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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

DONNA McCOOL and MICHAEL HARKIN

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Before: Morgan LCJ, Coghlin LJ and Gillen LJ

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MORGAN LCJ (giving the judgment of the court)

[1] These are renewed applications for leave to appeal by two applicants who were convicted, following pleas of guilty, of offences of false accounting contrary to section 17(1)(a) of the Theft Act (Northern Ireland) 1969 and making false declarations with a view to obtaining benefits contrary to section 105A(1) of the Social Security Administration (Northern Ireland) Act 1992. For these offences they were each sentenced to terms of imprisonment. Following sentencing, the judge made confiscation orders under the Proceeds of Crime Act 2002 ("the 2002 Act") in respect of both applicants in the sum of £38,814.77 each. The applicants seek leave to appeal their respective confiscation orders on the grounds that, due to the dates of offences, the judge had no jurisdiction under the 2002 Act; the judge erred in his calculation of the benefit received; the amount of benefit calculated was disproportionate and in breach of ECHR; and the confiscations orders were manifestly excessive. Mr Hutton appeared for McCool, Ms Devlin for Harkin and Mr Crawford for the PPS. We are grateful to all counsel for their helpful written and oral submissions.

[2] Donna McCool dishonestly claimed Income Support from September 1990 and Jobseekers Allowance from July 2010 in that she completed forms declaring herself to be single whereas in fact she was married to Michael Harkin. She pleaded guilty to 4 counts relating to 4 separate false representations made on 26 September 1990 (count 1), 28 November 2003, 20 October 2005 and 10 August 2010. She was sentenced on 6 June 2013 by His Honour Judge Grant to 5 months imprisonment and at the hearing the prosecutor asked the court to proceed to confiscation under the

2002 Act. An appeal against her sentence was dismissed by the Court of Appeal on 5 July 2013.

[3] The prosecutor served a statement on 2 August 2013 in which the benefit she obtained was calculated from 28 November 2003, the date of the second count. No benefit was claimed in respect of the first count arising from the false representation made on 26 September 1990. The prosecution asserted that the total payments made to McCool during the claimed confiscation period came to £76,154.59. Taking into account inflation the revised benefit figure was £84,996.30. On 2 July 2014 His Honour Judge Babington made confiscation orders under the 2002 Act in the sum of £38,814.77 against each applicant representing the recoverable property being their half share in a jointly owned property at 92 Circular Road, Derry.

[4] Michael Harkin similarly dishonestly claimed income support and housing benefit. He faced 3 counts in relation to income support as a result of failing to disclose that he was married and living with Donna McCool on 16 December 1999 (count 5), 20 October 2005 and 6 May 2007 and 4 counts in respect of housing benefit claims for property at Glenvale Park as a result of the same failure to disclose between 3 April 2006 and 3 August 2009. In relation to Harkin the total payments made to him adjusted for inflation came to £53,937.12. He was sentenced on 7 June 2013 by Judge Grant to 8 months imprisonment.

Jurisdiction

[5] The jurisdiction to make a confiscation order under the 2002 Act is found in section 156:

> "(1) The Crown Court must proceed under this section if the following two conditions are satisfied.
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> (2) The first condition is that a defendant falls within either of the following paragraphs -
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> (a) he is convicted of an offence or offences in proceedings before the Crown Court;
>
> (b) he is committed to the Crown Court in respect of an offence or offences under section 218 below (committal with a view to a confiscation order being considered).
>
> (3) The second condition is that-
>
> (a) the prosecutor asks the court to proceed under this section, or

(b) the court believes it is appropriate for it to do so.

(4) The court must proceed as follows-

(a) it must decide whether the defendant has a criminal lifestyle;

(b) if it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct;

(c) if it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct.

(5) If the court decides under subsection (4)(b) or (c) that the defendant has benefited from the conduct referred to it must-

(a) decide the recoverable amount, and

(b) make an order (a confiscation order) requiring him to pay that amount.

(6) But the court must treat the duty in subsection (5) as a power if it believes that any victim of the conduct has at any time started or intends to start proceedings against the defendant in respect of loss, injury or damage sustained in connection with the conduct.

(7) The court must decide any question arising under subsection (4) or (5) on a balance of probabilities.

(8) The first condition is not satisfied if the defendant absconds (but section 177 may apply).

(9) References in this Part to the offence (or offences) concerned are to the offence (or offences) mentioned in subsection (2)."

