

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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**IN THE MATTER OF AN APPLICATION BY JOHN KENNETH DORAN
AND SAMUEL WILLIAM SELWYN DORAN**

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AND

IN THE MATTER OF AN APPLICATION BY JOHN MARTIN DOHERTY

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AND

IN THE MATTER OF THE PROCEEDS OF CRIME (NI) ORDER 1996

WEATHERUP J

The application.

[1] The Proceeds of Crime (NI) Order 1996 provides for the confiscation of the proceeds of crime. When proceedings are instituted for certain offences the High Court may make restraint orders prohibiting a defendant from dealing with certain property. If the defendant is not convicted of the offences the High Court may, in certain circumstances, award compensation for loss sustained. In essence these applications contend that the compensation provisions are inadequate and result in a statutory scheme that involves disproportionate interference with the defendants' property.

[2] Further to the making of restraint orders against the defendants upon the application of the Director of Public Prosecutions, the defendants challenge the compatibility of Article 23 of the Proceeds of Crime (NI) Order 1996 with Article 1 of Protocol 1 of the European Convention on Human Rights. Notice to the Crown pursuant to Order 121 Rule 3A of the Rules of the Supreme Court (NI) was given by the Court to the Secretary of State for Northern Ireland and the Secretary of State for the Home Department and the Department of the Director of Public Prosecutions.

The Proceeds of Crime (NI) Order 1996

[3] Part II of the Proceeds of Crime (NI) Order 1996 deals with Confiscation Orders. Article 8 provides that where a defendant is convicted of specified offences the Court may determine whether the defendant has benefited from any relevant criminal conduct and the Court shall make a Confiscation Order. Article 31 provides that the High Court may make a Restraint Order prohibiting any person from dealing with any realisable property and may appoint a receiver to take possession of and manage or deal with any property. Under Article 32 the High Court may make a Charging Order on realisable property.

[4] Article 23 makes provision for compensation as follows:

“23. (1) If proceedings are instituted against a person for an offence or offences to which this Order applies and either –

(a) the proceedings do not result in his conviction for any such offence, or

(b) he is convicted of one or more such offences but –

(i) the conviction or convictions concerned are quashed, or

(ii) he is pardoned by Her Majesty in respect of the conviction or convictions concerned,

the High Court may, on an application by a person who held property which was realisable property, order compensation to be paid to the applicant if, having regard to all the circumstances, it considers it appropriate to make such an order.

(2) The High Court shall not order compensation to be paid in any case unless the Court is satisfied –

(a) that there has been some serious default on the part of a person concerned in the investigation or prosecution of the offence concerned, being a person mentioned in paragraph (5); and

(b) that the applicant has suffered loss in consequence of anything done in relation to the property by or in pursuance of an order of the High Court under Articles 30 to 34.

(3) The High Court shall not order compensation to be paid in any case where it appears to the Court that the proceedings would have been instituted or continued even if the serious default had not occurred.

(4) The amount of compensation to be paid under this Article shall be such as the High Court thinks just in all the circumstances of the case.

(5) Compensation payable under this Article shall be paid—

(a) where the person in default was or was acting as a member of the Royal Ulster Constabulary, by the Policing Board;

(b) where the person in default was a financial investigator, by the Policing Board;

(c) where the person in default was a member of the Office of the Director of Public Prosecutions for Northern Ireland, by the Director of Public Prosecutions for Northern Ireland;

(d) where the person in default was a member of the Serious Fraud Office, by the Director of that Office;

(e) where the person in default was an officer within the meaning of the Customs and Excise Management Act 1979, by the Commissioners of Customs and Excise; and

(f) where the person in default was an officer of the Commissioners of Inland Revenue, by those Commissioners.”

[5] The condition for the payment of compensation include establishing -

(a) “serious default” on the part of a person concerned in the investigation or the prosecution (section 23(2)(a)),

(b) the proceedings would not have been instituted or continued in any event in the absence of the serious default (section 23(3)).

These conditions were the object of particular attack on behalf of the defendants and I shall refer to them as “the statutory conditions”.

