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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

PETER JOSEPH McKIERNAN

_____

Before Kerr LCJ, Nicholson LJ and McCollum LJ

KERR LCJ

Introduction

[1] This is an appeal from a confiscation order made by His Honour Judge Curran QC under article 8 of the Proceeds of Crime (Northern Ireland) Order 1996. The single judge granted leave.

[2] At Craigavon Crown Court on 4 June 2003 the appellant pleaded guilty to a number of drugs offences including possession with intent to supply. He was sentenced to six years imprisonment on this charge and to a concurrent term of 12 months on a charge of simple possession. He does not appeal against those sentences.

[3] Before the appellant was sentenced the prosecution applied for a confiscation order under article 8 of the 1996 Order. Acting under article 11 of the Order, Judge Curran adjourned that application. A prosecutor's statement dated 29 May 2003 had been served on the court and on the appellant under article 15 (1) of the Order and the appellant was required under article 15 (3) to make a defence statement. This he did on 25 September 2003 and the resumed hearing of the application for the confiscation order took place on 3 October 2003. On that date the judge concluded that the appellant had benefited from the relevant criminal conduct (*viz* the sale of drugs) to the extent of £361,666.34 and that the total realisable assets in

respect of which a confiscation order could be made was £156,299. He made a confiscation order for the latter amount. In default of payment of that sum the learned judge ordered that the appellant should serve two years' imprisonment in addition to the sentence already imposed in respect of the drugs offences. It is against that order that the appellant appeals.

Factual background

[4] On 6 June 2002 police stopped a car driven by the appellant on the Lisburn bound lane of the A1 dual carriageway. The appellant was the sole occupant of the vehicle. In cardboard boxes in the boot and passenger compartment of the vehicle the officers found a large quantity of a substance that was subsequently confirmed to be cannabis resin. It had an estimated street value of £750,000 and an estimated wholesale value of £225,000. The appellant's explanation was that two men had approached him in a public house in Belfast and had offered him £700 (£200 being paid in advance) if he would drive to a location near Dublin Airport and collect a consignment of what he believed to be cigarettes. He was unable to name the two men or identify the people in Dublin who loaded the boxes into his car. He stated that he did not know that the boxes contained drugs.

[5] The police carried out a search of the appellant's home at 25 Duncoole Park, Belfast. In a chest of drawers in the main bedroom a member of the search team found £1700 in cash. Various other items were discovered. These included a small amount of cannabis resin concealed in a video case, which it was accepted was probably for personal use. A number of documents including a receipt for a £300 holiday deposit, a recent receipt for £1551.75 from an MFI store, documents relating to a current account with Halifax plc and a savings account with Newington Credit Union were also found as were plans for a proposed house extension.

[6] On 7 August 2002 Gillen J made a Restraint Order under article 31 of the 1996 Order prohibiting the appellant, his wife, Mrs Elaine Patricia McKiernan, and his mother in law, Mrs Robina McIlroy, from disposing of certain specified property and requiring them to make affidavits informing the Director of Public Prosecutions, in the case of the appellant, of all his assets and, in the case of his wife and mother in law, all assets held by them in their own name or jointly with the appellant or on his behalf. The appellant made an affidavit on 6 September 2002 in which he stated that when at liberty he received £300 per month disability living allowance and £60 per week income support. He had given his wife £5000 in 1999 towards the purchase of the house at 25 Duncoole Park and had given his mother £3000 in 2000.

[7] Mrs McIlroy provided an affidavit in which she said that she had taken a lease of a shop at 8 New Lodge Road Belfast. She claimed that this shop was extremely successful. Her daughter Shauna had acquired the lease of a

neighbouring shop and they had amalgamated, with the business prospering in consequence. Mrs McIlroy asserted that she had accumulated "huge amounts of cash" over the years and that she was therefore able to buy a house at 10 Shanlieve Park, Belfast on 14 December 2001. As well as these savings she claimed that the shop was making "several thousand pounds per week". These savings allowed her, she claimed, to lodge £92,521 in cash with a building society to purchase the house at Shanlieve Park. She also claimed to have obtained a loan of £15,500 in order to assist her daughter Elaine to buy the house at 25 Duncoole Park.