[6] Section 458 (1) of the 2002 Act provided for commencement and the relevant Order is the Proceeds of Crime Act 2002 (Commencement No.5, Transitional

Provisions, Savings and Amendment) Order 2003 ("the 2003 Order") which provides:

> "4. - (1) Section 156 of the Act (making of confiscation order) shall not have effect where the offence, or any of the offences, mentioned in section 156(2) was committed before 24th March 2003.
>
> …
>
> 11. Where, under article 4 or 6, a provision of the Act does not have effect, the following provisions shall continue to have effect-
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> …
>
> (e) articles 3 to 40 of, and paragraph 18 of Schedule 3 to, the Proceeds of Crime (Northern Ireland) Order 1996."

[7] Mr Hutton, whose submissions Ms Devlin adopted, submitted that there was no jurisdiction to make a confiscation order in this case under the 2002 Act. He contended that there was neither need nor power to introduce words into Article 4(1) of the 2003 Order to effect a change in its plain meaning (see R v Morgan and Bygrave (2009) 1 Cr App R (S) 60 at paragraph 24). Count 1 in relation to McCool and count 5 in relation to Harkin plainly fell within section 156 (2) of the 2002 Act in that each of them was convicted of a relevant offence in proceedings before the Crown Court. Article 4 (1) of the 2003 Order provided that there was no jurisdiction under the 2002 Act where, as in this case, any of the offences in respect of which the defendants were convicted were committed before 24 March 2003.

[8] We were referred to a number of cases in which transitional provisions in similar terms in confiscation legislation have been considered. The first was R v Ahmed (EWCA unreported 8 February 2000). The Proceeds of Crime Act 1995 ("the 1995 Act") came into force on 1 November 1995. It effected amendments to the Criminal Justice Act 1988 which contained the previous confiscation regime. The transitional provision was effectively in the same terms as that with which we are concerned. The appellant pleaded guilty to 3 counts of conspiracy, two of which began on 1 January 1995 and straddled the commencement date and the third of which was subsequent to the commencement date. Both counsel and the judge proceeded on the basis that the amended provisions were in force in relation to the 3 counts and agreed a confiscation order in the sum of £40,000.

[9] On appeal it was submitted that the first two conspiracy offences had been committed before 1 November 1995 and that accordingly the unamended regime should have applied. Under that regime there was a discretion as to the amount of

the benefit which should be ordered against the defendant. It was contended that if counsel had been aware that the unamended provisions applied, an agreement would not have been forthcoming in respect of the full benefit. The court rejected that submission in dismissing the appeal but agreed that in light of the transitional provisions the earlier regime applied. Mr Hutton relied on this case to support his argument that the section should be read in a straightforward manner. The case as a whole is, however, of limited benefit because it is common case that where the prosecution pursues a confiscation order in respect of an offence which was committed prior to the commencement date of the relevant statute the earlier provision will always apply. A conspiracy which commences before the relevant date is such an offence.

[10] R v Martin [2001] EWCA Crim 2761 was another case where there was a conspiracy charge between 1 October 1994 and 31 January 1997. A confiscation order in excess of £10 million was made by the Crown Court on the basis that the amended provisions commencing on 1 November 1995 applied. The Court of Appeal reversed that decision holding that the earlier provisions applied and that under those provisions a confiscation order could only be made where the prosecution had given written notice to the court that it appeared to the prosecution that it would be possible to make a confiscation order for at least a minimum amount. Since that had not occurred, the court had no power to make such an order. This case did not add a great deal on this issue to Ahmed.

[11] In R v Simpson [2003] EWCA Crim 1499 the appellant pleaded guilty to 2 counts charging VAT offences one of which predated 1 November 1995 (count 6) and various other fraud offences all of which post-dated the commencement of the 1995 Act. The prosecution did not seek a confiscation order arising from the plea to count 6. The appellant relied on Ahmed and Martin as authority for the proposition that the unamended provisions applied and had not been complied with. Lord Woolf chaired a five person court which noted that if the appellant had been acquitted on count 6 it was common case that the confiscation order would have been subject to the 1995 Act but because he was convicted of that count it was contended that the confiscation order could not be made under that Act. The court concluded that this was an absurd result and determined that after the word "offence" the words "in respect of which a confiscation order could be sought" should be read in. Having done so, it concluded that the amending provisions of the 1995 Act applied.

[12] Mr Hutton submitted that it was not immediately obvious why the distinction noted by Lord Woolf was absurd. This was a transitional provision which had to draw a line on some basis. To draw the line on the basis of whether there was a conviction for an earlier offence was neither irrational nor absurd. Secondly, it is not at all clear from the report why a confiscation order could not have been sought in relation to count 6. If so, the case fell to be considered under the unamended provisions on the court's formulation.

