Aziz Rahman, Senior Partner at Rahman Ravelli, represented the Gales in Gale and Others v Serious Organised Crime Agency [2011] UKSC 49: "The Voicing of suspicions..."

2 May 2012

THE UK government's right to seize people's assets without them being convicted of a crime is to be challenged in Europe.

Specialist fraud and business crime lawyer Aziz Rahman is to go to the European Court of Human Rights (ECHR) to contest the seizure of assets belonging to his clients.

The seizure was carried out because of a suspicion the assets were the proceeds of crime. But his clients, a married couple, have never been convicted of anything and Mr Rahman argues that having all their assets seized breached their human rights.

At present, the government can gain a Civil Recovery Order (CRO) from court to seize a person's assets even if the person has never been convicted.

Mr Rahman recently argued to the Supreme Court that such a seizure breached Article 6 of the European Convention on Human Rights - the right to be presumed innocent until proven guilty. The solicitor, of UK-based Rahman Ravelli Solicitors, also cited previous European cases to support his argument that it was wrong for a person acquitted of a crime to have that acquittal questioned in a civil action, such as the issuing of a CRO.

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On 26th October 2011 the Supreme Court gave judgment in the first Proceeds of Crime Act 2002 ("POCA") Part V [civil recovery] case to reach the highest court in the land.

There were two distinct issues in the Gale case, (effectively two appeals). The first issue was fundamental; the applicability of Article 6 to civil recovery proceedings - in particular where a respondent has been acquitted in prior criminal proceedings. The second issue related to whether or not the investigation costs of an Interim Receiver could be recovered from a losing respondent as costs in the case.

The Facts

The Gales, a British couple, lived in Spain in the 1980s and early 1990s. In July 1991 there was an incident involving a vessel moored off the Spanish coast with over two tonnes of cannabis. Arrests were made and the Spanish police came to suspect that David Gale ("DG") was involved as a principal player. By this time, the Gales were living in Florida. Given that Spain has a statute of limitation for this type of offence, the Spanish authorities eventually dropped their case against DG in 2003. There was, therefore, no trial.

In the mid-1990s, the Gales moved from the USA to Portugal. DG set up an airstrip. It was suspected that he was using light aircraft to smuggle cannabis from Morocco. He was kept under surveillance. In August 1996, Portuguese police seized from a jeep parked off the coast 450kgs of cannabis that had just been off-loaded from a boat. DG was linked to that vessel; he was arrested and stood trial in 2000 for drugs trafficking. The Portuguese court heard evidence from at least one British police officer about the Gales' finances. DG was acquitted - the court noting in its written reasons for the acquittal that it was satisfied of DG's innocence 'without a shadow of a doubt'. DG's wife was acquitted of money laundering in a later trial in Portugal.

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Five years on, the Assets Recovery Agency ("ARA") commenced civil recovery proceedings in the High Court. POCA created ARA and one of its purposes under Part V was to obtain 'recovery orders'. Section 266(1) of POCA provides that the court must make a recovery order if it is satisfied that property is 'recoverable'. Recoverable property is property obtained through criminal conduct (s304) which is defined, in summary, as an act which is contrary to the laws of the United Kingdom, wherever it is committed in the world. The standard of proof to be applied is the balance of probabilities: s241(3).

Their trial took place in early 2009. Both Mr and Mrs Gale were cross-examined about their involvement in drug trafficking and money laundering, particularly during their time in Portugal. On 12th May 2009, Griffith-Williams J gave judgment for SOCA ([2009]iEWHC 1015 QB). Between trial and judgement, the House of Lords had decided the case of R v Briggs-Price [2009] 2 WLR 1001. The Gales appealed relying, in the main, on that decision; the Court of Appeal ([2010] EWCA Civ 759, 7/7/10) was unmoved. The principle challenge was based on Article 6 and the effect of the Briggs-Price case on enshrined Convention rights.