[8] Mrs McIlroy's claims as to the income that her business generated were not supported by her accountant, Mr Brian Gillespie. Materials that he provided showed a net profit for her shop for the year ended 31 March 2002 of £13,381. Further doubt on her claims was cast by the finding that lodgements to her business account in the Ulster Bank between September 2001 and May 2002 were approximately £29,000 with monthly outgoings of £4000 or thereabouts. It was also found that the average amount of lodgements in Mrs McIlroy's current account with Alliance & Leicester plc in the period from 1999 to 2002 was £1750. Her claims of affluence were further undermined by the discovery that she had been in receipt of jobseeker's allowance in the six-month period ending in November 1999. In relation to her lodgement of £92,000 odd in the Alliance & Leicester building society in December 2001, staff of the Royal Avenue branch gave statements to the police that raised serious doubts about the authenticity of Mrs McIlroy's claims. She suggested to the staff that the money had been raised partly by her sale of a property in Spain but no further evidence to support that claim was ever produced and most of the money was in denomination produced by Northern Irish banks. That averment was not pursued in the proceedings before Judge Curran and neither Mrs McIlroy nor her daughter, Elaine McKiernan provided any further material for the hearing of the application for the confiscation order. The appellant did not give evidence but, as noted above, he did supply a defence statement pursuant to article 15 (3) of the 1996 Order to which he exhibited his mother in law's affidavit.

The statutory provisions

[9] Article 2 (2) of the Order defines 'drug trafficking' as: -

> "… doing or being concerned in any of the following, whether in Northern Ireland or elsewhere—
>
> (a) producing or supplying a controlled drug where the production or supply contravenes section 4(1) of the Misuse of Drugs Act 1971 or a corresponding law;

(b) transporting or storing a controlled drug where possession of the drug contravenes section 5(1) of that Act or a corresponding law;

(c) importing or exporting a controlled drug where the importation or exportation is prohibited by section 3(1) of that Act or a corresponding law;

(d) manufacturing or supplying a scheduled substance within the meaning of section 12 of the Criminal Justice (International Co-operation) Act 1990 where the manufacture or supply is an offence under that section or would be such an offence if it took place in Northern Ireland;

(e) in connection with proceeds of drug trafficking, acquiring, having possession of or using property in circumstances which amount to the commission of an offence under Article 45 or which would be such an offence if it took place in Northern Ireland;

(f) in connection with proceeds of drug trafficking, conduct which is an offence under Article 47 or which would be such an offence if it took place in Northern Ireland;

(g) using any ship for illicit traffic in controlled drugs in circumstances which amount to the commission of an offence under section 19 of the Criminal Justice (International Co-operation) Act 1990;

and includes a person doing the following, whether in Northern Ireland or elsewhere, that is entering into or being otherwise concerned in an arrangement whereby—

(i) the retention or control by or on behalf of another person of the other person's proceeds of drug trafficking is facilitated, or

(ii) the proceeds of drug trafficking by another person are used to secure that funds are placed at the other person's disposal or are used for the other person's benefit to acquire property by way of investment"

[10] Article 5 of the Order defines the terms 'amount that might be realised' and 'realisable property'. So far as is material for the present case the provisions of the article are: -

"**Meaning of "amount that might be realised" and "realisable property"**

5.—(1) For the purposes of this Order the amount that might be realised at the time a confiscation order is made against the defendant is—

(a) the total of the values at that time of all the realisable property held by the defendant, less

(b) where there are obligations having priority at that time, the total amounts payable in pursuance of such obligations,

together with the total of the values at that time of all gifts caught by this Order.

(2) In this Order "realisable property" means, subject to paragraph (3)—

(a) any property held by the defendant; and

(b) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Order."

[11] Thus all realisable property held by the appellant in this case was available for the purposes of a confiscation order together with such property as was held by a person to whom he had made a gift caught by the Order.

[12] Gifts caught by the Order are dealt with in article 7 of the Order. Again, so far as is material for present purposes, article 7 provides: -

"**Gifts caught by this Order**

7.—(1) A gift (including a gift made before the coming into operation of this Order) is caught by this Order if—

(a) …

(b) in the case of a drug trafficking offence—

(i) it was made by the defendant at any time since the beginning of the period of 6 years ending when the proceedings were instituted against him, or

(ii) it was made by the defendant at any time and was a gift of property—

(aa) received by the defendant in connection with drug trafficking carried on by him or another, or

(ab) which in whole or in part directly or indirectly represented in the defendant's hands property received by him in that connection.

