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Judgment: approved by the Court for handing down
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Delivered: **23/06/2014**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

KEVIN HIGGINS

Appellant

_____

Before GIRVAN LJ, COGHLIN LJ and TREACY J

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GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] This is an application for leave to appeal against a confiscation order made on 12 August 2013 at Belfast Crown Court in the sum of £16,068.36 to be paid within 6 months. This case raises a number of important issues relating to the proper procedures to be followed in relation to applications for confiscation orders arising out of criminal convictions; to the responsibilities and duties of counsel representing defendants in such cases; and to the effect of the limitations apparently imposed by the Legal Services Commission in relation to the provision of legal aid for confiscation applications. It also raises issues relating to the adverse consequences which flow from delay in the judicial process.

[2] On the hearing of the application Ms Lynch appeared on behalf of the applicant and Mr Steer appeared on behalf of the Crown. We are indebted to both counsel who presented admirable written submissions and made helpful oral submissions with care and tenacity. As the arguments developed it became clear that the case raised more complex issues than appeared from the case at first sight.

History of the proceedings

[3] Each of the counts with which the applicant was charged related to the unlawful keeping of controlled waste without a waste management licence. On 13

November 2008, the applicant was arraigned and pleaded not guilty to counts 1, 4 and 5. On 4 March 2009 he was arraigned and he pleaded not guilty to counts 2 and 3. He was also re-arraigned and pleaded not guilty to counts 1, 4 and 5. On 9 March 2009 he was re-arraigned and pleaded guilty to counts 1 to 4. He was on the same date convicted on counts 1 to 4 and count 5 was left on the books. On that day the judge ("the sentencing judge") sentenced the applicant to 4 months' imprisonment concurrent on each count 1 to 4 and the sentences were suspended for 2 years. The sentencing judge imposed a fine of £1,000 on each of the counts, amounting to a total fine of £4,000.

[4] On the day of sentencing the prosecution applied to have a confiscation hearing under the Proceeds of Crime Act 2002 ("the 2002 Act"). The sentencing judge purported to postpone the confiscation hearing. The confiscation hearing did not take place until 5 August 2013 at Belfast Crown Court before a different Crown Court judge ("the confiscating judge"). The applicant had no counsel or solicitor representing him at the confiscation hearing. The confiscating judge made a confiscation order in the sum of £16,068.36 on 12 February 2014 and directed that any period of custody to be served in default of payment was to be consecutive to any term imposed in respect of the substantive offences. He directed payment of the sum within 6 months. He did not specify the default period of imprisonment in the event of non-payment nor did he make any finding in relation to the available amount.

[5] The applicant, representing himself, applied for leave to appeal. His application was considered by the single judge, Maguire J. The applicant sought leave to appeal primarily on the basis that the calculation of tonnage that gave rise to the assessment of the monetary figure was erroneous. The confiscating judge fixed the sum at £16,068.36 on the basis that the landfill tax which had not been paid related to 6,837.6 tonnes of controlled waste for which tax should have been payable at the rate of £2 per tonne together with VAT. It is not clear on what basis the confiscating judge decided that VAT was due on the sum of £2 per tonne which reflected unpaid landfill tax which would have fallen due as a tax. VAT is not normally payable on a tax.

[6] In his ruling in relation to the application for leave to appeal Maguire J stated:

> "(9) At the hearing on 5 August 2013 there was some exploration of the issues but it is rather inconclusive. In respect of the tonnage issue the applicant at one point was asked by the judge whether he had any comment to make on the estimated tonnage of 6,837.6. The applicant however replied `I never really got a chance to work this out'. There is also some discussion of planning permissions but it lacks focus. At the end of the hearing the judge indicated that he would give his decision `very

> quickly'. It seems clear therefore that he intended to reflect on the matter subsequent to the hearing.
>
> (10) The central difficulty this court labours under is that while a confiscation order was made dated 13 August 2013 there is no accompanying reasoning as to how the judge reached his decision. It is therefore not possible to see how the judge dealt with the various issues which arise under the legislative scheme or to see how he dealt with the applicant's contentions. While the judge accepted the tonnage figure put forward by the prosecution, there is no explanation as to why he rejected the points made by the applicant. The decision produced by the judge and embodied in his order does not engage with some important issues which arise under the statutory scheme. For example, there is no engagement with the concept of `the available amount' and nor has the judge dealt with the issue of imprisonment in default of payment of the amount of the order. The questions that ought to be asked and answered in this situation are set out by Lord Bingham in the House of Lords case of R v May [2008] 1 AC 1028 at paragraph 8 and in more detail in the end note at paragraph 48 but his template does not seem to have been used in this case."