The First Issue - Article 6

Article 6(1) of the Convention enshrines the 'right to a fair trial' whatever the proceeding. Article 6(2) is the presumption of innocence but it only applies to criminal cases and requires any criminal allegation to be made out to the criminal standard of proof. The case law in the area of civil recovery and confiscation focused on the impact of Article 6(2) on the decision making processes.

R v Briggs-Price [2009] 2 WLR 1101

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At the criminal trial, the Crown had alleged that Briggs-Price ("BP") was part of a conspiracy to import Class A drugs. He was said to have had an existing

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cannabis supply network that he was intending to use to distribute the heroin. There was no count relating to the cannabis allegation. BP was convicted and the Court then moved to consider confiscation - a civil process triggered by the conviction.

The Crown Court made a confiscation order reflecting BP's involvement in the cannabis allegation even though he had not been tried for that, much less convicted. BP argued that he had a right to be presumed innocent unless proven guilty to the criminal standard in respect of this fresh allegation.

Strangely, the parties and the court agreed to conduct the case on the basis of evidence alone, rather than the statutory assumptions available under the statute (which would have resulted in the court having to make assumptions as to the criminal source of funds and other assets owned or expended by BP in a six-year period prior to the date of the commencement of proceedings). These assumptions then have the effect of putting the burden on a defendant such as BP to prove that particular property he held was not derived from the proceeds of crime.

Having abandoned the assumptions route the court could only proceed on proof that BP had benefited, and the Crown had to prove their case. The question was 'to what standard' did they have to prove that case? The Crown Court proceeded on the civil standard, BP appealed and the matter found its way via the Court of Appeal to the House of Lords.

Their Lordships held that the applicable Act, the Drugs Trafficking Act 1994, permitted confiscation orders to be made in respect of benefit derived from drug trafficking other than that of which the defendant had been convicted. The House of Lords held that confiscation proceedings did not engage Article 6(2), following Phillips v United Kingdom (2001) EHRR (App. No. 41087/98). In Phillips, the European Court of Human Rights in Strasbourg held that as confiscation proceedings were a part of the sentencing process there was no 'new charge' and thus Article 6(2) did not apply.

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The House of Lords did, however, conclude that although the requirements of Article 6(2) did not apply, the Article 6(1) requirement of a fair trial did apply and it followed, therefore, that where, as in the case of BP, the prosecution relied on new criminal offending to prove the existence of benefit, they had to prove that offending.

Although the statute expressly envisaged a civil standard of proof in relation to benefit from drug trafficking, where the statutory assumptions had not been deployed, and the prosecution sought to rely on criminal offending other than the extant conviction or some other conviction to prove the existence of benefit, Article 6(1) required proof to the criminal standard. This did not help BP as, on the facts, the evidence of the cannabis aspect was sufficient to satisfy the higher criminal standard.

A critical Strasbourg case in the Briggs-Price argument was the case of Geerings v Netherlands (2007) 46 EHRR 1212. In that case, the Dutch authorities pursued an acquitted defendant through the civil courts in confiscation proceedings. In a ruling which in part appears to contradict Phillips v UK, the ECtHR held that if a defendant was acquitted of offences of which he was charged, it was not legitimate to infer that he had benefited from those offences for the purposes of confiscation.

The Lords in Briggs-Price, were divided as to the application of Geerings. Lord Brown held that Article 6(2) applied to confiscation proceedings where new accusations, not tested at the criminal trial, were being made. Lord Mance noted that none of the Strasbourg authorities to which the House of Lords had been referred involved a Grand Chamber decision "and it may be that one day the Grand Chamber will have a look at its [Article 6(2)'s] application in the context of confiscation proceedings". In Gale, the Justices of the Supreme Court have now asked again for Strasbourg to settle this difficult area once and for all. Gale, it would appear, was granted leave to appeal to the Supreme Court in part, at least, because the House of Lords was so divided in the Briggs-Price case and Gale - we suggest - was a chance to look again at the Geerings principle as applied in domestic practice. Still now our highest court considers the Strasbourg case law as causing difficulties in practical application.