(2) …

(3) For the purposes of this Order—

(a) the circumstances in which the defendant is to be treated as making a gift include those where he transfers property to another person directly or indirectly for a consideration the value of which is significantly less than the value of the consideration provided by the defendant; and

(b) in those circumstances, the provisions of paragraph (1) and of Article 6 shall apply as if the defendant had made a gift of such share in the property as bears to the whole property the same proportion as the difference between the values referred to in sub-paragraph (a) bears to the value of the consideration provided by the defendant.

[13] The relevant provision in the present case is article 7 (1) (b) (i). The prosecution claims that the appellant made a gift of money to his wife and his mother in law that enabled them to buy the properties at 25 Duncoole Park and 10 Shanlieve Park. It therefore claims that these properties should be made the subject of the confiscation order in the sense that their current value should be taken into account in fixing the amount to be specified in the order.

[14] Article 8 deals with confiscation orders. The material provisions are: -

> "**Confiscation orders**
>
> **8.**—(1) Where a defendant is convicted, in any proceedings before the Crown Court or a court of summary jurisdiction, of an offence to which this Order applies the court shall—
>
> (a) if the prosecution asks it to proceed under this Article, or
> (b) if the court considers that, even though it has not been asked to do so, it is appropriate for it so to proceed,
>
> determine whether the defendant has benefited from any relevant criminal conduct, or as the case may be, from drug trafficking.
>
> (2) …
>
> (3) If, in the case of a drug trafficking offence, the Crown Court determines that the defendant has benefited from drug trafficking, the Court shall make an order (a confiscation order) ordering the defendant to pay—
>
> (a) subject to sub-paragraph (b), the amount the Court assesses to be the value of the defendant's proceeds of drug trafficking; or
> (b) if the Court is satisfied that the amount that might be realised at the time the confiscation order is made is less than the amount the Court assesses to be the value of the defendant's proceeds of drug trafficking,—

(i) the amount appearing to the Court to be the amount that might be so realised; or

(ii) a nominal amount, where it appears to the Court (on the information available to it at the time) that the amount that might be so realised is nil."

[15] The first task for the Crown Court in the present case, therefore, was to determine whether the appellant had benefited from drug trafficking. If it so concludes, the court is then empowered to make a confiscation order either in the amount that it considers is the value of his drug trafficking or, if the court decides that the amount that can actually be realised is less than this, the amount that the court considers can in fact be realised. This will involve the court in making a judgment as to the actual value of the assets which have been generated by the drug trafficking activities and that are available to become the subject of the confiscation order.

[16] Article 10 deals with the assessment of the proceeds of drug trafficking. It provides: -

"**Assessing the proceeds of drug trafficking**

10.—(1) Subject to paragraphs (3) and (4), the Crown Court shall, for the purpose—

(a) of determining whether the defendant has benefited from drug trafficking, and

(b) if he has, of assessing the value of his proceeds of drug trafficking,

make the assumptions set out in paragraph (2).

(2) The assumptions are—

(a) that any property appearing to the Court—

(i) to have been held by the defendant at any time since his conviction; or

(ii) to have been transferred to him at any time since the beginning of the period of 6 years ending when the proceedings were instituted against him,

was received by him, at the earliest time when he appears to the Court to have held it, as a payment

or reward in connection with drug trafficking carried on by him,

(b) that any expenditure of his since the beginning of that period was met out of payments received by him in connection with drug trafficking carried on by him; and

(c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a reward, he received the property free of any other interests in it.

(3) The Court shall not make any of the assumptions set out in paragraph (2) in relation to any particular property or expenditure if —

(a) that assumption is shown to be incorrect in the defendant's case; or

(b) the Court is satisfied that there would be a serious risk of injustice in the defendant's case if the assumption were to be made;

and where, by virtue of this paragraph, the Court does not make one or more of the required assumptions, it shall state its reasons.

[17] Assumptions are therefore to be made in two different contexts; firstly for the purpose of deciding whether the person convicted has benefited from drug trafficking, and, secondly, for the purpose of assessing the value of the proceeds of his drug trafficking. As regards the 6-year period before proceedings against him were instituted, the court is to assume (i) that property transferred to him during that period was as a payment or reward for drug trafficking; (ii) that any expenditure made by him was from the proceeds of drug trafficking; and (iii) any property that he received was free from encumbrances.

