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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

CECIL WALSH

Appellant

and

DIRECTOR OF THE ASSETS RECOVERY AGENCY

Respondent

Before Kerr LCJ, Nicholson LJ and Campbell LJ

KERR LCJ

Introduction

[1] This is an appeal from the decision of Coghlin J whereby he held that an application made by the Director of the Assets Recovery Agency (the agency) under Part 5 of the Proceeds of Crime Act 2002 (PoCA) for the recovery of assets from Cecil Walsh were civil proceedings and did not engage article 6 (2) of the European Convention on Human Rights and Fundamental Freedoms.

[2] The appeal opened on 7 September 2004 but it quickly became clear that the appellant's argument involved a challenge to the compatibility of such of the provisions of PoCA as purported to classify applications for the recovery of assets as civil proceedings. It was then necessary to adjourn the hearing so that a notice under Order 121 rule 2 of the Rules of the Supreme Court

(Northern Ireland) 1980 could be served. This notified the Crown that this court was considering whether to make a declaration of incompatibility. The hearing resumed on 17 January 2005 and was completed on 18 January.

Background

[3] On 13 June 2003 by direction of Her Honour Judge Kennedy, Mr Walsh was found not guilty of three charges of obtaining services by deception contrary to article 3 (1) of the Theft Act (Northern Ireland) 1978 and one charge of obtaining property by deception contrary to section 15A of the Theft Act (Northern Ireland) 1969. These offences were alleged to have occurred between July 2000 and January 2001.

[4] On 16 June 2003 an assistant chief constable in the Police Service for Northern Ireland (PSNI) made a referral to the agency concerning property held by Mr Walsh. The referral document included the statement that PSNI believed that certain property held by Mr Walsh derived from criminal activity on his part. On foot of the referral, on 27 June 2003 the agency obtained an order for a Mareva injunction restraining Mr Walsh from removing from Northern Ireland or from disposing of or dealing with certain property specified in the order.

[5] On 2 July 2003 the agency caused to be issued an originating summons under Order 123 rule 4 of the 1980 rules. By this, the agency applied for a recovery order in respect of the assets that had been specified in the Mareva injunction. On 10 November 2003 Coghlin J conducted the hearing of a preliminary issue as to whether recovery proceedings under Part 5 of PoCA should be classified as civil or criminal. He subsequently delivered a reserved judgment holding that they were to be regarded as civil proceedings. It is from that decision that the present appeal is taken.

Statutory History

[6] The Hodgson Committee report, 'The Profits of Crime and their Recovery, Howard League for Penal Reform, 1984' recommended the introduction into English law of a sentence of confiscation designed to catch the profits of major crime. Following this recommendation, a confiscation regime in relation to drug trafficking was introduced in England and Wales by the Drug Trafficking Offences Act 1986. As well as including the powers of restraint and confiscation the Act created a statutory assumption that a drug trafficker's assets were the proceeds of crime and were therefore liable to confiscation. In 1988 the Criminal Justice Act provided for a new power to make a confiscation order in respect of certain crimes other than drug trafficking. Equivalent provisions to those contained in the 1986 and 1988 Acts were introduced in Northern Ireland by the Criminal Justice (Confiscation) (Northern Ireland) Order 1990.

[7] The 1988 Act was then amended by the Criminal Justice Act 1993, the Criminal Justice and Public Order Act 1994 and the Proceeds of Crime Act 1995. Among the amendments was that the standard of proof required to determine whether a person had benefited from the proceeds of crime was to be that applicable in civil proceedings (section 71(7A) of the 1988 Act as inserted by section 27 of the Criminal Justice Act 1993). The amendments made to the 1988 Act by the Proceeds of Crime Act 1995 enlarged the powers of the criminal courts to make confiscation orders. In Northern Ireland the 1990 Order was subsequently repealed and replaced by the Proceeds of Crime (Northern Ireland) Order 1996 which replicated in this jurisdiction the changes to the confiscation legislation which had been made in England and Wales in 1993, 1994 and 1995.