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Some more Strasbourg case law, the case of Doig and the 'missing link'.

The Strasbourg court in Geerings relied on Asan Rushiti v Austria (2001) 33 EHRR 56 at 31. In that case the applicant had been tried for attempted murder and was acquitted. Under Austrian law he was then entitled to seek compensation through the courts. This was refused on the basis that there remained enough suspicion for the court to refuse the application for compensation. The European Court found a breach of Article 6(2) following the similar case of Sekanina v Austria (1993) 17 EHRR 221, where the Court had found that "even the voicing of suspicions regarding an accused's innocence" was not permissible after an acquittal.

A common-theme throughout the Strasbourg cases has been the need for a 'link'; i.e. that Article 6(2) will apply, even to civil proceedings, if a defendant has been tried and acquitted in 'linked' criminal proceedings eg: a compensation hearing following a criminal trial – per Sekanina. Their Lordships in Briggs-Price showed flexibility in relying on the all-embracing ambit of Article 6(1) where they had difficulties in applying Article 6(2) given its criminal 'badge'. But the House of Lords did not have the benefit of considering a civil recovery appeal from Scotland. Just two days after the House of Lords judgment in BP, the Inner House of the Court of Session handed down judgement in Scottish Ministers v Doig and others [2009]CSIH 34. In Doig the first two defendants were the mother and father of the third. The third had stood trial on drugs charges and was acquitted. Civil recovery proceedings were then commenced against all three. After finding that Article 6(2) did not apply on the facts the court went onto hold that where the rulings in civil courts were such that the language used "overstepped the bounds of the civil forum, thereby casting doubt on the correctness of that acquittal" – per Y v Norway [2005] 41 EHRR 7, then that of itself could bring the case within the compass of Article 6(1) protection.

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In other words even where there is no procedural 'link' between the criminal and the civil case that link could be created by the use of the civil court's language, per the Y case. SOCA argued that no such ‘link’ existed in the Gale case, procedurally or by use of language. Though there was clearly no procedural link between the Portuguese criminal case and the High Court civil case it was argued that the High Court's findings and use of language created the necessary link. SOCA relied on the Judge's comments in his judgement that he was not re-litigating the Portuguese case but applying a different test with material not just from that case but also the Spanish case and other material. The approach by Griffith-Williams J was acknowledged by the Justices in the Supreme Court to show that, factually, there was no language link. This was perhaps a surprising conclusion given that there were in fact a number of instances where the High Court made specific findings of fact, which were entirely at odds with the findings of fact made by the two Portuguese courts when acquitting the Gales.

It has always been possible for victims of crime to sue in the civil courts even after an acquittal of the suspect. SOCA argued that the Gales' argument would put a stop to this, turning an acquittal into a bar on any further proceedings. However this had been considered in the Y case:

"Thus, the Court considers that, while the acquittal from criminal liability ought to be maintained in the compensation proceedings, it should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof. However, if the national decision on compensation contains a statement imputing the criminal liability of the respondent party, this could raise an issue falling within the ambit of Art.6(2) of the Convention."

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The Strasbourg court was explicitly saying that its unease with the 'voicing of suspicions' after an acquittal was not to be taken as limiting the rights of victims to sue in tort. The difference, it is submitted, is that on the one hand if the State pursues a suspect in civil proceedings following acquittal that does raise issues offensive to the Convention, but that would not apply to a victim taking out a private action there being an emphasis on the 'national decision'. As will be seen this is not how the Supreme Court squared the circle.