[18] There are thus two circumstances in which the assumptions should not be made. Firstly, where it has been shown that to make the assumption would be wrong in the particular defendant's case. So, for instance, if the defendant was able to adduce evidence to show that a particular property could not have been acquired with money from drug trafficking, the court would not be obliged to make an assumption to the contrary. The second circumstance is where there would be a serious risk of injustice to make the

assumption. An example of this might be where a defendant was unable for reasons beyond his control to adduce evidence that might have established that a particular property was not bought with money from drug trafficking but there was good reason to suppose that such was the case. For the appellant Mr O'Donoghue QC argued that this provision might also be invoked where the court, although it had concluded that the property had been acquired by money from drug trafficking, acknowledged that it might have been wrong to reach that conclusion. We do not consider that this would reflect the intention of the legislature. The court is enjoined to make the assumption if the statutory conditions are present. To refrain from doing so because of an unspecified feeling of unease that the assumption might not be justified would, it appears to us, run directly counter to the explicit intention of Parliament that the court *should* make the assumption.

[19] The standard of proof to be applied in determining whether a person has benefited from drug trafficking or in relation to the amount to be recovered in his case is that applicable in civil proceedings *i.e.* proof on the balance of probabilities – article 12 (6). Property for the purposes of the Order includes "money and all other property, real or personal, heritable or movable, and including things in action and other intangible or incorporeal property" – article 3 (1).

[20] Where the prosecution asks the court to make an order under article 8 (1) (a), it must give the court a statement as to matters relevant to the determination of whether the defendant has benefited from drug trafficking and the assessment of the amount of the benefit – article 15 (1). Where the prosecution has given such a statement article 15 (3) comes into play. It provides: -

> "Where the prosecution has given any statement under this Article and the court is satisfied that a copy of the statement has been served on the defendant, the court may require the defendant—
>
> (a) to indicate to it, within such period as the court may direct, the extent to which he accepts each allegation in the statement; and
>
> (b) so far as he does not accept any such allegation, to give particulars of any matters on which he proposes to rely."

[21] Article 22 deals with circumstances where the realisable property is not adequate for the payment of the sum to be recovered under the confiscation order. It provides in paragraph (1): -

"**Inadequacy of realisable property**

22.—(1) If, on an application in respect of a confiscation order by —

(a) the defendant, or

(b) a receiver appointed under Article 31 or 34 or in pursuance of a charging order,

the High Court is satisfied that the realisable property is inadequate for the payment of any amount remaining to be recovered under the order, the Court shall issue a certificate to that effect, giving the Court's reasons."

[22] Where a certificate of inadequacy has been issued by the High Court an application can then be made to the Crown Court under paragraph (3) for a reduction in the amount to be recovered under the confiscation order and under paragraph (4) the Crown Court shall reduce the sum payable and adjust the term of imprisonment to be served in default accordingly. It is clear, however, that the defendant may not invite the High Court to revisit the decision of the Crown Court on the basis solely of the evidence available to the Crown Court – see Mitchell, Taylor & Talbot, *Confiscation and the Proceeds of Crime* para 7.007.

The prosecution and defence statements

[23] The prosecution statement disclosed that the appellant had been in receipt of benefits from the Social Security Agency for the six years preceding his arrest on 6 June 2002. The Inland Revenue held no record of his having been employed during that period. It was asserted therefore that the only legitimate source of income for the appellant during the period 6 June 1996 to 6 June 2002 was £44,621.88 paid by way of benefits.

[24] The appellant was found to have a building society account with Halifax plc. Lodgements of various sums ranging from £20 to £1550 had been made over the period from 7 January 1998 to 16 May 2002. These totalled £3186. The balance as at 6 June 2002 was £9. The appellant also held a savings account with Newington Credit Union. The balance owing on that account was found to be £1846. Over the period from 14 June 1999 to 15 April 2002 lodgements totalling £6297 were made to this account. The amounts lodged ranged from £40 to £2120.

[25] Following his arrest the appellant's home at 25 Duncoole Park was searched and £1,700 in cash was found concealed in clothing. The

prosecution statement recorded that the appellant's wife had claimed that the money belonged to her and comprised £300 maternity payment; £900 tax rebate; and the remainder savings. It was pointed out that no documentary evidence had been produced to support these claims.