[8] Before PoCA, therefore, the statutory confiscation regime in Northern Ireland was contained in the 1996 Order. The following features of the regime are relevant: where a defendant appeared before the Crown Court to be sentenced in respect of an offence to which the Order applied, the court was obliged to hold a confiscation inquiry if either the prosecution asked it to do so or the court considered it appropriate; the court was required to determine whether the defendant had benefited from relevant criminal conduct or from drug trafficking; article 12(6) of the 1996 Order provided that the standard of proof in determining whether a person had benefited from drug trafficking or the amount to be recovered from him, should be that applicable in civil proceedings; and under article 10, the court was required to make a number of assumptions in determining the question of benefit and the amount of proceeds of drug trafficking. Some of these assumptions were discussed by this court in the case of *R v McKiernan* [2004] NICA 18.

PoCA

[9] The agency was created by section 1 of PoCA. By virtue of section 2 (1), the director of the agency is required to exercise his functions in the way which he considers is best calculated to contribute to the reduction of crime. This theme is developed in the provisions that deal firstly, with the way in which the director should react to the guidance that he receives from the Secretary of State, and secondly, with what the guidance should contain. Section 2 (5) provides that, in considering the way which is best calculated to contribute to the reduction of crime, the director must have regard to any guidance given to him by the Secretary of State. In turn, under section 2 (6) the Secretary of State, in giving such guidance, must indicate that the reduction of crime is in general best secured by means of criminal investigations and criminal proceedings.

[10] Part 4 of PoCA deals with confiscation orders in Northern Ireland. It contains provisions broadly similar to those contained in the 1996 Order. It is to be noted that a confiscation order is an *in personam* order – the Crown Court makes an order requiring the defendant to pay the amount that it has decided is recoverable. The court is required by section 156 to make the order if certain statutory conditions are satisfied. It must decide whether the defendant has a criminal lifestyle; if it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct; if not, it must decide whether he has benefited from particular criminal conduct. These various questions must (under section 156 (7)) be decided on a balance of probabilities.

[11] Part 5 introduces a system of civil recovery of the proceeds of unlawful conduct. Section 240 (1) describes the general purpose of this part of the Act. It is to recover assets and cash generated by criminal activity. Two forms of the retrieval of the proceeds of crime are provided for: civil recovery and cash forfeiture. Property obtained through unlawful conduct may be recovered in civil proceedings by the enforcement authority. Cash acquired in this way may be forfeited, again in civil proceedings. Section 240 (2) makes clear that the powers conferred by Part 4 are exercisable whether or not any proceedings have been brought for an offence in connection with the property.

[12] Unlawful conduct in this context is defined in section 241 as follows:-

> "(1) Conduct occurring in any part of the United Kingdom is unlawful conduct if it is unlawful under the criminal law of that part.
>
> (2) Conduct which -
>
> (a) occurs in a country outside the United Kingdom and is unlawful under the criminal law of that country, and
> (b) if it occurred in a part of the United Kingdom, would be unlawful under the criminal law of that part,
>
> is also unlawful conduct."

Proof of unlawful conduct is on the balance of probabilities – section 241 (3).

[13] Section 243 prescribes the procedure for civil recovery. Proceedings for a recovery order may be taken by the enforcement authority in the High Court against any person who the authority thinks holds recoverable property. The

director must serve proceedings on the person who holds the recoverable property and, unless the court dispenses with service, on any person who holds associated property which the agency wishes to be subject to a recovery action. The claim must specify the property to which it relates or describe it in general terms and state whether it is alleged to be recoverable property or associated property.

[14] Section 266(1) of the 2002 Act provides that if the court is satisfied that any property is recoverable, it must make a recovery order. The effect of a recovery order is to vest the property in the trustee for civil recovery - per Section 266(2). By section 266(3) the court is prohibited from making a recovery order if the conditions in subsection (4) are met and it would not be just and equitable to do so. The conditions in section 266(4) are:-

> "(a) the respondent obtained the recoverable property in good faith;
>
> (b) he took steps after obtaining the property which he would not have taken if he had not obtained it or he took steps before obtaining the property which he would not have taken if he had not believed he was going to obtain it;
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> (c) when he took the steps, he had no notice that the property was recoverable;
>
> (d) if a recovery order were made in respect of the property, it would, by reason of the steps, be detrimental to him."

Section 266(6) provides that in deciding whether it would be just and equitable to make the provision in the recovery order where the conditions in subsection (4) are met the court must have regard to (a) the degree of detriment that would be suffered by the respondent if the provision were made, and (b) the enforcement authority's interest in receiving the realised proceeds of the recoverable property."