The Proceeds of Crime Act 2002

[6] The respondent raises a preliminary issue that Article 23 is no longer in force and for that reason the compatibility challenge is ill founded. The Proceeds of Crime Act 2002 introduced a new confiscation system in Northern Ireland. Section 156 provides for the making of Confiscation Orders, Section 190 provides for the making of Restraint Orders and Section 220 provides for the payment of compensation. The respondent contends that Section 220 of the 2002 Act governs the compensation provisions applicable to the defendants and that Article 23 of the 1996 Order has no application.

[7] The relevant path through the legislation is as follows -

(a) In the 2002 Act, section 456 provides that Schedule 11 contains miscellaneous and consequential amendments.

(b) Schedule 11, at paragraph 31 (2), provides that parts II and III of the 1996 Order cease to have effect (this includes the compensation provisions under Article 23).

(c) Section 458 provides that the provisions of the Act come into force in accordance with the Order of the Secretary of State.

(d) In exercise of the power under section 458 the Secretary of State made the Proceeds of Crime Act 2002 (Commencement No: 5, Transitional Provisions, Savings and Amendment) Order 2003, No: 333.

(e) Article 2 (1) of the 2003 Order provides that:

“The provisions of the Act listed in column 1 of the Schedule to this Order shall come into force on 24 March 2003, subject to the transitional provisions and savings contained in this Order.”

(f) The Schedule to the Order provides that Section 456 (Amendments) was “Commenced for the purposes of the provisions of Schedule 11 to the Act commenced by this Order”.

(g) Further, the Schedule provides that Schedule 11 paragraph 31 (2) "...is commenced so far as it repeals Article 4 to 41 of the Proceeds of Crime (NI) Order 1996". [So far it may appear that Article 23 has been repealed]

(h) However article 2 (1) of the 2003 Order provides that the commencement on 24 March 2003 is subject to the transitional provisions and savings contained in the 2003 Order.

(i) Article 6 contains transitional provisions relating to Restraint Orders in Northern Ireland and provides that Section 190 (Restraint Orders) shall not have effect where the offence was committed before 24 March 2003.

(j) Article 11 contains savings for Northern Ireland and 11(e) provides that where under Article 6 a provision of the Act does not have effect, Articles 3 to 40 of, and paragraph 18 of Schedule 3 to, the Proceeds of Crime (NI) Order 1996 shall continue to have effect.

[8] By this complicated route the offences concerning the defendants, which were all committed before 24 March 2003, remain subject to the 1996 Order, and so too do the compensation provisions in Article 23. Accordingly I reject the respondent's preliminary point.

The background

[9] John Kenneth Doran and Samuel William Selwyn Doran were arrested on 5 December 2001 and charged with offences contrary to Article 47 of the 1996 Order relating to converting or transferring or removing from the jurisdiction the proceeds of criminal conduct. This arose out of a criminal investigation into money laundering by HM Customs and Excise involving a company of which the Dorans were Directors. On 7 December 2001 a Restraint Order was made under the 1996 Order in relation to the defendants' assets and a Receiver was appointed and the defendants were required to make disclosure of information about their assets. The company was described as having essential two limbs – the sale and distribution of supplies to the mushroom industry and the operation of a bureau de change. The Receiver reported to the Court and following her recommendations the mushroom business was sold by the Receiver. The Receiver also recommended the permanent closure of the bureau de change and the defendants state that the profitable business has not traded since the suspension following the granting of the Restraint Order and as a result significant financial loss has been sustained.

[10] John Martin Doherty was arrested on 27 July 2001 and was charged with 26 counts of handling stolen goods. He operated a car dismantling business. A Restraint Order was made on 6 November 2001 and a Receiver was appointed and the defendant was required to disclose information about his assets. The defendant was required to cease trading on the 16 April 2002. In August 2003 at

Londonderry Crown Court the charges were withdrawn from the jury. The defendant states that he has suffered considerable financial loss as a result of the imposition of the Restraint Order.