[26] In relation to expenditure by the appellant the prosecution statement detailed the purchase of the two houses at 25 Duncoole Park and 11 Shanlieve Park. In relation to the first of these it stated that the purchase price was £69,000 with a charge to the Woolwich plc of £41,595 with the balance of £27,405 being supplied by moneys withdrawn from Mrs Elaine McKiernan's Ulster Bank account. That withdrawal occurred on 7 April 2000 and was preceded on 30 & 31 March 2000 by three substantial lodgements of respectively, £8500, £15,500 and £1454.55. The lodgement of £15,500 was a loan obtained from Mrs Robina McIlroy obtained on 30 March 2000 and repaid by numerous cash lodgements from that date until the account was closed on 22 February 2002. The prosecution statement asserted that the various lodgements derived from the proceeds of drug trafficking. It was pointed out that the appellant had accepted in the affidavit he had filed in September 2002 that he had given his wife £5000 towards the purchase of the house at Duncoole Park but that he had not produced any documentation to support that claim nor had he given any information as to where he had obtained that money. The prosecution statement also dealt with the purchase of 11 Shanlieve Park. Mrs Robina McIlroy bought this using a draft of £92,521.50 with a £50,000 mortgage repayable over 7 years. The prosecution statement dealt with the anomalies in Mrs McIlroy's claim to have saved this money. These are outlined in paragraph [8] above.

[27] The prosecution statement also dealt with the purchase by the appellant of the drugs found when he was arrested. It was claimed that the wholesale price of these was £225,000 (150 kg of cannabis @ £1,500 per kilo). A credit card account between March 2000 and December 2002 revealed further expenditure of £7,064.92. Some of this was written off on the basis of a reported fraudulent use of the card and a substantial sum was still owed. It was suggested that the cash payments to the account that the records revealed totalling £1,055.09 had been derived from the proceeds of drug trafficking. Purchases made in cash of bedroom furniture in June and July 2001 for a total of £1551.75 were included in the prosecution's calculation of the expenditure deriving from drug trafficking. Finally the gift of £3,000 to his mother that the appellant had referred to in his affidavit was also brought into the final reckoning giving a total of £361,666.34. The amount that the prosecution suggested might be realised was calculated by aggregating the value of the properties at 25 Duncoole Park and 11 Shanlieve Park less the amounts outstanding on the mortgage for each property and the £1700 seized by police.

[28] In his defence statement the appellant repeated his denial that the £1700 was his. He asserted that his disability living allowance was paid into his Halifax account and that none of the cash deposits that he made had anything to do with drug trafficking. He had lodged various sums in his Newington Credit Union account from a variety of sources including compensation monies that he had received in relation to an accident. On other occasions he received loans of money from friends that he then lodged. He denied contributing to the purchase of either property except by the payment of £5,000 to his wife. He claimed that he had received this by way of loan from the credit union. The expenditure on the credit card and the purchase of furniture he maintained came from his legitimate income or loans from family members or the proceeds of his compensation claim. Finally he declared that the £3,000 that he gave his mother came from other family members.

The trial judge's findings

[29] At the beginning of his ruling on the confiscation application the trial judge noted that the prosecution did not accept the appellant's claim that he was merely a courier for the drugs. He then stated, "Clearly he has been involved in drug trafficking and was in possession of this vast amount of drugs". Having reached the conclusion that the appellant had been engaged in drug trafficking, the trial judge was bound to make the assumption under article 10 of the Order that he had benefited from that activity unless one of the dispensing provisos applied. It would perhaps have been preferable that he should have dealt with that directly after having recorded his conclusion that the appellant had been engaged in drug trafficking and we would commend to sentencing judges that they set out their conclusions under this somewhat structured legislation in a series of propositions reflecting the arrangement of the Order itself.

[30] In any event later in his ruling the judge said that he made the statutory assumptions in this case and it is clear from the tenor of his judgment and the disposal that he ultimately made that he had made the assumption that the appellant had benefited from drug trafficking. Again, however, for the sake of clarity it would have been helpful if this could have been related to the particular finding that the appellant had been engaged in drug trafficking. We would suggest that the proper approach to the making of a confiscation order is that the judge should set out each finding that he has made and which assumptions, if any, he has made in relation to each.