[13] The matter was next addressed in R v Aslam [2004] EWCA Crim 2801. That was a case in which the appellant pleaded guilty to 24 offences of dishonesty and asked for a further 14 offences to be taken into consideration. One of the offences to which he pleaded guilty was committed before 1 November 1995 and one of the offences taken into consideration occurred before that date. The appellant submitted that in light of these offences the court had no jurisdiction to continue with confiscation proceedings under the amendments introduced by the 1995 Act. The rationale of the court was set out at paragraph 11: –

> "The legislative purpose of s.16(5), as it seem to us, was to prevent the Crown from dividing convictions against a defendant in one set of proceedings into pre- and post-November 1, 1995 matters and then taking confiscation proceedings (concurrently or consecutively) under both statutes. So if at the time the judge is asked to make a confiscation order under the 1995 Act on a number of counts there remains a pre-commencement count on which the Crown is seeking, or *could still* seek, a confiscation order under the 1988 Act as amended in 1993, there is no jurisdiction to make an order under the 1995 Act. However, if the pre-commencement count is one which could not be the basis of confiscation proceedings, there is no obstacle to using the 1995 Act regime. Similarly if (as in this case) the Crown has expressly abandoned any reliance on the pre-commencement count for the purposes of a confiscation order, the fact that it *could have* sought such an order in respect of that count seems to us entirely immaterial. In such a case also, in our judgment, there is no obstacle to using in the 1995 Act regime in respect of the post- commencement counts. We do not understand Simpson to require a contrary conclusion."

[14] The issue was once again considered in R v Stapleton [2008] EWCA Crim 1308. The appellant submitted that R v Clarke [2008] UKHL 8 supported the proposition that where statutory provisions were clear in their terms, the court was bound to apply them, even if the consequence appeared to suggest that the defendant was able to take advantage of an unmeritorious technicality. The court noted that the reasoning in Aslam had been criticised by the late Prof Thomas but concluded that it was bound to follow that decision. Thereafter there are numerous instances of the courts following that approach.

[15] There are a number of difficulties with an approach to jurisdiction which is based upon the election of the prosecution. The first is that the Crown Court must

proceed to deal with confiscation where there is a conviction and the prosecutor asks the court to proceed under section 156 or the court believes it appropriate to do so. The statute plainly did not intend jurisdiction to be determined solely by the prosecutor. Secondly, there are substantive differences between the triggering of the criminal lifestyle provisions of section 156(4) and section 223 of the 2002 Act compared to Article 10 of the Proceeds of Crime (Northern Ireland) Order 1996 ("the 1996 Order"). This is not a matter of procedure only. Thirdly, the requirement to consider benefit from particular criminal conduct in section 156(4)(c) is defined in section 224(3)(b) as including conduct which constituted offences of which he was convicted in the same proceedings as those in which he was convicted of the offence or offences concerned. As Prof Thomas pointed out this appears to reintroduce the offence which the prosecution had elected not to pursue by the back door! Mr Hutton also pointed out certain differences in relation to the treatment of gifts and the circumstances in which an order may be made for an increase in the confiscation order by reason of subsequently acquired realisable property.

[16] We would have found this matter more difficult to determine had we not been conscious of the long line of authority in England and Wales on this statutory provision upon which those involved in this work have relied. Any decision to depart from the approach heralded in Aslam would in our view introduce an unwelcome area of uncertainty into a field which has already seen its fair share of litigation. For those reasons we have concluded that the learned trial judge was correct to deal with the confiscation application under the 2002 Act.

Benefit

[17] It is common case that the 2002 Act must be given effect in a manner which avoids a violation of Article 1 Protocol 1 of the Convention and that a confiscation order which did not conform to the test of proportionality would constitute such a violation. This was confirmed in R v Waya [2012] UKSC 51. It is further agreed that as a result section 156(5)(b) of the 2002 Act has to be read subject to the qualification "except in so far as such an order would be disproportionate and thus a breach of Article 1, Protocol 1".

[18] The difficult issue is how one applies that principle in proceedings such as this. This was addressed by the Supreme Court in Waya at paragraphs 20 to 22:

> "[20] The difficult question is when a confiscation order sought may be disproportionate. The clear rule as set out in the Strasbourg jurisprudence requires examination of the relationship between the aim of the legislation and the means employed to achieve it. The first governs the second, but the second must be proportionate to the first. Likewise, the clear limitation on the domestic court's power to read and give effect to the statute in a manner which keeps it

Convention compliant is that the interpretation must recognise and respect the essential purpose, or 'grain' of the statute.

