

Neutral Citation No: [2023] NIKB 74

Ref: ROO12195

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

Delivered: 19/06/2023

POCA No. 5 of 2020

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

KING'S BENCH DIVISION

IN THE MATTER OF THE PROCEEDS OF CRIME ACT 2002

Between:

NATIONAL CRIME AGENCY

Applicant

and

AIDAN (AIDEN) GREW

and

**NUALA GREW
(No.2)**

Respondents

Dr Tony McGleenan KC with Mr David McNeill BL (instructed by the National Crime Agency) for the Applicant
Joseph O'Keefe BL (instructed by Phoenix Law Solicitors) for the Respondents

ROONEY J

Issue for Determination

[1] An application was brought by the National Crime Agency ("NCA") under section 362A of the Proceeds of Crime Act 2002 ("POCA") for an Unexplained Wealth Order ("UWO") against both defendants.

[2] On 30 June 2022, following an ex parte hearing, this Honourable Court granted leave to serve the originating summons for an UWO out of the jurisdiction.

[3] The defendants contend that the NCA does not have the capacity to bring the said proceedings on the ground that, as a matter of statutory interpretation, the NCA lacks the necessary *vires* to operate in Northern Ireland.

[4] Under Schedule 24 to the Crime and Courts Act 2013 (“the 2013 Act”) certain provisions of Part 1 of the Act relating to the NCA did not extend to Northern Ireland. Pursuant to paragraph 2(2)(a) of Schedule 24 to the 2013 Act the Secretary of State was given power (exercisable by order) to provide for any relevant NCA provision to extend to Northern Ireland.

[5] On 19 March 2015, the Crime and Courts Act 2013 (National Crime Agency and Proceeds of Crime) (Northern Ireland) Order 2015 (“the 2015 Order”) was made and signed by the Secretary of State. The 2015 Order came into force on 20 March 2015.

[6] The defendants argue that the necessary legislative process leading to the enactment of the 2015 Order was flawed, in that the necessary consent of the Northern Ireland Assembly was not obtained as required by paragraph 6(1) of Schedule 24 and paragraphs 6(1) and 13(1) of Schedule 25 to the Crime and Courts Act 2013.

[7] The defendants’ argument, if correct, would plainly have far reaching implications for the operation of the NCA in Northern Ireland.

[8] The applicant, the NCA, submits that the defendants’ argument erroneously conflates procedure with outcome and is misconceived. In essence, as examined in detail below, the applicant contends that the enabling statute, namely the 2013 Act, required the Secretary of State to engage in a number of interlocking steps before the Minister could make an order pursuant to section 59 and Schedules 24 and 25 to the 2013 Act. The interlocking steps involved (a) the affirmative resolution procedure of each House of Parliament and (b) obtaining the consent of the Northern Ireland Assembly (“the Assembly”) to the making of a transferred provision. At the conclusion of that process, the applicant submits that a final and valid order was made by the Secretary of State, namely the 2015 Order.

The Crime and Courts Act 2013 and the enabling provisions

[9] Pursuant to Schedule 24, paragraph 1 to the 2013 Act, certain provisions relating to the NCA did not extend to Northern Ireland. In Schedule 24 these provisions are described as the “relevant NCA provisions.” However, the 2013 Act enables the Secretary of State to make orders extending the NCA provisions to Northern Ireland. The enabling provisions can be found in (a) section 58 and section 59(1)-(3); (b) paragraphs 2, 3, 5 and 7(1) of Schedule 24; (c) paragraphs 3, 4, 7(1)-(2), 10, 11 and 14(1) of Schedule 25.

[10] Section 58(4) and (6) of the 2013 Act makes provision for the parliamentary process to be applied for an order made pursuant to section 59 and Schedules 24 and 25. Section 58 provides as follows:

“58 Orders and regulations

(1) Orders and regulations made by the Secretary of State or Lord Chancellor under this Act are to be made by statutory instrument.

(2) An order made by the Secretary of State under section 2 is subject to super-affirmative procedure.

(3) Schedule 23 (super-affirmative procedure) has effect.

(4) The Secretary of State or Lord Chancellor may not make a statutory instrument containing any of the following (whether or not also containing other provisions) unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament—

...

(j) an order under section 59 which amends or repeals any provision of primary legislation;

...

(l) an order under paragraph 5 of Schedule 24.”

[11] Section 59 of the 2013 Act makes provision for consequential amendments and provides:

“59 Consequential amendments

(1) The Secretary of State or Lord Chancellor may by order make such provision as the Secretary of State or Lord Chancellor (as the case may be) considers appropriate in consequence of this Act.