[31] The judge did not accept that the appellant's wife or his mother in law could have afforded on their income to buy the properties at Duncoole Park and Shanlieve Park. In this context he referred to Mrs McKiernan's income of £11,000 from her work as a secretary and to the fact that she worked for her mother for no remuneration and, we consider, implied thereby that she could

not have funded the purchase of the house from her own resources. In dealing with Mrs McIlroy's claim to have amassed the money to buy her house from the profits of her business, he said: -

> "I cannot accept where the evidence shows a tax return from Mrs McIlroy's business of £257 a week, that there is the remotest chance that the business actually yielded a profit of £2,700 a week. Nor do I think that £95,000 could be accounted for as money saved from the business. It seems to me much more likely in the balance of probabilities this was money derived from drugs furnished by the respondent."

And later in his ruling he said: -

> "I disbelieve entirely the contents of Mrs McIlroy's affidavit …"

[32] It therefore appears to us to be implicit in the judge's ruling that he had concluded that the money used to buy both properties came from the proceeds of the appellant's drug dealing and was therefore a gift caught by article 7 (1) (b) (i) of the Order. We suggest, however, that such a finding should be explicitly stated and, where necessary, the judge should recite the evidence on which he has relied to make the finding.

[33] In his ruling the judge referred to the decision of the House of Lords in *Re Norris* [2001] 3 All ER 961. He suggested that the effect of that decision (in relation to the confiscation order in the present case) was to make it unnecessary to consider the third party claims made by Mrs McKiernan and Mrs McIlroy.

[34] *Re Norris* involved an application made to the High Court for the enforcement of a confiscation order of the Crown Court. The confiscation order had included a property that Mrs Norris had bought and in which she lived with her three sons. She was registered as having the unencumbered title to the property. Mr Norris had called his wife to give evidence in the hearing of the application before the Crown Court. The judge rejected her evidence about owning the house. He concluded that her husband had provided the finance for its purchase. Customs and Excise made an ex parte application to a High Court judge for the appointment of a receiver. The judge made the orders sought, including a declaration that Mr Norris held the beneficial interest in the property. Subsequently Mrs Norris applied for the order to be varied so as to recognise her title or interest in the property. Customs and Excise contended that the matter had been concluded by the order of the Crown Court judge, and that accordingly Mrs Norris' application

was an abuse of process. The judge upheld that objection. On appeal, the Court of Appeal held that she was seeking to re-litigate issues which had been decided by Crown Court on the same or substantially the same evidence and submissions and that in those circumstances her application to the High Court had been an abuse of process. The House of Lords held that such a claim would not be rendered an abuse of process merely because, in the Crown Court proceedings the judge had rejected the third party's evidence that she was the owner and had held instead that the property was beneficially owned by the defendant. Although the extent of the defendant's interest was relevant to the Crown Court's assessment of the value of his realisable property, the question of what other persons, if any, had an interest and what was the extent of their interests had to be decided by the High Court in the exercise of its jurisdiction.

[35] Although the House of Lords decided that the question whether third parties had an interest in property for which a confiscation order was sought should be determined by the High Court, it recognised that the Crown Court and High Court proceedings were related. The extent of the defendant's interest might well be determined by the Crown Court's conclusions as to the validity of a third party's claim to have funded purchase of the property that the prosecuting authorities alleged had been bought with the proceeds of the defendant's drug trafficking. In as much as the determination of the extent of the property to be made the subject of the confiscation order depends on the Crown Court's judgment as to the validity of a third party claim the Crown Court will be required to consider and adjudicate on such a claim. In effect the judge did this in the present case because he held that the money for the purchase of the houses came from the appellant.

The powers of the Court of Appeal

[36] Section 30 (3) of the Criminal Appeal (Northern Ireland) Act 1980 (as inserted by the article 57(1), Schedule 3 (5) of the 1996 Order) provides that a confiscation order under the 1996 Order is included in the definition of 'sentence' for the purpose of Part I of the Act. Section 8 of the 1980 Act (which is included in Part I) provides: -

> "A person convicted on indictment may appeal to the Court of Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law."