While refusing leave to appeal Maguire J went on to state that this might be a case where the applicant might consider renewing his application for leave before the full Court of Appeal highlighting the points raised above concerning the absence of material to enable him to understand the judge's reasoning.

[7] The applicant subsequently sought and secured legal representation and renewed his application before the full Court of Appeal. Paragraph 6 of counsel's skeleton argument refers to the renewal of the application for leave to appeal before the full Court of Appeal on the grounds included in Form 16. While not abandoning the points raised by the applicant when representing himself, counsel's argument focussed largely on the issue whether the appellant had benefitted from his specific criminal conduct in the form of landfill tax and VAT thereon. Counsel submitted that the correct application of the Finance Act 1996 meant that the applicant did not fall within the category of persons who could be personally liable for the payment of landfill tax and, therefore, he could not be said to have gained a pecuniary advantage in this sum for the purposes of the confiscation regime. Since, for the reasons set out below, the confiscation order must be quashed on other grounds, it is not necessary to reach a final conclusion on the applicant's primary submission. It is, however, a submission which sits uneasily with the ruling of this court in R v Allingham [2012] NICA 29 (which is binding on this court unless decided per

incuriam) or the reasoning in R v Morgan [2013] EWCA 1307 (which being a decision of the English Court of Appeal is strongly persuasive).

Factual background to the case

[8] On 13 January 2004, 10 March 2004 and 24 February 2006, following receipt of complaints, officers of the Northern Ireland Environment Agency inspected land belonging to the applicant at Killybearn Road, Cookstown. At the site they found a large area of bog land which had been in-filled with construction and demolition waste which included soil, clay and concrete. No waste management licence or exemption had been granted or applied for in relation to a site and this led the officers to suspect that controlled waste was being disposed of on the site without the required permissions.

[9] A letter dated 18 October 2005 advised the appellant that the then activities were in contravention of the Waste and Contaminated Land (Northern Ireland) Order 1997 ("the 1997 Order") and no further deposit should take place unless in accordance with a waste management licence.

[10] A further visit to the site by Agency officers on 3 April 2007 revealed the deposits were much larger than observed on previous visits. On 29 May 2007 enforcement officers and police officers carried out an intrusive survey. They took samples for analysis, photographs and video recordings. The test pits revealed the presence of construction and demolition waste (concrete, brick and stone below a layer of clay) and other types of waste (in the form of carpet, linoleum, metal piping, a wheelbarrow and a tyre).

[11] On 29 May 2007 the enforcement officers interviewed the applicant under caution. He stated that he was the owner of the land and when asked if he had a licence to deposit waste he replied "that was my father Kevin Higgins Senior, he is deceased."

The sentencing of the applicant

[12] The Crown case as opened by counsel and apparently accepted by defence counsel was that the applicant owned land at Killybearn Road between Cookstown and Coagh in County Tyrone. The site had been extensively in-filled with soil, clay and construction and demolition waste, including bricks, rubble and reinforced concrete. The material was classified as inert. It did not present a risk of the development or release of leachates. The Crown calculated the volume of waste as 13,098 metric tonnes. Disposal of waste on part of the area was permitted for planning purposes. The amount on the land which was not subject to planning permission was 6,837 cubic metres. The case was presented to the court on the basis that there was roughly £14,000 of landfill tax evaded. It was the defence case that

the defendant had planning permission to place hard core on part of the site but that he had extended the area of in-fill beyond that permitted area.

[13] In sentencing the applicant the sentencing judge proceeded on the basis that it would have cost £82,000 inclusive of VAT to remove the material and on the basis that by operating an unlicensed site the applicant avoided incurring the cost of a properly prepared site which would have involved the construction of a pit with a liner at the bottom and a finish cap at the top. The cost of remedial work was, in the judge's view, significant. He accepted that the defendant did not receive payment for accepting the material. The judge concluded that the offences were sufficiently serious to justify custodial sentences. He decided to impose a sentence of 4 months' imprisonment on each count suspended for 2 years. The judge went on to impose a fine of £1,000 in relation to each count with 3 months to pay. He said that he set the fines at that level because of the defendant's limited financial resources, stating that "it is only right and appropriate that such monetary penalty be imposed upon you together with a suspended sentence."

[14] In the course of the sentencing hearing and before the judge passed sentence Crown counsel informed the court that there would be an application for a confiscation order under section 156 of the Proceeds of Crime Act 2002 ("the 2002 Act"). According to the transcript of the hearing Crown counsel said:

> "I would ask that the court would postpone that hearing until such time as it is ready to proceed. The prosecution have a timetable at the moment but at this stage, Your Honour, I understand that the legislation requires that I make the application to postpone the application at this stage before Your Honour."

In response to that the judge said:

> "Yes, well I will postpone that."