The Gale decision in the Supreme Court

The Court found that Article 6(2) did not apply in the Gale case. Curiously, there was no consideration of Article 6(1) despite extensive argument as to the effect of Briggs-Price and that three of the seven Justices in Gale had been in Briggs-Price. Briggs-Price, the Court held, was decided on its facts and all else in the case was obiter. There was also no reference in the judgment to Doig. Lord Phillips, with whom Lords Mance, Judge and Reed agreed, said that he felt that the Strasbourg court in Sekanina and Rushiti may have taken a 'wrong turn' (para 32). This was because he found 'unconvincing' Strasbourg's attempts to distinguish between claims for compensation by an acquitted defendant and claims of compensation by a third party against an acquitted defendant. He rationalised the case law by concluding that possibly the Strasbourg Court meant that Article 6(2) prohibits a public authority from suggesting that an acquitted defendant should have been convicted on the application of the criminal standard of proof.

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Respectfully,
it
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difference
between
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saying,
'we
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or the same court finding that 'on the balance of probabilities the defendant committed the act complained of'. Both judgments pronounce the same thing - the defendant did rape or did assault etc. It is submitted that the real difference is, as stated above, the difference between the State 'going behind' an acquittal and a private person suing a defendant following an acquittal.

True it is that in either case a court (a public body) will have to make some factual findings and perhaps some findings that sit uncomfortably with the acquittal but that is where, for policy reasons, the Strasbourg Court, permits some latitude into what could otherwise be regarded as the sanctity of the acquittal. The unease, it seems, is in the State relentlessly pursuing individuals.

Lord Phillips had a different view on this; he recognised the difficulty and said "this confusing area of Strasbourg law would benefit from consideration by the Grand Chamber" (para 32) - all their Lordships agreed (except for Lord Dyson).

Lord Dyson had no difficulties with the Strasbourg case-law. He found that the Strasbourg cases do no more than require the civil court not to make any statement 'imputing criminal liability' - following Y v Norway (para 138). Respectfully, as noted above, this will, in a great many cases, be a distinction without a difference. Is the next step for the Supreme Court's invitation to be accepted and for Strasbourg to be asked to settle this issue?

The Second Issue - The costs of the interim receiver

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The Supreme Court reversed the Northern Irish case of SOCA v Wilson [2009] NICA 20. The Court of Appeal in Northern Ireland had held that the costs of the interim receiver were not costs of or occasioned by the litigation, that the receiver was an officer of the court and independent of the parties and the costs therefore were not costs that should be met by other assets held by an unsuccessful respondent in civil recovery proceedings. Griffiths- Williams J agreed. The Court of Appeal disagreed and concluded that the Court of Appeal in Northern Ireland was wrong and that there was nothing in the rules, legislation or practice that could properly bar SOCA from recovering the costs of the interim receiver as an extra cost in the litigation.

The Supreme Court agreed. The result is that it will give SOCA a greater degree of confidence when applying for interim receivership appointments that the cost-benefit analysis of a civil recovery action will not have to take into account, in the event of a successful action the considerable costs of the interim receiver when considering the amount of property that might be available in a recovery order. A respondent will have to consider the costs of the interim receiver, recognising that those costs will be a cost to be borne from property that is not recoverable, provided that they are reasonable, per Lord Clarke para. 109. It is going to be an important feature in the tactics of civil recovery litigation in the future.

Respondents should be keener to strike early settlements with SOCA for fear otherwise of those huge further costs being added to the costs of resolving the dispute.

The receiver's costs in the Gale matter are estimated to be in excess of £1m. The value of the remaining recoverable property may well be less - leaving the Gales personally liable for any outstanding amount.

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Rahman Ravelli acted for both Mr and Mrs Gale and continue to do so in their application to the European Court of Human Rights. Rahman Ravelli are a leading Specialist POCA / Fraud firm and have recently been ranked by Legal 500 as an 'excellent' firm with Aziz

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Rahman being described as 'first class and very experienced'. Our instructed counsel are Andrew Mitchell QC of 33 Chancery Lane Chambers in London and Jonathan Lennon of 23 Essex Street Chambers in London.

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