[15] Further safeguards are contained in sections 281 and 282. Section 281 gives precedence to the claim of the true owner over the claims of the enforcement authority *viz*. the director of the agency. Thus, a person who claims that an item of property belongs to him may apply for a declaration to that effect and, if the application is successful, the property is not recoverable by the agency. Section 282 provides that proceedings for civil recovery may not be taken in respect of certain people in prescribed circumstances.

[16] Sections 304 to 310 deal with recoverable property. Sections 305 and 306 allow the agency to recover property which has not itself been obtained through unlawful conduct but which "represents" such property. Section 307 provides that the property that is recoverable under sections 304 and 306 is to be taken to include accrued profits. Section 308 limits the Agency's ability to follow and trace property. For example, property is not recoverable while a restraint order applies, nor is it recoverable if it has already been taken into account in making a criminal confiscation order.

The issues in the appeal

[17] The central question arising in the appeal is whether the agency should be required to establish that the appellant was engaged in unlawful conduct to the criminal standard *i.e.* beyond reasonable doubt. For the appellant Mr McCollum QC argued that, notwithstanding the terms of section 241 (3), since, for the recovery action to succeed, it must be shown that the appellant was guilty of unlawful conduct and since the particular species of unlawful conduct that must be established is conduct that is in violation of the criminal law, the appellant can only be found guilty of such conduct if that is established beyond reasonable doubt. That proposition, Mr McCollum said, is based not only on the appellant's common law rights not to be declared guilty of crime except on proof beyond reasonable doubt, but also on his rights under article 6 (2) of ECHR.

Article 6

[18] So far as is material article 6 of ECHR provides:-

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 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:
> …"

The determination whether the issue is criminal or civil

[19] In *Engel v Netherlands* (*No 1*) (1976) 1 EHRR 647 at 678–679, ECtHR provided what has come to be recognised as authoritative guidance on the approach to be adopted in deciding whether an issue is to be regarded as criminal for the purpose of article 6. In that case the European Court held that the matter was to be examined by the application of three tests. These are set out in paragraph 82 of the judgment:-

> "… it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.
>
> The very nature of the offence is a factor of greater import. …
>
> However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so (see, *mutatis mutandis*, the *De Wilde, Ooms and Versyp* judgment of 18 June 1971, Series A no. 12, p. 36, last sub-paragraph, and p. 42 in fine)."

[20] These three tests:- (1) the classification of the issue in national law; (2) the nature of the offence alleged against the individual; and (3) the seriousness of what is at stake or the nature of the penalty to be imposed, have been applied in England and Wales in *R v H* [2003] UKHL 1 and in this jurisdiction in *Lord Saville of Newdigate v Harnden* [2003] NI 239 in deciding whether a particular form of proceeding should be recognised as criminal or civil. Some of the factors that arise in each of the tests are common to more than one and the tests tend to blend into each other to some extent but it is necessary to consider each in turn and then to make some observations about their cumulative effect in the present case.

The classification in national law

[21] As Lord Bingham of Cornhill pointed out in *R v H* this test is far from decisive, for the practical reason that if it were possible to avoid the engagement of article 6 by domestic legislation, the aim of achieving broadly equivalent standards among the member states of the Council of Europe would be defeated. But it is a starting point and it is, therefore, important that section 241 (3) of PoCA expressly states that the court must decide on a balance of probabilities whether it is proved that any matters alleged to constitute unlawful conduct have occurred. Although this obviously connotes the civil standard of proof, the classification, even in the domestic setting, cannot be determined by a mere statement to that effect. The question is whether the statutory provision under consideration belongs to the criminal law of the state. This is to be determined, not only by reference to the indications given by the legislation, but also by examining whether it has the appurtenances of the criminal law – see, for instance, *Lauko v Slovakia* (1998) ECHR 26/38/95.