Defence counsel did not object. At the conclusion of the sentencing remarks the judge said:

> "In relation to the confiscation proceedings, those are a quite separate matter which I have not taken into account in the course of these sentencing remarks. I leave those matters. I have postponed the application in relation to the Proceeds of Crime to another day …"

[15] Section 164 of the 2002 Act, so far as material, provides:

> "(1) The court may –

(a) proceed under section 161 before it sentences the defendant for the offence (or any of the offences) concerned or

(b) postpone proceedings under section 161 for a specified period.

(2) A period of postponement may be extended.

(3) A period of postponement (including one as extended) must not end after the permitted period ends.

(4) But subsection (3) does not apply if there are exceptional circumstances.

(5) The permitted period is the period of two years starting with the date of the conviction.

…….

(8) If

(a) proceedings are postponed for a period or

(b) an application to extend the period is made before it ends

the application may be granted even after the period ends.

The question arises as to whether, when postponing the confiscation proceedings the sentencing judge, or at a later stage the confiscating judge, failed to postpone the proceedings "*for a specified period*." A period of postponement (including one as extended) must not end after the permitted period which is defined as two years after the date of conviction "*unless there are exceptional circumstances*." The question arises as to the consequences which flow from the fact that the confiscation hearing disposing of the case did not take place until 5 August 2013 over four years after the initial postponement of the case. We will come back to those questions at a later stage in the judgment.

[16] Section 163 of the 2002 Act, so far as material, provides:

"(1) If the court makes a confiscation order it must proceed as mentioned in subsections (2) and (4) in respect of the offence or offences concerned.

(2) The court must take account of the confiscation order before:

(a) It imposes a fine on the defendant; or

(b) It makes an order falling within Subsection (3).

(3) These orders fall within this subsection … (*there are then listed 4 situations of compensation orders, forfeiture orders, deprivation orders and forfeiture orders under other pieces of legislation).*"

It follows from the wording of section 163 that the court must not impose a fine before the conclusion of confiscation proceedings. It is not difficult to understand the reason for this. When imposing a fine the court must take account of the means of the defendant. Until the confiscation proceedings are concluded it will not be possible for the court to assess and measure the means of the defendant (see Lord Rodger in R. v Soneji [2005] UKHL 49 at para. [35].

[17] As noted, under section 164 a court may proceed with the confiscation hearing either before or after sentence is passed. A proper judgement must be made as to which course is fairer and more desirable in the particular case. It is clear that in cases where the imposition of a fine is under consideration the sentencing proceedings must follow the conclusion of the confiscation proceedings. There may be other cases where it may be considered more desirable to conclude the confiscation proceedings first. While under section 163(4), subject to section 163(2), the court must leave the confiscation *order* out of account in deciding the appropriate sentence, information and evidence in relation to financial losses and gains to the defendant or the state authorities may constitute relevant *information* material to the gravity of the offences and inform the proper level of penalty to be imposed. In the present instance, as will be noted, on the hearing of the confiscation proceedings the Crown made financial concessions which painted a somewhat different picture to the one which may well have been formed by the court at the sentencing stage. Before he passed sentence the sentencing judge received no submissions or assistance from the defence on the question whether it would be appropriate to consider hearing the confiscation proceedings first. Since it is apparent that defence counsel had no intention of representing the defendant in the confiscation proceedings, and left the confiscation proceedings out of consideration and, by implication, what was involved in them, the applicant did not have the advantage of competent legal advice from his legal team on issues which may have been material to the question of how the defence should have approached the question of the postponement of confiscation proceedings until after sentencing.

[18] Section 164(11) and (12) of the 2002 Act provide:

> "(11) A confiscation order must not be quashed only on the ground that there was a defect or omission in the procedure connected with the application for or the granting of a postponement.
>
> (12) But subsection (11) does not apply if before it made the confiscation order the court –
>
> (a) imposed a fine on the defendant,
>
> (b) made an order falling within section 163(3),
>
> (c) made an order under Article 14 of the Criminal Justice (Northern Ireland) Order 1994 (Compensation Orders)."

[19] The intended effect of section 164(12) is not immediately apparent. Although Mr Steer in his written submissions appeared to accept that, if the court did impose a fine on the defendant before the conclusion of confiscation proceedings, any resultant confiscation order would fall to be quashed, in oral submissions he submitted that since the sentencing judge had already postponed the confiscation proceedings the court had no power to impose a fine. Section 165(2)(a) provides that in sentencing a defendant for the offence concerned in the postponement period the court must not impose a fine. As already noted, the question arises as to whether there could be any valid postponement under section 164(1)(b) where no period was specified for the period of the postponement.