[37] The appeal in the present case is taken under section 8 of the Act, therefore. Section 30 (1) provides that a power of the Court of Appeal to pass sentence includes power to make any such order or recommendation that could lawfully have been made by the court of trial. Section 10 (3) provides: -

> "On an appeal to the Court against sentence under section 8 or 9 of this Act the Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed by the Crown Court and pass such other sentence authorised by law (whether more or less severe) in substitution therefor as it thinks ought to have been passed; but in no case shall any sentence be increased by reason or in consideration of any evidence that was not given at the Crown Court."

[38] It is clear therefore that the Court of Appeal has all the powers available to the court of trial in the matter of sentencing and since a confiscation order falls within the definition of sentence it may make such order in respect of this as could have been made by the learned Crown Court judge. This court must approach the making of the confiscation order in precisely the same manner as was required of the Crown Court, therefore.

Disposal

[39] As was the trial judge, we are satisfied that the appellant has benefited from drug trafficking. We have reached that conclusion for the following reasons. It is clear that he was involved in drug trafficking as it is defined in article 2 (2) of the Order. We are therefore obliged to make the assumption that he has benefited from that activity unless the conditions provided for in article 10 (3) are present. We are satisfied that neither condition applies in the present case. The assumption has not been shown to be incorrect in the appellant's case and there is not a serious risk of injustice if the assumption is made.

[40] We are satisfied that the money for the purchase of the two houses came from the appellant and was obtained by him from drug trafficking. Although part of the moneys paid for the house at Duncoole Park came from a loan obtained by Mrs McIlroy from Newington Credit Union we are satisfied that the repayments of that loan were funded by the appellant. We have reached those conclusions for the following reasons. We are satisfied from the available evidence that neither Mrs McKiernan nor Mrs McIlroy had the resources to fund the purchase of these properties. No credible source of funding other than the appellant's drug trafficking has been identified. The claims made by Mrs McIlroy as to her wealth are far fetched and cannot be reconciled with the objective evidence as to her means. Equally, she was not in a position to repay the loan from the credit union in the way that she did other than by receiving funds from the appellant. We are therefore satisfied that the money supplied to the appellant's wife and mother in law falls within article 7 of the Order as a gift made by the appellant within the period specified in paragraph (1) (b) (i) of the article.

[41] The money given by the appellant to his wife and mother in law for the purchase of the houses constitutes expenditure for the purposes of article 10 (2) (b). We therefore make the assumption that this expenditure was met out of payments received by him in connection with drug trafficking.

[42] The £1700 cash found in the appellant's home was, we are satisfied, money that he had obtained through drug dealing. We do not believe the claims made by Mrs McKiernan in relation to this money. No documentation to support those claims has ever been produced. It would not have been difficult to obtain vouching material to sustain Mrs McKiernan's assertions if they were true. The failure to produce such material leads us to the conclusion that they were false.

[43] We have concluded therefore that the total realisable assets in respect of which a confiscation order could be made are, as the trial judge found them to be, £156,299. We therefore confirm his order that this amount be the subject of a confiscation order and his order that the appellant must serve two years imprisonment consecutive to the sentences imposed for the drugs offences in default of payment of that sum. The appeal is dismissed.

Postscript

[44] An interesting question arises (which it is not strictly necessary for us to resolve for the purposes of the present appeal) as to the opportunity for Mrs McKiernan and Mrs McIlroy to assert their rights to the property under article 22 of the Order. In *Gokal v Serious Fraud Office* [2001] EWCA Civ 368 a convicted drugs offender applied under the equivalent statutory provision in England for a certificate of inadequacy. The Court of Appeal upheld an order dismissing the application as an abuse of the process. The basis on which the appeal failed is explained in the following passage from paragraph 3 of Keene LJ's judgment: -

> "… the issues which the appellant was seeking to raise were ones which had been adjudicated upon by a court of competent jurisdiction and which the appellant had had full opportunity to raise during the confiscation proceedings or on appeal therefrom. It is from that order that this appeal is now brought."

[45] It is entirely clear from the judgment, however, that Keene LJ did not rule out the possibility of fresh evidence being adduced by third parties in such an application – see paragraph 41 of his judgment. It appears to us therefore that the opportunity would arise for Mrs McKiernan and Mrs McIlroy, on an application by the appellant or a receiver under article 22, to

assert their rights to the relevant properties and it would be open to the High Court to decide the matter on the basis of the material then before it.