The right to protection of property

[11] Article 1 of the First Protocol to the European Convention on Human Rights deals with protection of property as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provision shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

[12] The European Court of Human Rights has found that the Article comprises three distinct rules. First, the principle of peaceful enjoyment of property (set out in the first sentence of the first paragraph). Second, the principle against deprivation of possessions (set out in the second sentence of the first paragraph). Third, the right of the state to enforce laws to control the use of property (set out in the second paragraph). *Sporrong v Sweden* [1982] 5 EHRR 35 at paragraph 61.

[13] As to the proportionality of the interference the ECtHR in *Fredin v Sweden* [1991] 13 EHRR 784 at paragraph 51 stated -

“It is a well established case law that the second paragraph of Article 1 of Protocol 1 must be construed in the light of the principle laid down in the first sentence of the Article. Consequently, an interference must achieve a “fair balance” between the demands of the general interests of the community and the requirements of the protection of the individual’s fundamental rights. The search for this balance is reflected in the structure of Article 1 as a whole, and therefore also in the second paragraph thereof - there must be a reasonable relationship of proportionality between the means employed and the aim pursued.”

The Defendants' grounds

[14] The defendants contend that Article 23 is incompatible with Article 1 of the First Protocol because:

- (a) it does not provide an effective means of compensation to an innocent defendant,
- (b) it is not proportionate in that there is an absence of compensation for innocent defendants generally,
- (c) proof of "serious default" is an impossible hurdle.
- (d) there is an absence of compensation for an innocent defendant who would have been involved in proceedings even if serious default had not occurred,
- (e) there is an absence of a fair balance between the legitimate aim of the scheme and the effect on the individual.

Confiscation of the proceeds of crime and the European Court of Human Rights

[15] The European Court of Human Rights has held that a scheme for the seizure and confiscation of the suspected proceeds of crime is not a violation of Article 1 of the First Protocol. In Riamondo v Italy [1994] 18 EHRR 237 the Government did not deny that there had been interference with the applicant's right to peaceful enjoyment of his possessions but contended that the seizure and confiscation were justified under the exceptions under Article 1. The seizure of the applicant's goods did not purport to deprive the applicant of his possessions but only to prevent him from using them, and the Court held that the third rule applied. It was held that the seizure was -

"...clearly a provisional measure intended to ensure that property which appears to be the fruit of unlawful activities carried out to the detriment of the community can subsequently be confiscated if necessary. The measure as such was therefore justified by the general interest and in view of the extremely dangerous economic power of "organisation" like the Mafia, it cannot be said that taking it at this stage of the proceedings were disproportionate to the aim pursued." (Paragraph 27).

[16] Further, confiscation of property does not necessarily come within the scope of the second rule, and as there was no irrevocable decision which had the

effect of transferring ownership of the property to the State, the third rule applied. The Court held that the confiscation –

“-pursued an aim that was in the general interest, namely it sought to ensure that the use of the property in question did not procure for the applicant, or the criminal organisation to which he was suspected of belonging, advantages to the detriment of the community.” (Paragraph 30).

[17] The European Court of Human Rights has also held that a Confiscation Order under the Drug Trafficking Act 1994 was not a disproportionate interference with a defendant’s peaceful enjoyment of his possessions. In Phillips v United Kingdom (5 July 2001) the ECtHR stated –

“ 51....the Confiscation Order constituted a “penalty” within the meaning of the Convention. It therefore falls within the scope of the second paragraph of Article 1 of Protocol, 1 which, inter alia, allows the Contracting States to control the use of property to secure the payment of penalties. However, this provision must be construed in the light of the general principle set out in the first sentence of the first paragraph and there must, therefore, exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, among many examples, Allen Jacobson v Sweden (no. 1), judgment of 25 October 1989.

52. As to the aim pursued by the confiscation order procedure, as the Court observed in Welsh v United Kingdom (judgment 9 February 1995) these powers were conferred on the courts as a weapon in the fight against the scourge of drug trafficking. Thus, the making of a confiscation order operates in the way of a deterrent to those considering in engaging in drug trafficking, and also deprive a person of profits received from drug trafficking and to remove the value of the proceeds from possible future use in the drugs trade.”