[20] Under section 49 of the Judicature (Northern Ireland) Act 1978 a sentence of the Crown Court takes effect from the beginning of the day on which it is imposed unless the court otherwise directs. Section 49(2) provides that subject to the following provisions of the section a sentence imposed by the Crown Court may be varied or rescinded by the Crown Court within the period of 56 days beginning with the day on which the sentence was imposed. Section 49(7)(b) provides that Crown Court Rules may prescribe the cases and circumstances and the time within which any order may be made by the Crown Court varying or rescinding a sentence. Rule 45 of the Crown Court Rules (NI) 1979 provides:-

> "Where a judge considers pursuant to section 49 of the Act whether a sentence or other order should be varied or rescinded he shall do so in open court."

[21] The problems created by the sentencing judge's imposition of fines on the applicant were drawn to the attention of the judge who made a decision on 18 March to take the fines out of the order which he had made. Under the order as ultimately

drawn (which does not appear to have been drawn up until 14 May 2014) a monetary penalty is recorded on the four counts as £0 "to be paid by 9 June 2009". This somewhat bizarrely worded order reflects the fact that a fine was imposed requiring a payment by 9 June 2009 but subsequently the decision was made to remove the fines. It appears that the applicant's solicitor was alerted to the possibility that the Crown would ask the judge to remove the fines from the sentence. Crown Counsel informed the judge that while he had spoken to the defence solicitor neither counsel was available. The defence solicitor had made clear to the Crown, and the judge was so informed, that he would prefer counsel to be present. However, the judge considered the matter was straightforward and he proceeded to make an order setting aside the fines in the absence of counsel. As a result the applicant was given no opportunity to make submissions in relation to the proposed course of removing the fines from the order. Defence counsel might well have made submissions that the variation would have adverse consequences for the applicant in relation to the argument that confiscation proceedings may have been rendered inappropriate by the existence of the fines imposed by the judge in the first instance. Since the judge in approaching his sentencing of the defendant had decided on a package of suspended sentence and fines, the suggestion that there should have been a removal of the fines might have opened the argument that the overall sentence fell for reconsideration. Having regard to the transcript of the sentencing hearing it must be said that neither defence nor prosecution counsel provided the sentencing judge with any assistance in relation to proper sentencing principles in such a case or in relation to any sentencing case law or in relation to the effect of the Proceeds of Crime Act 2002 in relation to the way in which the judge should proceed with the sequencing of sentencing and confiscation proceedings. It is clearly part of counsel's duties to assist or correct the trial judge in relation to all statutory provisions and authorities which are relevant in the sentencing process.

The discharge of the applicant's legal representatives

[22] While the sequence of events relating to the sentencing and the subsequent variation of the sentence was unsatisfactory what followed thereafter aggravated the procedural unfairness of the overall process. Senior and junior counsel, who had taken on the brief to represent the applicant in relation to the criminal trial which he faced, decided, following the imposition of the sentence, to abandon their client in relation to his defence of the confiscation proceedings. This is because they did not consider that the legal aid available for the conduct of such confiscation proceedings represented adequate remuneration. Counsels' actions were in clear breach of their professional duties to their client. Paragraph 4.02 of the Code of Conduct of the Bar ("the Code") provides that counsel's fundamental obligation is to ensure that every aspect of a lay client's interests is properly represented and protected without fear or favour. Counsel must conduct himself with honour and integrity as befits the high standing of the profession (paragraph 4.05). Where a barrister has accepted a brief he must not return it to the professional client or transfer it simply because he has received a more lucrative assignment. Under paragraph 4.17 counsel must attend

the trial or hearing in its entirety. Under paragraph 18.02 a barrister who is instructed to represent an accused person must ensure that his right to a fair trial is protected.

[23] It should have been abundantly clear to defence counsel that the case would inevitably entail confiscation proceedings; that such proceedings raised complex factual and legal issues; that the issues in such confiscation proceedings were more complex and difficult than those that arose simply at the sentencing stage; and that, in order to act properly in relation to the plea for the sentence and the sequencing of sentencing and confiscation, they needed to understand the issues which were likely to arise in the confiscation proceedings, since they were potentially relevant to the issue of mitigation, the gravity of the offence and the proper sequencing of proceedings. It was not possible or proper for counsel to simply close their eyes to the effect of the confiscation proceedings on the overall process. It should have been obvious to counsel that if they undertook to represent the defendant then, as para. 4.02 of the Code shows, they had to ensure that every aspect of the client's interests were properly represented and protected and that included his financial interest in the confiscation proceedings which were inevitably and intrinsically linked to the case. If acting with honour and integrity it would not be acceptable conduct for counsel to take on a case with the ulterior intention of abandoning the client once the simpler part of the case was dealt with.

