COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 43384/05
by Cecil Stephen WALSH
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 21 November 2006 as a Chamber composed of:

Mr J. CASADEVALL, *President*,
Sir Nicolas BRATZA,
Mr G. BONELLO,
Mr M. PELLONPÄÄ,
Mr K. TRAJA,
Mr S. PAVLOVSCHI,
Mr J. ŠIKUTA, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having regard to the above application lodged on 15 September 2005,

Having deliberated, decides as follows:

THE FACTS

A. The circumstances of the case

The applicant is an Irish citizen born in 1966 and currently serving a prison sentence in HM Prison Maghaberry, Lisburn, Northern Ireland. He is represented by Mr P. Pierce, a solicitor practising in Belfast.

The applicant has an extensive criminal record, commencing in February 1980. This record includes some 132 road traffic offences, one offence of conspiracy to rob, four of burglary, eight of theft and 14 of going equipped for theft, together with other miscellaneous convictions.

On 13 June 2003, the applicant, with other co-defendants, was acquitted of offences of obtaining services and property by deception. The restraint order imposed on the applicant's property pending any eventual confiscation order on conviction was discharged.

On 2 July 2003, the Assets Recovery Agency served a summons on the applicant for the purposes of recovery proceedings. The Agency sought recovery of the sum of GBP 70,250 allegedly paid to his solicitor in 2001 for buying a house and the sum of GBP 5,969.10 held in a bank account, alleging that these were the proceeds of unlawful conduct within the meaning of the Proceeds of Crime Act 2002 ("POCA").

At an interlocutory hearing, it was contended on behalf of the applicant, that the proceedings for recovery of his assets were not "civil" but criminal in nature and that the guarantees of Articles 6 §§ 1 and 2 applied, in particular as regarded the standard of proof.

On 1 April 2004, the High Court judge rejected the applicant's claims on this interlocutory matter, considering, on examination of domestic and Strasbourg authority, that there was no criminal charge being determined in the recovery proceedings.

On 26 June 2005, the Court of Appeal in Northern Ireland rejected the applicant's appeal. It found, applying the *Engel* criteria, that in domestic law the proceedings were classified as civil, not involving the preferring of a criminal charge in a criminal setting, or giving rise to any criminal record; that the purpose of the proceedings was not to make him amenable to punishment for a specific crime by way of imprisonment or a fine but that they were restitutionary in nature seeking the recovery of assets acquired through criminal conduct.. As to the nature of any penalty, while the recovery of assets could readily be described as a preventative measure, it considered that even if the proceedings did impose a penalty that this was not sufficient to classify the proceedings as criminal for the purposes of Article 6 § 1 of the Convention.

It concluded, rejecting arguments that cumulatively the proceedings were criminal:

> "The essence of article 6 in the criminal dimension is the charging of a person with a criminal offence for the purpose of securing a conviction with a view to exposing that person to criminal sanction. These proceedings are obviously and significantly different from that type of application. They are not directed towards him in the sense that they seek to inflict punishment beyond the recovery of assets that do not lawfully belong to him. As such, while they will obviously have an impact on the appellant, these are predominantly proceedings *in rem*. They are designed to recover the proceeds of crime, rather than to establish, in the context of criminal proceedings, guilt of specific offences. The cumulative effect of the application of the tests in *Engel* is to identify these clearly as civil proceedings."

On 7 July 2005, the House of Lords refused leave to appeal.

On 6 July 2006, in determining the application for a civil recovery order against the applicant for the sums, principally, of GBP 70,250 alleged to have been paid by the applicant in January 2001 for the purpose of purchasing property and of GBP 5,969.10 currently held in a bank account, the High Court judge took into account the applicant's criminal convictions up until 2003 as showing a clear indication of his propensity to indulge in serious criminal conduct. He did not take into account the offences for which the applicant was acquitted as he had not had the opportunity of assessing the quality of the evidence of the one identifying witness, and while he noted that no prosecution was brought following the arrest of the applicant and E. on suspicion of robbery, he did take into account that the applicant had been found, on the day of the robbery, in company with E. who was carrying marked bank notes as confirming his criminal associations, as did evidence from police officers as concerns his associations with other persons with criminal records. The judge went on to to find that the applicant had not accounted for his assets. There had been no evidence to support his alleged car dealing and no record with the Inland Revenue that he had been in employment. Only small sums, from alleged employment with a cleaning business (which earnings dubiously overlapped with a period in prison) and from state benefits were accounted for. He concluded that he was satisfied on the balance of probabilities that the applicant had for some time pursued a criminal lifestyle involving dishonest and acquisitive criminal conduct with a willingness to resort to violence if necessary. His criminal record and in particular his conviction for conspiracy to rob, his association with criminals with a similar background of offences together with the circumstances in which he had most recently been arrested served to convince him that crime had been his primary means of acquiring funds for a number of years. In the circumstances he was satisfied that the sums that the Agency sought to recover represented property obtained through unlawful conduct and he accordingly made a recovery order for the sums set out in the application.