(2) The power to make an order under this section may, in particular, be exercised by amending, repealing, revoking or otherwise modifying any provision made by or under an enactment.

(3) In this section “enactment” means an enactment whenever passed or made, and includes an Act of the Scottish Parliament, a Measure or Act of the National Assembly for Wales and Northern Ireland legislation.”

[12] Paragraph 6(1) of Schedule 24 and paragraphs 6(1) and 13(1) of Schedule 25 to the 2013 Act each provide that:

“Consent of Northern Ireland Assembly to transferred provision

6(1) The Secretary of State may not make an order under this Part of this Schedule which makes transferred provision unless the Northern Ireland Assembly consents to the making of that provision.

(2) In this paragraph “transferred provision” means provision which, if it were contained in an Act of the Northern Ireland Assembly –

- (a) would be within the legislative competence of the Assembly, and
- (b) would deal with a transferred matter without being ancillary to other provision (whether in the Act or previously enacted) which deals with an excepted or reserved matter.

A Summary of the Parliamentary Process pursuant to the 2013 Act

[13] In this case, as stated above, the enabling legislation is the 2013 Act. Pursuant to section 59 of the 2013 Act, the Secretary of State may by order make such provision as he considers appropriate in consequence of the 2013 Act. The power to make an order may be exercised by amending, repealing, revoking or otherwise modifying any provision made by or under an enactment.

[14] Section 58(1) of the 2013 Act provides that any orders and regulations made by the Secretary of State under the 2013 Act are to be made by statutory instrument.

[15] Section 58(4) of the 2013 Act imposes conditions on the Secretary of State, which will invalidate the statutory instrument unless conditions are fulfilled. For the purpose of this case, the conditions are as follows:

- (a) Where the proposed statutory instrument under section 59 of the 2013 Act seeks to amend or repeal any provision of primary legislation, a draft of the statutory instrument must be laid before, and approved by a resolution of, each House of Parliament (see section 58(4)(j) and (6) of the 2013 Act).
- (b) Where the proposed statutory instrument seeks to modify the ways in which the NCA functions are exercised in Northern Ireland or the manner in which the exercise of NCA functions in Northern Ireland is planned or supervised, a draft of the statutory instrument must be laid before, and approved by a resolution of, each House of Parliament (see section 58(4)(l) and (6) and Schedule 24, paragraph 5) to the 2013 Act.
- (c) The Secretary of State may not make an order under Schedules 24 and 25 to the 2013 Act regarding transferred provision unless the Northern Ireland Assembly consents to the making of that provision (paragraph 6(1) of Schedule 24; paragraph 6(1) and 13(1) of Schedule 25 to the 2013 Act).

The Parliamentary Process for the enactment of the 2015 Order

[16] It is clear from the above analysis of the statutory scheme under the 2013 Act that, prior to the enactment of the 2015 Order, a series of interconnected steps were required involving (a) the affirmative resolution of both Houses of Parliament and (b) the consent of the Northern Ireland Assembly to the making of a transferred provision before the Secretary of State could make an order under Schedules 24 and 25 to the 2013 Act.

[17] Accordingly, it is necessary to analyse whether the Parliamentary process as set out in the 2013 Act was followed. The following sequence of dates is relevant.

[18] On 29 January 2015, as required by section 58 of the 2013 Act, a draft of the 2015 Order was laid before each House of Parliament.

[19] On 3 February 2015 the Northern Ireland Assembly debated the motion “that this Assembly consents to the making of the draft Crime and Courts Act 2013 (National Crime Agency and Proceeds of Crime) (Northern Ireland) Order 2015 laid before Parliament on 29 January 2015.”

[20] The Hansard record of the debate on 3 February 2015 provides that at the commencement of the debate, the Speaker was invited to rule on the competence of the Assembly to consider the order. The motion was brought before the Assembly as a Private Member’s Motion. The Minister of Justice confirmed that he had been unable to bring the Motion forward because he required Executive Committee agreement to do so and had not been able to secure that agreement.

[21] On 11 February 2015, the draft Statutory Instrument, the Crime and Courts Act 2013 (National Crime Agency and Proceeds of Crime) (Northern Ireland) Order 2015 was scrutinised and approved by the Joint Committee on Statutory Instruments. The 22nd Report from 2015 records that the draft order did not require to be reported to both Houses.