[24] It appears that counsel and their instructing solicitor made application to another judge who was reviewing the confiscation proceedings in October 2009 ("the reviewing judge") to come off record. Under paragraph 14.02 of the Code a barrister may withdraw from a case (a) if his instructions have been withdrawn; (b) if his professional conduct is being impugned and provided such withdrawal can be achieved without prejudicing the lay client's interests; or (c) he has been instructed and required to act otherwise than in conformity with the provisions of the Code. None of those situations applied in the present case. Counsel submitted that "at the end of the case when the Proceeds of Crime application is made there is no separate fee for proceeds of crime. It is not contained in the Criminal Costs Rules 2005 and no provision is made." Counsel submitted to the reviewing judge that legal aid for junior counsel only amounted to £63 for an application and that the solicitor's fee amounted to only £150. Counsel took the view that the Proceeds of Crime application was in reality a fresh case and would require a fresh brief fee. The judge expressed concern that the lawyers were cherry picking and taking the money for the substantive hearing and then just abandoning the other part of the case because the other was more troublesome and difficult. Counsel responded to this suggestion by saying that the Proceeds of Crime application was not provided for under the rules. Counsel was asked to discuss the issues with the applicant and when counsel returned to court he informed the judge that the applicant did not want the legal aid certificate discharged. He would contact other solicitors to see if they would take the case on. The judge, notwithstanding his obvious misgivings, gave the solicitors and counsel liberty to come off record for the applicant. The decision by the judge to

allow the solicitor and counsel to withdraw was in fact unjustified. It was inevitably going to result in the defendant being left unrepresented to grapple with a factually and legally complex case. The combination of counsels' unjustifiable abandonment of the case and the court's decision to release counsel and solicitors from their duty to complete the case resulted in serious procedural unfairness to the defendant.

[25] It is clear that counsels' only objection to continuing with the case arose from their understanding of the Legal Services Commission's approach to legal aid for confiscation hearings. If, indeed, the legal aid rules and/or the practice and policy of the Legal Services Commission entail the limiting of legal aid remuneration in all confiscation proceedings in criminal cases to a small fixed fee suitable for a mere application, it would not be difficult to see how such rules, policy or practice would be open to challenge in judicial review on the grounds of Wednesbury unreasonableness and on the grounds that such a rigid fixed policy or rules would be unlawful in the light of the approach taken by the Supreme Court in Re Brownlee [2014] UKSC 4. In fact, the standard fees set out in Schedule 1 Part 4 of the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 may not be as limited as suggested. Rule 14 deals with section 156 applications under the 2002 Act. It provides time based fees as set out in the Table. When an application is between 1.5 and 3 hours senior counsel's fee is fixed at £250. If the application exceeds 3 hours the fee allowed is £500. Led junior's fee is one half of the senior's fee. Nevertheless, the rigidity of the fixed fee system in such cases may work injustice. The fact remains that the more complex and difficult a case, the more likely it would be that the situation would arise that the fixed fee is disproportionately low in relation to the work involved and the less justifiable is the capping of the fee at a relatively small amount, which does not bear a proportionate relationship to the difficulty of the case or the work involved. The impression that legal aid for confiscation proceedings fails to provide adequate remuneration appears to have contributed to the situation in which the applicant was left unrepresented to grapple with a complex case. There is a real risk that defendants may end up unrepresented at any stage of proceedings where there is the likelihood of complex confiscation proceedings arising. This case is not, however, a suitable mechanism for this court to carry out what would in effect be a judicial review of the current legal aid rules and practice in this field and we have heard no argument on the legal issues. We will say no more than that the current position may require detailed consideration in an appropriate case.

The confiscation proceedings

[26] The confiscation proceedings, having been postponed on 9 March 2009 to an indeterminate date in the future, did not come on for hearing until 5 August 2013, that is to say over four years later.

[27] The chronology of events in relation to the handling of the case is confused and confusing. While the statutory regime envisages a careful programming of the