[22] In *S v The Principal Reporter and the Lord Advocate* [2001] SC 977 the Lord President (Lord Rodger) discussed the terms of article 6 by reference to both the English and the French texts. He pointed out that the expression 'criminal charge against him' in the English text appears as 'en matière pénale dirigée contre lui' in the French. This emphasises the penal nature of the provision and the fact that it must be directed against the individual as a criminal charge. In other words, for the criminal part of article 6 to come into play, there must be a criminal charge directed to the person who seeks its protection and it must carry a penalty. On this subject the Lord President said this:-

> "[21] The English version of Article 6(1), which uses the term "criminal charge", does not on its face expressly state that it is dealing only with proceedings where a penalty may be imposed. But the point emerges more clearly in the French text, which I have quoted above at paragraph 7. It

> speaks of the tribunal deciding 'du bien-fondé de toute accusation en matière pénale dirigée contre lui.' The charge must be 'en matière pénale' - which suggests that a penal element is one of the defining characteristics. Many of the States which are subject to the Convention have codified systems of law. In such systems there will often be a separate criminal code and in the passage from paragraph 50 of their judgment in *Öztürk* which I have quoted already, the Court clearly have such codes in mind when they say that
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> > "The first matter to be ascertained is whether or not the text defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law..."
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> But the very titles of such codes of criminal law will often reveal that they are indeed concerned essentially with 'matière pénale'. For instance, in France there is a 'code pénal', in Italy a 'codice penale', in Spain a 'código penal' and in Germany a 'Strafgesetzbuch'. It follows that when, in such cases as *Öztürk*, the Court investigates whether the text defining the offence belongs to criminal law, it is investigating whether the text belongs to an area of the law where proceedings can result in a penalty being imposed. …"

[23] As Lord Hope of Craighead pointed out in *R (McCann & others) v Crown Court at Manchester* [2002] UKHL 39 (paragraph 60), the expression 'charged with a criminal offence' has an autonomous meaning in the context of the convention - *Adolf v Austria* (1982) 4 EHRR 313 at 322 paragraph 30. And so it is relevant that in the present case proceedings for the recovery of assets do not involve the preferring of a charge against the appellant. He does not acquire a criminal conviction if he is found liable to deliver up the assets to the agency. True it is that there is an examination of whether he has been guilty of unlawful conduct (*i.e.* conduct that is contrary to the criminal law) but this does not take place in a criminal setting. He is not required to plead to a charge, no bill of indictment is preferred and all the trappings of the proceedings are those normally associated with a civil claim.

[24] Mr McCollum invited us not to follow the reasoning of Lord Rodger in *S v The Principal Reporter and the Lord Advocate*. He suggested that the opinion of Lord Prosser in the earlier case of *McIntosh v Her Majesty's Advocate* [2001] JC 78 was to be preferred. In that case the petitioner had been convicted of an

offence under the Misuse of Drugs Act 1971 and the prosecutor had applied under the Proceeds of Crime (Scotland) Act 1995 for a confiscation order. Section 3 (2) of the 1995 Act allowed the court to make assumptions that property held by or expenditure made by a defendant convicted of a drug trafficking offence derived from the proceeds of drug trafficking. At paragraph 30 of his opinion, Lord Prosser said:-

> "… By asking the court to make a confiscation order, the prosecutor is asking it to reach the stage of saying that he has trafficked in drugs. If that is criminal, that seems to me to be closely analogous to an actual charge of an actual crime, in Scottish terms. There is of course no indictment or complaint, and no conviction. And the advocate depute pointed out a further difference, that a Scottish complaint or indictment would have to be specific, and would require evidence, whereas this particular allegation was inspecific and based upon no evidence. But the suggestion that there is less need for a presumption of innocence in the latter situation appears to me to be somewhat Kafkaesque and to portray a vice as a virtue. With no notice of what he is supposed to have done, or any basis which there might be for treating him as having done it, the accused's need for the presumption of innocence is in my opinion all the greater. …"

[25] The decision of the High Court of Justiciary in the *McIntosh* case was reversed in the Privy Council. Mr McCollum suggested that the reasoning of Lord Prosser in the passage quoted above remains intact and that the decision of the Privy Council was reached on different grounds. We do not accept that argument. At paragraph 14 of his judgment Lord Bingham said:-

> "It was not contended on the respondent's behalf in the Court of Appeal that, in relation to an application for a confiscation order, he was a person charged with a criminal offence as that expression would be understood in Scots domestic law (see the judgment of Lord Prosser, 2001 JC 78 at 81 (para 6)). There are a number of compelling reasons why he would not be so regarded. (1) The application is not initiated by complaint or indictment and is not governed by the ordinary rules of criminal procedure. (2) The application may only be made if the accused is convicted, and

