1950 : DRUG TRAFFICKING ACT 1994

At the second stage of confiscation proceedings under the Drug Trafficking Act 1994, when the court had to determine the amount to be recovered under a confiscation order, the prosecution did not have to show a prima facie case that the defendant had hidden assets.

The appellant (B) appealed against a confiscation order made by a judge in the sum of £1,525,615 following B's conviction on two counts of conspiracy fraudulently to evade the prohibition on the importation of a controlled drug. The confiscation proceedings were conducted in two stages. At the first hearing, the judge determined the total assumed benefit which B obtained from his drug trafficking operations. At the second hearing in respect of realisable assets, the judge found that B had not been a truthful witness and ruled that the amount which he should be ordered to pay under the confiscation order was the amount which had been assessed as the benefit that B had obtained. B submitted that (1) the European Convention on Human Rights 1950 Art.6 (1) was engaged at the second stage of the confiscation proceedings as well as the first and that, in a case involving an allegation by the Crown that a defendant had hidden assets, the Crown had to make out a prima facie case before a defendant could be expected to deal with such an allegation; (2) the judge's decision in respect of the assessment of benefit obtained from the drug trafficking was unfair since it relied on the assumed cost of obtaining drugs even though the conspiracies had failed in the sense that no drugs reached the UK, and failed to make any deduction for costs attributable to other persons involved in the conspiracies and included an element of double-counting.

HELD: (1) At the second stage of confiscation proceedings there was a persuasive burden on a defendant to prove to the civil standard what realisable assets he had, R v Barwick (Robert Ernest) (2001) 1 Cr App R 445 applied; R v Benjafield (2002)

UKHL 2 , (2003) 1 AC 1099 considered. The correct approach for the court to take when dealing with confiscation proceedings at the second stage was the same whether the benefit had been proved by evidence in addition to the statutory assumptions. Once the Crown had established the benefit obtained there was no requirement on it to provide a prima facie case that the defendant had hidden assets. By the second stage a defendant would know exactly how the court had determined the benefit attributable to him and the burden of proof to the civil standard shifted to the defendant to establish, if he could, his realisable assets to the satisfaction of the court. If the defendant proved that he had no, or appreciably less, realisable assets than the amount of the benefit determined by the court, the order would be made in the lesser sum. To hold that the Crown must, in some way, show a prima facie case that the defendant had hidden assets would defeat the object of the confiscation provisions of the Drug Trafficking Act 1994 , which was designed to enable the court to confiscate a criminal's ill-gotten gains. (2) Having heard all the evidence and rejected the evidence of B and his wife, the judge was entitled to find that B had not discharged the burden of proving that he had no realisable assets other than his house. The drugs which never arrived in England were not to be ignored as potential realisable assets. The judge had considered whether to make an allowance for contributions or expenses incurred by other conspirators and concluded that B had sufficient control over the criminal enterprise to pay for and realise the proceeds of the importations himself. The judge had correctly identified the need to ensure that the result of the reverse burden had not, in the instant case, caused any risk of injustice and concluded that no such injustice had been caused. The judge had been entitled to make a confiscation order in the same sum as his determination under the first stage of the proceedings and his order would be confirmed, subject to a reduction of £65,000 which the Crown was prepared to accept that the judge appeared to have double-counted.

Appeal allowed in part.

Counsel:

For the appellant: Tim Owen QC, Gary Summers

For the Crown: Andrew Stubbs, Linda Saunt

LTL 29/4/2005 : (2006) 1 Cr App R (S) 16 : (2005) Crim LR 657

http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090429/briggs-1.htm

---

R v BRIGGS-PRICE (2009)

[2009] UKHL 19

HL (Lord Phillips of Worth Matravers, Lord Rodger of Earlsferry, Lord Brown of Eaton-under-Heywood, Lord Mance, Lord Neuberger of Abbotsbury) 29/4/2009

CRIMINAL PROCEDURE - HUMAN RIGHTS

BENEFIT FROM CRIMINAL CONDUCT : CONFISCATION ORDERS : DRUG TRAFFICKING : PRESUMPTION OF INNOCENCE : RIGHT TO FAIR TRIAL : STANDARD OF PROOF : CONSIDERATION OF BENEFIT FROM OFFENCE NOT CHARGED : STANDARD OF PROOF TO BE APPLIED : s.4(3) DRUG TRAFFICKING ACT 1994 : art.6(2) EUROPEAN CONVENTION ON HUMAN RIGHTS : s.4(2) DRUG TRAFFICKING ACT 1994 : art.6(1) EUROPEAN CONVENTION ON HUMAN RIGHTS

Although the European Convention on Human Rights 1950 art.6(2) did not apply to confiscation proceedings, the presumption of innocence did. Where the judge was considering whether a convicted person had benefited from a specific drug trafficking offence with which he had not been charged, the criminal standard of proof should be applied.