proceedings of the court to ensure a timely structuring of events with the imposition of time limited postponements of the final hearing, the proceedings in this case appear to have drifted. The requirements of the statutory framework on occasion appear to have been overlooked. The chronology of events, which emerges from the affidavit sworn on behalf of the Public Prosecution Service ("the PPS"), shows frequent adjournments of the case. Any distinction between a postponement and an adjournment does not appear to have been fully appreciated at times. A large part of the problem militating against a timely disposal of the matter lay in the long delay on the part of the Court of Appeal in giving its decision in in the case of R v Allingham, a case which raised the legal issue central to the resolution of the present case. On 9 March 2011, the day on which the two year permitted period prescribed by section 164(5) expired, the confiscating judge made an order postponing the date for hearing beyond the two year permitted period. He relied on the exceptional circumstances arising from the delay in the judgment which was pending in Allingham. In the papers exhibited to the PPS affidavit two postponement orders are exhibited. One is dated 5 May 2011 postponing the application until 10 June 2011. Although further postponement orders are not exhibited, it appears the application was "adjourned" until 10 June, 29 June 30 September 2011,and 28 October 2011. An order on 21 August 2012, which is exhibited, records that the court, having postponed the application until that date, extended the postponement until 14 September 2012. There does not appear to have been any finding of exceptionality justifying the further extension, although judgment was given in Allingham in July 2012. It would be understandable that a short additional postponement might be appropriate to arrange for the disposal of the matter relatively soon after July 2012. Events after 14 September 2012 become very unclear. According to an internal email from Crown Counsel, he asked for the case to be listed "because it seemed to have dropped off the list". The case was last mentioned in September and was adjourned for a date to be fixed according to counsel's note. Counsel correctly pointed out that "you cannot do this with a confiscation hearing as it has to be postponed for a particular date". Counsel asked for the case to be relisted with a view to arranging a hearing date, given that there was a two year time limit from the date of the plea and that seemed to have been forgotten about.

[28] The matter was mistakenly listed on 9 November 2012 before the wrong judge. It was then adjourned for a date to be fixed. This could not constitute a postponement for a prescribed time. The next reference in the listing seems to be dated 24 May 2013. It was then listed on 21 June 2013 at Belfast where the confiscating judge was now sitting. The matter came on for hearing on 5 August 2013.

[29] Clarity in relation to the events after 14 September 2012 is important. In RCPO v Iqbal [2010] EWCA 376 the Court of Appeal held that, having regard to section 14(8) (the equivalent of section 164(8) in relation to Northern Ireland proceedings) an application to extend the period of postponement must be made

before the end of the current period of postponement. At paragraph 26 Hooper LJ said:

> "In our view the wording of section 14 and in particular sub-paragraphs (3) and (8) make it clear that Parliament intended to give prosecutors a longer period than the 6 months under the earlier legislation but at the same time intended to make it clear that any application to extend the period of postponement had to be made before the permitted period expired."

The court in that case upheld the trial judge's decision that he had no jurisdiction to entertain an application where no order was made postponing the hearing of the application for a confiscation order and no application had been made for the postponement of the hearing during the period of a valid postponement period. The Court of Appeal accepted as correct the argument that the intention of Parliament was that the application for a confiscation order should be heard within two years of conviction in the absence of exceptional circumstances and if there had been no application to extend the permitted period of two years before that period expired the confiscation proceedings could not continue.

[30] In the present case the court had extended the two year period on exceptional grounds, namely the fact that the court was waiting for judgment in Allingham. It made postponement orders accordingly. The applicant challenges these postponement orders as not properly made. Whether counsel is correct in that or not, what seems clear is that the last potentially valid postponement order expired in September 2012. By that stage the Allingham judgment was available. There was thus no reason why the matter should not be fixed thereafter for early determination. As at September 2012, absent any valid postponement order made on or before that date and absent any further exceptional circumstances, the time limit had expired. There is, thus, a strong argument that the court thereafter lost jurisdiction to make a confiscation order.

[31] However, the matter is not free from doubt. In Iqbal the court left open the question of the effect of sub-paragraph (11) when a confiscation order has been made. The reasoning in R v Soneji [2005] UKHL 49 in the House of Lords may lead to the conclusion that, notwithstanding the irregularity arising from the exceeding of the permitted time limit, the confiscation order, when finally made, was not, for that reason, invalid. In view of our overall conclusions that the confiscation order must for other reasons be quashed it is not necessary to reach a firm determination on this issue. What is clear is that the decision in Iqbal was not drawn to the attention of the confiscating judge who heard no argument in relation to the issues raised by his reasoning. The chronology of events, the passage of time and the failure after September 2012 to consider the issue of whether there were ongoing exceptional circumstances are all factors which are relevant to the question of whether the

defendant in the circumstances had a fair trial of the issues in the confiscation proceedings.

[32] The confiscation proceedings came on for hearing before a judge who was not the sentencing judge. He had in the meantime moved to a different Division. There may be good and unavoidable reasons for confiscation proceedings having to be determined by a judge other than the sentencing judge where, for example, the original judge has died, retired or is ill or otherwise unable to undertake the task. It should be said as a general proposition that it is much more desirable that the sentencing judge should conclude the case and determine the confiscation proceedings (see R v Knights [2003] 1 WLR 1655 and R v Odewale [2005] EWCA 709). Where the work is divided between different judges there is a real risk, as happened in the present case, that proper oversight of the case will be lost. Furthermore, evidence may emerge in the course of confiscation proceedings that may show that, with the benefit of that fresh information, the sentencing judge might consider that the sentence he imposed was inappropriate. Furthermore, the one judge dealing with all aspects of the case will be more likely to have a fuller grasp of the details of the case and a keener sense of the need for expedition to bring the proceedings to finality.