[21] Both Mr Perry and Lord Pannick submitted that it would be very unusual for orders sought under the statute to be disproportionate. Both drew attention to the severity of the regime and commended its deterrent effect. The purpose of the legislation is plainly, and has repeatedly been held to be, to impose upon convicted defendants a severe regime for removing from them their proceeds of crime. It is not to be doubted that this severe regime goes further than the schoolboy concept of confiscation, as Lord Bingham explained in R v May [2008] 1 AC 1028. Nor is it to be doubted that the severity of the regime will have a deterrent effect on at least some would-be criminals. It does not, however, follow that its deterrent qualities represent the essence (or the 'grain') of the legislation. They are, no doubt, an incident of it, but they are not its essence. Its essence, and its frequently declared purpose, is to remove from criminals the pecuniary proceeds of their crime. Just one example of such declarations is afforded by the explanatory notes to the statute (para 4):

> 'The purpose of confiscation proceedings is to recover the financial benefit that the offender has obtained from his criminal conduct.'

[22] A confiscation order must therefore bear a proportionate relationship to this purpose. Lord Bingham recognised this in his seminal speech in R v May, in adding to his "Endnote" or overview of the regime, at para 48, two balancing propositions:

> 'The legislation … does not provide for confiscation in the sense understood by schoolchildren and others, but nor does it operate by way of fine'."

[19] All of the fraudulent claims made by McCool were for income support or jobseekers allowance. The total sum received by her was £76,154.59 and making allowance for inflation the amount came to £84,966.30. Mr Crawford submitted that

each and every claim made by McCool was fraudulent and that the amounts received in relation to each claim constituted the benefit for the purpose of the 2002 Act.

[20] Mr Hutton did not take any material issue with the figures but he relied upon the Social Security (Payments on Account, Overpayments and Recovery) Regulations (NI) 1998 which prescribe the sums to be deducted under the Social Security legislation in calculating recoverable amounts which had been overpaid:

> "Sums to be deducted in calculating recoverable amounts
>
> 13. In calculating the amounts recoverable under Article 54(1) of the Order or regulation 11, where there has been an overpayment of benefit, the adjudicating authority shall deduct -
>
> …
>
> (b) any additional amount of income support, state pension credit, income-based jobseeker's allowance or income-related employment and support allowance which was not payable to the person from whom the amount is recoverable or their partner under the original, or any other, determination but which should have been determined to be payable to that person or their partner…
>
> (ii) on the basis of the claim as it would have appeared had the representation or non-disclosure been remedied before the determination
>
> (iii) on the basis of the determination if any change of circumstances had been notified at the time that change occurred…."

It was agreed that McCool would have been entitled to Social Security benefits by way of income support and jobseekers allowance at a lower level and if the Social Security authorities instituted a claim against her for overpayment they would, as a result of these Regulations, have been able to establish an overpayment of £5036 which on the basis of inflation should be adjusted to £5531.95.

[21] We consider that it is significant that the Regulations make specific allowance for recovery in circumstances where there has been misrepresentation or non-disclosure. Where the statute make specific provision for the amount recoverable in such circumstances the calculation of a benefit figure which is far in excess of that amount has the character of fine. In our view proportionality requires that the benefit in the case of McCool should be confined to the figure of £5531.95. We accordingly give leave to appeal in her case and substitute that figure in place of the figure of £38,814.77 ordered by the judge.

[22] In respect of Harkin similar considerations apply. He received a total of £22,507 by way of income support but would have been entitled to the sum of £17,599. Under the Regulations he is entitled to set one off against the other in calculating the overpayment. He also received a sum of £26,001 by way of housing benefit. That was benefit claimed in respect of a property at 8 Glendale Park, Northland Road whereas the matrimonial home was at 92 Circular Road. The prosecution case was that at all material times he was both married to McCool and living at the latter address. There is no material before the court to suggest that he would have been entitled to any sum by way of housing benefit in respect of the property at Glendale Park and there are no offsetting provisions in relation to housing benefit.

[23] In the case of Harkin we also give leave to appeal and allow the appeal to the extent of substituting for the sum of £38,814.77 the sum of £33,624 representing the net income support overpayment and the full housing benefit overpayment for the appropriate periods uplifted for inflation.