cannot be pursued if he is acquitted. (3) The application forms part of the sentencing procedure. (4) The accused is at no time accused of committing any crime other than that which permits the application to be made. (5) When, as is standard procedure in anything other than the simplest case, the prosecutor lodges an application under s 9, that application (usually supported by detailed schedules) is an accounting record and not an accusation. (6) The sum ordered to be confiscated need not be the profit made from the drug trafficking offence of which the accused has been convicted, or any other drug trafficking offence. (7) If the accused fails to pay the sum he is ordered to pay under the order, the term of imprisonment which he will be ordered to serve in default is imposed not for the commission of any drug trafficking offence but on his failure to pay the sum ordered and to procure compliance. (8) The transactions of which account is taken in the confiscation proceedings may be the subject of a later prosecution, which would be repugnant to the rule against double jeopardy if the accused were charged with a criminal offence in the confiscation proceedings. (9) The proceedings do not culminate in a verdict, which would (in proceedings on indictment) be a matter for the jury if the accused were charged with a criminal offence. It is of course true that if, following conviction of the accused and application by the prosecutor for a confiscation order, the court chooses to make the assumptions specified in s 3(2) of the 1995 Act or either of them, an assumption is made (unless displaced) that the accused has been engaged in drug trafficking which, as defined in s 49(2), (3) and (4), may (but need not) have been criminal. But there is no assumption that he has been guilty of drug trafficking offences as defined in s 49(5). The process involves no inquiry into the commission of drug trafficking offences. Unless Strasbourg jurisprudence points towards a different result, I would not conclude that a person against whom application for a confiscation order is made is, by virtue of that application, a person charged with a criminal offence."

[26] Many of the characteristics identified in this passage are present in the case of recovery proceedings. Their presence points clearly to the same outcome in the current case. But Mr McCollum focussed on the statement that the confiscation proceedings did not involve any inquiry into the commission of drug trafficking offences and suggested that, if such an inquiry had been required, the Privy Council would have held that the respondent had been charged with a criminal offence. Again we do not accept that submission. We do not regard the fact that there was no inquiry into drug trafficking offences as pivotal to the decision. This was referred to, we are satisfied, merely to highlight the difference in the type of proceeding involved in the confiscation proceedings from a criminal trial. Moreover, we do not accept that it is in any way inevitable that the recovery proceedings will be confined to an examination of specific offences committed by the appellant. We consider that it would be open to the agency to adduce evidence that the appellant had no legal means of obtaining the assets without necessarily linking the claim to particular crimes. Finally, the purpose of the recovery action is to obtain from the appellant what, it is claimed, he should not have – property that has been acquired by the proceeds of crime. It is not designed to punish him beyond that or to establish his guilt of a precise offence.

[27] We are satisfied that all the available indicators point strongly to this case being classified in the national law as a form of civil proceeding. The appellant is not charged with a crime. Although it must be shown that he was guilty of unlawful conduct in the sense that he has acted contrary to the criminal law, this is not for the purpose of making him amenable as he would be if he had been convicted of crime. He is not liable to imprisonment or fine if the recovery action succeeds. There is no indictment and no verdict. The primary purpose of the legislation is restitutionary rather than penal.

The nature of the proceedings

[28] Much of what we have had to say about the first of the *Engel* tests applies to this question also. Mr McCollum drew our attention to a formulation of the issue that appeared in the opinion of Lord Macfadyen in *S v Lord Advocate* where he said at paragraph 33:-

> "… the second criterion involves consideration of whether the situation in which the person concerned finds himself is of such a nature that he ought objectively for the purposes of the Convention to be regarded as "charged with a criminal offence". That will involve consideration of the nature of the allegation against him, and of the nature of the proceedings in which the allegation is made. It may involve consideration of

> the capacity in which the person making the allegation is acting. It may involve (at this stage rather than in the context of the third criterion) consideration of whether the imposition of a punishment or penalty is either the purpose or a possible outcome of the proceedings."

[29] This approach, which we believe has much to commend it, illustrates the difficulty in considering each of the *Engel* criteria on a strictly segregated basis for, ultimately, a decision on whether a particular form of proceeding is civil or criminal must be made by a comprehensive evaluation of all its characteristics. Be that as it may, the factors outlined in this passage, when applied to recovery actions, again compellingly point to the conclusion that the proceedings are civil in character. The allegation made against the appellant does not impute guilt of a specific offence; the proceedings do not seek to impose a penalty other than the recovery of assets acquired through criminal conduct; and they are initiated by the director of an agency, which, although it is a public authority, has no prosecutorial function or competence. In this context what Lord Bingham said about the nature of criminal proceedings in *Custom and Excise Commissioners v City of London Magistrates' Court* [2000] 1WLR 2020, 2025 is relevant:-

> "It is in my judgment the general understanding that criminal proceedings involve a formal accusation made on behalf of the state or by a private prosecutor that a defendant has committed a breach of the criminal law, and the state or the private prosecutor has instituted proceedings which may culminate in the conviction and condemnation of the defendant."