[33] The delay in this case was considerable. Under Article 6 of the Convention a defendant is entitled to a determination of the case within a reasonable time. It appears that the delay in this case was at least in part attributable to the fact that the judge conducting the confiscation proceedings was awaiting the decision of the Court of Appeal in the case of R vAllingham which was to decide legal issues of relevance in the present case.

[34] Article 6 entitles litigants to a fair trial within a reasonable time. A fair trial necessarily involves a determination of the parties' rights within a reasonable timeframe otherwise they will not have received their trial within a reasonable time. In Anderson v UK [2010] ECHR 19859/04 the European Court of Human Rights ("ECHR") held that notwithstanding that the parties themselves had contributed to delay that was not sufficient to absolve the domestic court of its own obligation to take an active role in the management of the proceedings. As the Court stated:

> "As the Court has frequently stated, the State remains responsible for the efficiency of its system; the manner in which it provides for mechanisms to comply with the reasonable time requirement – whether by automatic time-limits and directions or some other method – is for it to decide. If a State allows proceedings to continue beyond the "reasonable time" prescribed by Article 6 of the Convention without doing anything to advance them, it will be responsible

for the resultant delay (Bhandari v UK 42341/04, 2 October 2007, together with references therein.)"

[35] In the case of R v Allingham judgment was reserved for what was by any reckoning a very lengthy period of time. During part of this period the Court of Appeal was awaiting judgment in R v Waya, [2012] UKSC 51, a case which went to the Supreme Court which itself reserved judgment for a lengthy period. The confiscating judge very properly brought to the attention of the Office of the Lord Chief Justice that he had a number of cases potentially affected by the outcome in Allingham in respect of which he was awaiting judgment from the Court of Appeal. Faced with on-going delays with no guarantee of an early outcome it was, of course, open to the judge concerned to proceed to deal with the case applying the current law. In fact, that is what ultimately happened in Allingham which was decided in advance of the ruling in R v Waya. As it happened, the decision in Waya did not govern the outcome in Allingham.

[36] While in nearly every other stage of the litigation process timetables are laid down by rules of court and the proceedings are, in any event, subject to judicial case management, no similar mechanism exists in relation to the actual judgment process after the conclusion of the hearing of a case. The absence of adequate workable mechanisms to guard against undue delay by courts in delivering judgment can result in systemic failures by the courts in fulfilling their Article 6 obligation. As Anderson v UK makes clear, it is for the relevant state authorities to ensure that proceedings do not exceed the reasonable time provisions of Article 6 and for the state authorities to choose the appropriate mechanism to ensure that delays do not infringe Article 6 rights. Appropriate mechanisms would be effective protocols or directions or, in the absence of effective protocols, rules of court. It is ultimately the responsibility of the relevant rules committees, charged as they are with the oversight of the effectiveness of rules of practice, to ensure that there are in place effective mechanisms to ensure Article 6 compliance. Any system designed to ensure the timely trial of proceedings, including the timely delivery of judgments, must be clear, transparent, accessible and effective if the state authorities are to ensure Article 6 compliance.

[37] While judgment in R v Allingham was pending there was, in fact, in place a protocol designed to ensure that, if judgment in any case was not delivered within three months, a case would be relisted for explanation, with the fixing of a timetable for judgment to be delivered. If the protocol had not been overlooked, as it apparently was in the case of Allingham, the Court of Appeal would have had a better appreciation of the problems which delay was causing in other cases. A new protocol designed to avoid this type of problem arising in the future is now in place. If properly applied, it should avoid the recurrence of the kind of problems which arose in the present case and ensure Article 6 compliance.

The confiscation hearing

[38] The position is that by the time that the confiscation proceedings eventually came on for hearing, the applicant had no legal assistance for the reasons indicated and he had been waiting for four years for a determination of a case that had been postponed from time to time and beyond the prescribed two year period. In the confiscation proceedings the Crown started off asserting that the claim was for some £70,000. This was then reduced to £32,136.72. The Crown initially asserted that the claim included money assumed to have been received by the defendant from his permission for the waste to be deposited on his site. In addition, it claimed a sum equivalent to the landfill tax at £2 per tonne. The judge in argument suggested that this represented tax which the haulier would have paid the land owner (the applicant) who should have accounted to the Revenue for that "in the same way as one collects VAT and passes it on. Then of course there is VAT on it." In fact, the monetary claim was a sum representing the amount which the defendant as the landowner should have paid as landfill tax had he conducted himself lawfully and properly under the relevant legislation. The tax was not payable by the haulier. It was a tax payable by a person lawfully allowing the dumping of material on his land. The judge's assumption that VAT was payable on the sum was never the subject of any argument and, as already noted, in fact there seems to be no basis for the proposition.