[22] On 15 March 2015, the Grand Committee of the House of Lords debated and agreed the motion:

“That the Grand Committee do consider the Crime and Courts Act 2013 (National Crime Agency and Proceeds of Crime) (Northern Ireland) Order 2015.”

[23] On 18 March 2015 a motion was passed in the House of Commons that:

“The draft Crime and Courts Act 2013 (National Crime Agency and Proceeds of Crime) (Northern Ireland) Order 2015 be approved.”

[24] The question was agreed as recorded in Hansard at Vol. 594, Col. 865.

[25] The 2015 Order was made on 19 March 2015 and came into force on 20 March 2015.

The defendants' challenge to the validity of the 2015 Order

[26] The defendants challenge the legal effect of the 2015 Order on the basis that a draft of the statutory instrument was laid before the Northern Ireland Assembly and that the Assembly gave its consent to a draft of the order as opposed to the actual order. The defendants submit that paragraph 6(1) of Schedule 24 and paragraphs 6(1) and 13(1) of Schedule 25 to the 2013 Act require consent to the *actual* order which makes transferred provision rather than a draft of the order. The argument is advanced that the omission of the words "draft" in the said statutory provisions was deliberate and that the reasonable interpretation of these provisions must be that Parliament intended the actual order to be placed before the Northern Ireland Assembly for its consent. In support of this argument, the defendants refer to section 58(4) of the 2013 Act which makes express reference to a draft order being laid before both Houses of Parliament and requiring affirmative resolution by both Houses.

[27] The defendants submit that it is only after amendments have been made and the order has been finalised, that the actual order should be laid before the Northern Ireland Assembly for its consent.

[28] I reject the defendants' argument. The argument fails to appreciate the purpose of delegated legislation and the nature of Parliamentary control over delegated legislation, to include the arrangements and procedures put in place to exercise such control. The control mechanisms include, for example, affirmative and negative procedures.

[29] The 2015 Order is a statutory instrument, a form of delegated legislation. The term "delegated legislation" emphasises that it is the delegation of legislative powers by Parliament that gives legal effect to the statutory instrument. A valid provision of delegated legislation has the same force of law as an Act of Parliament. As stated by Bennion, Bailey and Norbury on 'Statutory Interpretation' (8th Edition) at para 3.2, the three main reasons identified for the requirement to use delegated legislation are:

- (a) the pressure of Parliamentary time and the volume of legislation;
- (b) modern legislation requires consideration of a vast amount of complex and technical detail that is not particularly well suited to primary legislation or to scrutiny; and
- (c) the need for flexibility to deal with unforeseen and uncertain situations and to

make adjustments and amendments within limits set by the scrutiny procedure and the enabling Act.

[30] Significantly, with regard to this case, Bennion, Bailey and Norbury on 'Statutory Interpretation' (8th Ed) further states as follows at p. 92:

“... delegated legislation cannot generally be amended by either House of Parliament. Even where there is some form of parliamentary control in relation to delegated legislation, the only choice for Members of Parliament is to accept the instrument or reject it. In practice it is extremely rare for delegated legislation to be rejected.”

[31] Therefore, during the parliamentary process, delegated legislation cannot be amended, and the draft statutory instrument must reflect the actual order, assuming that it has been approved by resolution of each House of Parliament. The draft 2015 Order considered by the Northern Ireland Assembly which required its consent to the making of the transferred provision was the same as the final order.

[32] Furthermore, it is illogical, in my judgement, that paragraph 6(1), Schedule 24 and paragraphs 6(1) and 13(1) of Schedule 25 should be interpreted in such a manner that requires the Northern Ireland Assembly to consider only the proposed actual order. As submitted by the applicant, the statutory scheme under the 2013 Act requires a series of steps to be undertaken which are interlocked and involve conditional requirements, including affirmative resolution by each House of Parliament and the consent of the Northern Ireland Assembly to the making of a transferred provision. It is only at the conclusion of this process that a final and valid order can be made and signed by the Secretary of State. There is no facility within the 2013 Act for the Northern Ireland Assembly to approve anything other than to consent to the making of a transferred provision. Plainly, the consent of the Northern Ireland Assembly is a necessary condition for the completion of the legislative process. Accordingly, applying the presumption that Parliament is a rational and informed body pursuing a clear purpose in a coherent and principled manner, a logical conclusion must be that a draft of the 2015 Order was correctly laid before the Northern Ireland Assembly.

[33] On the basis of the above, I reject the defendants' argument relating to the validity of the 2015 Order.