The appellant (B) appealed against a decision ((2008) EWCA Crim 146) upholding a confiscation order imposed following his conviction for conspiracy to import heroin. The Crown's case was that B had been brought into the conspiracy because he had an existing network for the transportation and distribution of cannabis which could be used for the distribution of heroin, though B was not charged in relation to the distribution of cannabis. It was made clear to the jury that determination of B's guilt in respect of the heroin did not require resolution of the issue regarding cannabis. The confiscation proceedings were conducted on the agreed basis that the assumptions contained in the Drug Trafficking Act 1994 s.4(3) were not to be made. The judge held that the determination of benefit derived by B was not limited to the heroin in respect of which he was convicted, and that there was considerable evidence that B was involved in other offences, including cannabis trafficking. The Court of Appeal held that the judge's approach did not breach B's rights under the European Convention on Human Rights 1950 art.6(2). B submitted that (1) where the court was considering an alleged benefit not deriving from a conviction, the structure of the 1994 Act meant that it could proceed only on the basis of the assumptions in s.4(3) of the Act; (2) the procedure adopted by the judge had breached his rights under art.6(2).

HELD: (Lord Brown dissenting on the applicability of art.6(2) of the Convention and Lords Phillips and Mance dissenting on the standard of proof issue) (1) Section 4 of the 1994 Act was a tool to be used presumptively but was neither mandatory nor exclusive in assessing whether, and to what extent, a defendant had benefited from drug trafficking. However, it should only be in exceptional cases that the assumptions under s.4(3) were not pressed by the Crown, at least where it was apparent that a

defendant had assets. The purpose of s.4(2) and s.4(3) was to require the court to make certain assumptions against a defendant when considering his receipt or retention of proceeds from drug trafficking, and it would be absurd if a defendant could object to a confiscation order on the ground that those assumptions were not made. (2) For the purposes of art.6(2) of the Convention, a person against whom an application for a confiscation order was made was not accused of any offence other than the trigger offence of which he had been convicted, HM Advocate v McIntosh (Robert) (No1) (2001) UKPC D 1, (2003) 1 AC 1078, Phillips v United Kingdom (41087/98) 11 BHRC 280 ECHR and Van Offeren v Netherlands (19581/04) Unreported July 5, 2005 applied. Article 6(2) was not therefore engaged when the court was determining, as part of the sentencing procedure for the trigger offence, whether B had benefited from drug trafficking, other than the drug trafficking comprising the trigger offence. That said, it was important to note that, even though art.6(2) did not apply to confiscation proceedings, the presumption of innocence did. That was because it was implied into art.6(1), which did, of course, apply to such proceedings. In this case, there was no question of the judge proceeding on a presumption that B had been involved in the cannabis network. Indeed, the judge plainly thought that B's involvement had been proved to the criminal standard, beyond a reasonable doubt. On any view, therefore, the presumption of innocence in art.6(1) was fully respected in the confiscation proceedings, Geerings v Netherlands (30810/03) (2008) 46 EHRR 49 ECHR considered. (3) Where the judge was considering whether a convicted person had benefited from a specific drug trafficking offence with which he had not been charged, art.6 required that the criminal, rather than the civil, standard of proof should be applied. If a presumption of innocence was implied into art.6(1), then it, too, had to require that the person be proved guilty according to law. In the context of a criminal trial, the standard of proof, according to domestic law, was beyond reasonable doubt. Indeed, if that were not the position, the Crown could ask the court to make a confiscation order on the basis of an alleged benefit from a specific offence of which the defendant would have been acquitted if he had been prosecuted for it. (4) (Per Lord Brown) On close analysis, Geerings showed that art.6(2) did apply in circumstances such as the instant. However, the requirements of art.6(2) were satisfied in this case. (5) (Per Lord Mance) The standard of proof of every aspect of benefit by drug trafficking was the civil standard, whether such benefit was established by direct or indirect evidence.

Appeal dismissed

Counsel: For the appellant: Tim Owen QC, Timothy Kendal

For the Crown: Mark Lucraft QC, Thomas Payne, Mark Sutherland Williams

Solicitors: For the appellant: Henry Milner & Company

For the Crown: In-house solicitor

LTL 29/4/2009 : Times, April 30, 2009