[30] The reference in Lord Macfadyen's judgment to the purpose of the proceedings is a theme that featured in *Phillips v United Kingdom* (2001) EHRR *(Application no. 41087/98)*. In that case the applicant had been convicted of the importation of a quantity of drugs. Subsequent to his conviction a confiscation order was made. The applicant contended that a statutory assumption applied by the Crown Court when calculating the amount of the confiscation order breached his right to the presumption of innocence under article 6 (2) of the Convention. The European Court gave its decision on this argument in paragraph 34 of its judgment as follows:-

> "… the purpose of this procedure was not the conviction or acquittal of the applicant for any other drug-related offence. Although the Crown Court assumed that he had benefited from drug trafficking in the past, this was not, for example, reflected in his criminal record … In these

> circumstances, it cannot be said that the applicant was "charged with a criminal offence". Instead, the purpose of the procedure under the 1994 Act was to enable the national court to assess the amount at which the confiscation order should properly be fixed. The Court considers that this procedure was analogous to the determination by a court of the amount of a fine or the length of a period of imprisonment to be imposed on a properly convicted offender. This, indeed, was the conclusion which it reached in *Welch* (judgment cited above) when, having examined the reality of the situation, it decided that a confiscation order constituted a "penalty" within the meaning of Article 7."

[31] This passage makes clear that, even though the confiscation of the applicant's property was to be regarded as a penalty within the meaning of article 7 of the convention, since the purpose of the confiscation procedure was not to secure the conviction of the applicant, it did not constitute the preferring of a charge against him within the meaning of article 6. In particular the right to be presumed innocent under article 6 (2) arose "only in connection with the particular offence charged." – paragraph 35. Likewise in the present case, the purpose of the recovery proceedings is not to prosecute the appellant for any offence or to secure a criminal conviction on any specific charge. Whether or not it can be regarded as a penalty, it does not constitute the charging of the appellant with a criminal offence.

[32] The purpose of Part 5 of PoCA can be viewed on a more general basis as the state's response to the need to recover from those who seek to benefit from crime the proceeds of their unlawful conduct. Although said in relation to confiscation orders, the words of Lord Steyn in *R v Rezvi* [2002] UKHL 1 are apposite:-

> "[14] It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating the proceeds of crime are therefore essential. The provisions of the 1988 [Criminal Justice] Act are aimed at depriving such offenders of the proceeds of their criminal conduct. Its purposes are to punish convicted offenders, to deter the commission of further offences and to reduce the profits available to fund further criminal enterprises. These objectives reflect not only national but also international policy. The

> United Kingdom has undertaken, by signing and ratifying treaties agreed under the auspices of the United Nations and the Council of Europe, to take measures necessary to ensure that the profits of those engaged in drug trafficking or other crimes are confiscated (see United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988; TS 26 (1992) Cm 1927); Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg, 8 November 1990 (Cm 1561)). These conventions are in operation and have been ratified by the United Kingdom."

[33] Lord Steyn referred to the partly dissenting opinion in *Phillips* of Sir Nicolas Bratza (in which Judge Vajic joined) which suggested that the majority had taken too narrow a view of article 6 (2). Lord Steyn commented that if article 6(2) was held to be directly applicable, it would tend to undermine the effectiveness of confiscation procedures generally. We respectfully agree and would add that the same can clearly be said of recovery proceedings. If recovery proceedings could only be taken on proof beyond reasonable doubt that the person from whom recovery was sought had benefited from crime, the efficacy of the system would be substantially compromised.