Relevant domestic law and practice

According to the Proceeds of Crime Act 2002, application may be made to the High Court for the civil recovery of property representing the proceeds of "unlawful conduct"

By virtue of section 241(1) unlawful conduct is defined as:

> "Conduct occurring in any part of the United Kingdom is unlawful conduct if it is unlawful under the criminal law of that part."

Section 241(3) provides that the standard of proof of unlawful conduct is that of the balance of probabilities.

COMPLAINTS

The applicant complains that recovery proceedings fall under the criminal head of Article 6. He complains that he has been denied the presumption of innocence contrary to Article 6 § 2 as the civil standard, not the criminal standard, applied. He complains that the proceedings may be conducted entirely upon affidavit evidence contrary to Article 6 § 3(d); that he was subject to a penalty imposed in respect of conduct that predated the entry into force of POCA; and that the recovery of his assets in these circumstances infringes Article 1 of Protocol No. 1.

THE LAW

1. The applicant complains that he was denied the presumption of innocence in the recovery proceedings as the civil standard of proof applied and that the proceedings could be conducted entirely by affidavit without the hearing of witnesses. He invoked Article 6 §§ 2 and 3(d) of the Convention.

The relevant provisions read as follows:

> "2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ..."

The preliminary issue to be decided is whether the recovery proceedings against the applicant involved the determination of a criminal charge such

as to bring into play the provisions invoked above. The Court must have regard, in this context, to the three guiding criteria as to whether a criminal charge has been determined: the classification of the matter in domestic law, the nature of the charge and the penalty to which the person becomes liable ((*Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 82, ECHR 2003-X, citing *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, pp. 34-35, §§ 82-83). It notes, as to the first, that according to domestic law, recovery proceedings are regarded as civil, not criminal. The proceedings may have followed an acquittal for specific criminal offences but were separate and distinct in timing, procedure and content (*cf. Phillips v. the United Kingdom*, no. 41087/98, §§ 32 and 39, ECHR 2001-VII). As to the second, the domestic courts considered that the purpose of the proceedings was not punitive or deterrent but to recover assets which did not lawfully belong to the applicant (see also *Butler v. the United Kingdom* (dec.), no. 41661/98, ECHR 2002-VI. The Court also notes that there was no finding of guilt of specific offences and that the High Court judge in making the order was careful not to take into account conduct in respect of which the applicant had been acquitted of any criminal offence. Lastly, the recovery order was not punitive in nature; while it no doubt involved a hefty sum, the amount of money involved is not itself determinative of the criminal nature of the proceedings (see *Porter v. the United Kingdom*, (dec.), no. 15814/02, 8 July 2003, where the applicant was liable to pay some GBP 33 million in respect of financial losses to the local authority during her mandate as leader).

It follows that the proceedings fell outside the criminal head of Article 6 § 1 of the Convention and that this part of the application must be rejected as incompatible *ratione materiae* with the provisions of the Convention pursuant to Article 35 §§ 3 and 4 of the Convention.

2. The applicant complained that the recovery of assets legislation was imposed on him retrospectively, invoking Article 7 (prohibition of retrospective criminal penalties) and Article 1 of Protocol No. 1 (right to peaceful enjoyment of possessions) in that regard.

As regards Article 7, the Court has found above that the proceedings did not involve the determination of a criminal charge. This provision is therefore not applicable and the complaint is to be rejected as incompatible *ratione materiae* pursuant to Article 35 §§ 3 and 4 of the Convention.

As regards Article 1 of Protocol No. 1, the Court notes that the applicant has not shown that he has raised his complaints about interference with property rights under this provision before the domestic courts. It follows that he has failed to exhaust domestic remedies in this regard as required by Article 35 § 1 of the Convention and that this complaint must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

T.L. Early
Registrar

Josep Casadevall
President