[18] The European Court of Human Rights dealt with a Restraint Order under the Criminal Justice Act 1988 in Andrews v United Kingdom (26 September 2002). The issue concerned the effect of the costs of the Receiver being recovered from the applicant’s property after his acquittal on VAT charges. Section 89 of the 1988 Act contained compensation provisions similar to those operating under Article 23 in the present case. The Court confined itself to the question of

whether in the circumstances there was a reasonable relationship of proportionality between the use made of the money once it was placed at the disposal of the Receiver and the aim pursued. The Court concluded:

“Having regard to these considerations, the Court is not persuaded that the applicant was required to bear an individual and excessive burden through having to fund the costs and expenses incurred by the Receiver (see *mutatis mutandis* the Hentrich v France judgement of 22 September 1994). It is true that the applicant was ultimately acquitted of the charges brought against him. However, it is equally true that at the time of the execution of the Restraint and Receivership Orders there was a case against him which required to be answered and necessary steps had to be taken to preserve assets in respect of which he had more than a peripheral interest. In these circumstances, and having also to the absence of any arbitrariness in the impugned decisions, the Court does not consider that the authorities can be said to have failed to strike a fair balance between the applicant’s property right and the general interests of the community. It would further add that the limited possibilities available to the applicant under the Criminal Justice Act 1988 to obtain compensation do not in the circumstances of this case tilt the balance in the applicant’s favour. Indeed the scope of the compensatory remedy set out in that Act are consistent with the Court’s finding that the decisions taken in the applicant’s case and resultant interference with his property right cannot be considered arbitrary.”

Compensation provisions in the Court of Appeal in England and Wales

[19] The Court of Appeal (Civil Division) considered the compensation provisions under the Drug Trafficking Act 1994 in Hughes v Customs and Excise Commissioners (2003) 1 WLR 177. Again section 89 of the 1994 Act contains compensation provisions similar to those operating under Article 23 in the present case. Simon Browne LJ stated –

“55. I entirely accept that an acquitted (or indeed unconvicted) defendant must for these purposes be treated as an innocent person (see particularly *Minnelli v Switzerland* [1983] 5 EHRR 554 and *Sekanina v Austria* [1994] 17 EHRR 221)..... I cannot accept, however, that for this reason it must be regarded as disproportionate, still less arbitrary, (another contention advanced by the

respondents), to leave the defendant against whom restraint and receivership orders have been made uncompensated for such loss as they may have caused him – unless, of course, by establishing “some serious default” on the prosecutor’s part he can bring himself within the strict requirements of Section 89.

56. It is common ground that acquitted defendants are not, save in the most exceptional circumstances, entitled to compensation for being deprived of their liberty whilst on remand or indeed for any other heads of loss suffered through being prosecuted. In my judgment it is no more unfair, disproportionate or arbitrary that they should be uncompensated too for any adverse effects that restraint and receivership orders may have upon their assets.”

[20] Arden LJ expressed the opinion that -

“67. In my judgment, contrary to the view taken by the judge, the proportionality of a restriction of this nature on compensation for unconvicted defendants has to be viewed in the light of the legislatures view that restraint and receivership orders properly made are in the public interest. So viewed, in my judgment, the restriction is proportionate when viewed against the aims sought to be achieved.”

[21] The approach of the ECtHR indicates the considerations that were judged to render the interference proportionate i.e. when the restraint order was made the defendant had a case to answer; steps had to be taken to preserve assets; there was no arbitrariness in the decision. The approach of the Court of Appeal added the considerations that acquittal does not result in compensation for loss of liberty or financial loss (save in exceptional circumstances) and that it was the legislatures view that restraint orders are in the public interest. In both instances the limited compensation provisions were not such as to render the interference with property unfair or arbitrary or disproportionate.