[34] In this context it is relevant that significant safeguards are in place to ensure that innocent persons are not penalised by the recovery procedures. Quite apart from the provisions of section 266 (3), (4) and (6) and sections 281 and 282 (which we have referred to in paragraphs [14] and [15] above), the appellant is entitled to the protection afforded by article 6 (1) of the convention. Lord Bingham referred to this (albeit in relation to confiscation proceedings) in *McIntosh* where he said:-

> "In concluding, as I do, that art 6(2) has no application to the prosecutor's application for a confiscation order, I would stress that the result is not to leave the respondent unprotected. He is entitled to all the protection afforded to him by art 6(1), which applies at all stages, the common law of Scotland and the language of the statute. If the court accedes to the application of a prosecutor under s 1(1) of the 1995 Act, it will order an accused to pay 'such sum as the court thinks fit'. In making a confiscation order the court must act with scrupulous fairness in making its assessment

> to ensure that neither the accused nor any third person suffers any injustice."

[35] Analogous rights and duties arise in relation to recovery proceedings. The appellant cannot be deprived of assets unless it is established to the requisite standard that these were obtained by unlawful conduct, specifically conduct that was contrary to the criminal law of Northern Ireland. The proceedings by which the agency will seek to establish that proposition will be subject to the requirements of article 6 (1) of the convention. The court is specifically enjoined to have regard to the rights of the appellant and innocent third parties by the terms of the sections that we have referred to in the preceding paragraph.

Is a penalty imposed – if so, what is the nature of the penalty?

[36] The expression 'penalty' in article 6, like the expression 'criminal charge', involves an autonomous convention concept, – see, for instance, *X v France* judgment of 31 March 1992, Series A no 234-C, page 98, paragraph 28. In *Welch v United Kingdom* judgment of 9 February 1995, Series A no. 307-A the European Court acknowledged the 'preventive purpose' of confiscation orders but concluded that "the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment". It decided therefore that a confiscation order constituted a penalty.

[37] In *R v Benjafield* [2002] UKHL 2 the Court of Appeal in England and Wales was disposed to accept this reasoning and that a confiscation order was penal – see paragraph 82 of the judgment of Lord Woolf CJ. Likewise in *Rezvi* Lord Steyn accepted that one of the purposes of confiscation proceedings was "to punish convicted offenders" – see paragraph [31] above. The learned trial judge in the present case did not consider that recovery proceedings involved a penalty. At paragraph [20] of his judgment he said:-

> "… the purpose and function of the civil recovery procedure is to recover property obtained through unlawful conduct but not to penalise or punish any person who is proved to have engaged in such conduct …"

[38] A distinction between confiscation orders and recovery proceedings can be drawn in that, as Lord Bingham pointed out in *McIntosh*, the sum ordered to be confiscated need not be the profit made from the drug trafficking offence of which the accused has been convicted, whereas recovery may only be ordered in relation to assets that have been acquired by proven unlawful conduct. The recovery of assets may more readily be described as a preventative measure, therefore. After all, the person who is required to yield

up the assets does no more than return what he obtained illegally. It is clear, however, from the judgment in *Welch* that the European Court considered that a provision will not be classified as non-penal solely because it partakes of a preventative character and since it is unnecessary for us to decide the point, we will refrain from expressing any final view on whether recovery of assets should be regarded as penal within the autonomous meaning of that term.

[39] Even if the proceedings in this case are to be regarded as imposing a penalty on the appellant, we are satisfied that this is not sufficient to require them to be classified as criminal for the purposes of article 6. Indeed, Mr McCollum accepted that this attribute alone could not achieve that result. For the reasons that we have given earlier we consider that the predominant character of recovery action is that of civil proceedings. The primary purpose is to recover proceeds of crime; it is not to punish the appellant in the sense normally entailed in a criminal sanction.

The cumulative effect of the Engel tests

[40] Mr McCollum argued that the effect of the recovery action in terms both of its impact on the appellant and in the way that it was instituted and presented militated strongly against a finding that these were civil proceedings. He pointed out that the proceedings were initiated by a public authority on referral from PSNI, a state agent. The agency would rely on material adduced in the criminal trial of the appellant. It would seek to establish his guilt of criminal conduct and, if successful, the proceedings would have a direct impact on him by depriving him of his personal property. It was invidious that he should be stigmatised with having been guilty of criminal conduct if that was not proved beyond reasonable doubt. Viewed cumulatively, the *Engel* tests should be applied to this case, he claimed, to identify the proceedings as criminal in character.

[41] We cannot accept these submissions. The essence of article 6 in its 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.

Conclusions

[42] None of the arguments advanced on behalf of the appellant has been made out. The appeal must be dismissed. It follows that the application for a declaration of incompatibility must likewise be dismissed.