[39] The hearing before the confiscating judge then focused on the measurement of the tonnage of material dumped on the land. The way in which the proceedings were conducted was unsatisfactory. No one gave sworn evidence before the judge. No real opportunity was afforded to the applicant to cross-examine any Crown witnesses in relation to the issue of the measurement of the tonnage. The debate was conducted in a conversational format more akin to mediation than an adjudication. As matters proceeded the Crown withdrew its financial claim for everything other than the sum equivalent to unpaid landfill tax.

[40] Having heard the Crown's submissions, and before the defendant was given an opportunity to present his case, the judge said:

> "You have now heard in the last few moments, the prosecution are not going to proceed with the claim in relation to what it would … some sort of figure which they calculated at £2 per tonne which they say you may have benefited from in receipt of this waste. The only matter that they are now proceeding with is a landfill tax which is a tax like income tax, like VAT just which is levied on citizens or on businesses. And that figure is £2. There is no real dispute about the fact that it is £2 per tonne. There may be an issue then as to the tonnage

> which is estimated (and it is an estimate) so it is not again set in stone, that there may be discussion about that or argument about it, ultimately I have to make a decision and that is 6,837.6 tonnes of waste. If your daughter wants to write this down, 6,837.6 tonnes."

The judge's statement at that stage that "ultimately I have to make a decision and that is 6,837.6 tonnes of waste", which was made before the applicant had been afforded an opportunity to present his argument, may well have given the applicant a clear impression that the judge had made his mind up at that stage. It is clear from the transcript that the defendant was bewildered by the course of the proceedings. He asked "Can I have my say as well …?" The applicant's confusion is further evidenced when he said shortly afterwards, "Is this really like a hearing today or is this …?" Before he completed his sentence the judge interjected:

> "Well this is the concluding – because of this other case (which may be to your advantage) I didn't want you to lose out on that, so I wanted to bring this case back for the matter to be heard. But yes we are moving towards a decision now because it's dragged on for so long. I think it is in everyone's interest that a final decision is made."

[41] Had the applicant been professionally represented there is no doubt that the case would have been presented in an entirely different way. Competent counsel would have ensured that the defendant's case was properly put to the Crown witnesses, who would have been open to cross-examination on the relevant issues. The applicant would have been given an opportunity to give his evidence in a clear and structured way. Submissions would have been made about the legal consequences of delay and the breaches of the applicant's Article 6 rights. Counsel would have had to raise the issue of the jurisdiction of the court to proceed to a hearing well beyond the permitted two year period and would have been bound to raise with the court the absence of a valid postponement order after September 2012. Furthermore, it is apparent from the very recent decision of the ECHR in Paulet v United Kingdom No 6219/08 (13 May 2014) that the confiscating court must address the issue of proportionality. As stated in para [67], the domestic court "must determine whether the requisite balance was maintained in a manner consonant with the applicant's right to the peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol 1." The issue of proportionality was not addressed by the parties or the court in the confiscation hearing.

Conclusions

[42] In view of the combination of procedural errors and shortcomings, the protracted delays and the discharge of counsel in circumstances in which the applicant should have had the benefit of legal assistance, the applicant's Article 6

rights were breached. He had been deprived of an opportunity to present his case fairly. In the result the confiscation order must be quashed.

[43] We have considered the question whether the matter should be remitted to a different judge but we have concluded that this would be inappropriate. Having regard to the passage of time; the absence of a proper postponement order after September 2012; the fact that the case appears to have been forgotten about; the failure of the prosecution and the court to consider the implications of the passage of more than two years since the date of conviction; the absence of any finding of justifiable exceptional circumstances for enlargement of the time after September 2012 (and we can find none) together with the clear breaches of the applicant's fair trial rights under Article 6, we conclude that it would be unfair and unjust to remit this matter for further hearing. In Paulet the Strasbourg court stated at para [65]:

> "Although the second paragraph of Article 1 of Protocol 1 contains no explicit procedural requirements, the Court must consider whether the proceedings as a whole afforded the applicant a reasonable opportunity for putting his case to the competent authorities with a view to enabling them to establish a fair balance between the conflicting interests at stake."

[44] We conclude that the proceedings as a whole did not afford the applicant a reasonable opportunity to put his case and at this juncture we conclude that a remittal of the case would be unjust.

[45] We will hear counsel on the question of costs.