[22] Counsel for the defendants accepted the legitimate aim of the confiscation scheme, but contended that it was not proportionate, and did not strike a fair balance of public and private interests, to require an innocent defendant to satisfy the statutory conditions in order to qualify for the payment of compensation. In advancing the grounds set out at paragraph [14] above it was contended that there should be compensation for all innocent defendants or at least a scheme that would substitute for the statutory conditions the requirement of establishing simple default (and not serious default) in the investigation or

prosecution. It was sought to distinguish the decision in Hughes v CEC on the basis that the Court was considering the compensation issue in the abstract and that it was necessary to consider the compensation scheme as a separate entity rather than as a part of a confiscation scheme. Further the defendants relied on the ECtHR in James v United Kingdom [1986] 8 EHRR 123 at paragraph 54 to the effect that compensation terms are material to the assessment whether the contested legislation represented a fair balance between the various interests at stake and notably whether it imposed a disproportionate burden on the individual.

Fair balance

[23] It is clearly the case that Parliament could have adopted a more generous compensation scheme for innocent/unconvicted defendants that equated to one or other of the schemes proposed by the defendants. Had Parliament done so it would have adopted a less intrusive interference with the property of an innocent/unconvicted defendant, in the sense that the defendant would have eventually enjoyed a greater degree of restitution. However a requirement that the legislature adopt the least intrusive means is not the test applied by the ECtHR. The issue was addressed in James v United Kingdom in relation to the rights of acquisition granted to tenants under the Leasehold Reform Act 1967.

“It is, so the applicants argued, only if there was no other less drastic remedy for the perceived injustice that the extreme remedy of expropriation could satisfy the requirements of Article 1.

This amounts to reading a test of strict necessity into the Article, an interpretation that the Court does not find warranted. The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a ‘fair balance’. Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way.”

[24] Fair balance is the measure and not least intrusive means. The defendants proceed on the basis that the innocent defendant should in effect receive effective restitution. However evaluation of a fair balance includes the Court having regard to the circumstances in which a Restraint Order comes to be made. It is made when proceedings have been instituted against the defendant. The ECtHR in Andrews v United Kingdom expressed the position in terms that

there was a case against the defendant that required to be answered. The Court of Appeal in Hughes v C&EC expressed the position in terms that the defendant was in the same position as any unconvicted defendant who (save in exceptional circumstances) remains uncompensated for loss of liberty or financial loss. The defendants do not accept the comparison with the defendant who has lost his liberty or lost financially by reason of arrest and detention. The defendants seek to distinguish that position on the basis that a loss suffered by an arrested defendant would be an indirect result of his arrest and detention whereas it is said that there is direct loss occasioned by the imposition of a Restraint Order on a defendant's assets. I do not accept that this is a basis for distinguishing the two situations. In each case the defendant suffers loss as a result of being investigated for criminal activity; in each case there will be reasonable grounds for suspecting involvement in offences; in each case the arrest and detention or the Restraint Order will affect the management of the defendant's assets so as to occasion loss. I do not accept that such differences as exist between the two situations invalidate the comparison.

[25] The present confiscation and compensation scheme is the response of Parliament to the problem of dealing with the proceeds of crime and the confiscation of such proceeds. The role of the Courts is to determine if that response is within the State's legal framework by representing a fair balance of public and private interests. It may be that the time has passed to speak of the Courts "deference" to Parliament, as that expression does not adequately convey the process that is undertaken when such matters are being considered by the Court. In R(ProLife) v BBC [2003] 2 WLR 1403 Lord Hoffmann stated -

"[75] My Lords, although the word 'deference' is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.

[76] This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of

government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle. It is reflected in art 6 of the convention. On the other hand, the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise, when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law.”

[26] Whether the compensation provisions are considered as part of the overall confiscation scheme or as a distinct scheme, I consider that the relevant context is that Restraint Orders are imposed where there are reasonable grounds to undertake proceedings against the defendant for specified offences. I agree with the approach that has been taken by the ECtHR and the Court of Appeal in England and Wales. In all the circumstances a fair balance has been struck between the public interest and the private interests of the defendants. Article 23 of the 1996 Order is not incompatible with the European Convention on Human Rights.