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

FOURTH SECTION

CASE OF PHILLIPS v. THE UNITED KINGDOM

(Application no. 41087/98)

JUDGMENT

STRASBOURG

5 July 2001

FINAL

12/12/2001

In the case of Phillips v. the United Kingdom,

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

Mr G. RESS, *President*,
Mr A. PASTOR RIDRUEJO,
Mr J. MAKARCZYK,
Sir Nicolas BRATZA,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mr J. HEDIGAN, *judges*,
and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 8 February and 14 June 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 41087/98) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mr Steven Phillips ("the applicant"), on 20 April 1998.

2. The applicant was represented by Mr R. James, a solicitor practising in Newport, Gwent, and by Mr R. Pearse Wheatley, a barrister practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Ms H. Fieldsend, of the Foreign and Commonwealth Office.

3. The applicant alleged, *inter alia*, that the statutory assumption made against him by the court which issued a confiscation order following his conviction for a drug offence violated his right to the presumption of innocence under Article 6 § 2 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). It was declared partly admissible on 30 November 2000 [*Note by the Registry*. The Court's decision is obtainable from the Registry].

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 8 February 2001 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*
Ms H. FIELDSEND, Foreign and Commonwealth Office, *Agent*,
Mr D. PERRY, *Counsel*,
Ms M. DYSON, Home Office,
Mr P. VALLANCE, Home Office, *Advisers*;

(b) *for the applicant*
Mr R. PEARSE WHEATLEY, *Counsel*,
Mr Y. CHANDARANA, *Junior Counsel*,
Mr R. JAMES, *Solicitor.*

The Court heard addresses by Mr Pearse Wheatley and Mr Perry.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. On 27 June 1996, at Newport Crown Court, the applicant was convicted of being concerned in the importation in November 1995 of a large quantity of cannabis resin, contrary to section 170(2) of the Customs and Excise Management Act 1979. On 12 July 1996 he was sentenced to nine years' imprisonment in respect of this offence. The applicant had previous convictions, but none in respect of a drug-related offence.

9. An inquiry was conducted into the applicant's means, pursuant to section 2 of the Drug Trafficking Act 1994 ("the 1994 Act" – see below).

On 15 May 1996 a Customs and Excise appointed drug financial investigation officer advised the applicant's solicitors that he was carrying out an investigation into their client's financial affairs and that he wished to interview him in order to assist the court in determining whether he had benefited from drug trafficking. The applicant declined to take part in the interview.

10. The investigation officer prepared a written statement pursuant to section 11 of the 1994 Act which was served on the applicant and filed with the court.

In the statement the investigation officer observed that the applicant had no declared taxable source of income, although he was the registered owner

of a house converted into four flats from which he had started a bed-and-breakfast business in December 1991. Examination of the applicant's building society account showed cash and cheque deposits in the period from August 1994 to November 1995 totalling over 17,000 pounds sterling (GBP), which the investigation officer suggested might represent rental income from the four flats. The applicant was found to have become a director of a newsagents business in July 1992 of which his parents were the sole shareholders and to have bought a shop in September 1992 for GBP 28,493.25, of which GBP 12,200 was paid in cash. He was the registered owner of five cars, of an estimated total value of approximately GBP 15,000, and was found to have spent GBP 2,000 on a BMW 520i in October 1995, and approximately GBP 88,400 on expenses related to the November 1995 importation of cannabis (in respect of which he had been convicted). The investigation officer concluded that the applicant had benefited from drug trafficking and that the total benefit was GBP 117,838.27.

In respect of the applicant's realisable assets, the investigation officer observed:

> "The size of Phillips' realisable assets is likely to be peculiarly within the defendant's own knowledge and I feel it reasonable to suppose that any successful drug trafficker (in as much as the defendant is) may take care to ensure, so far as he can, that the proceeds of his trade will be hidden away so as to be untraceable. Examples include the fact that his business dealings are always conducted in cash, that no records are ever maintained, and that some assets, for example the BMW 520i, are registered in false names."

11. The applicant filed a written statement in response, in which he denied having benefited from drug trafficking. He explained that in 1990-91 he had been convicted of car theft and required to pay GBP 25,000 to the insurance company which had indemnified the victims. He claimed that he had sold the house for GBP 50,000 to X in order to clear this debt and had used the GBP 12,000 residue from the sale to purchase the newsagents premises for his parents because he owed them money too. He denied owning any part in the newsagents business. When he was released from prison in April 1994 he began trading in telephones; this was the source of the GBP 17,000 in his building society account. He denied owning any of the cars registered in his name, claiming variously that each had been purchased and sold on behalf of a friend or stolen without insurance. In conclusion, he alleged that his only realisable assets were some GBP 200 in a building society account and the fittings of a garage rented from the local authority. The applicant filed documentary evidence and affidavits in support, primarily, of his claim no longer to own the house.

12. The investigation officer filed a second statement in accordance with section 11(1) of the 1994 Act. He stated, *inter alia*, that the applicant was

still the owner of the house and that the conveyance to X had never been registered.

13. At the confiscation hearing in the Crown Court the applicant gave evidence and called witnesses. Giving judgment on 24 December 1996 the judge observed:

> "It is for the prosecution to establish, of course, on a balance of probabilities that he has benefited from drug trafficking, that is received any payment or reward in connection with drug trafficking. Here there is no direct evidence of that so the Crown invite me to make the assumptions required by section 4(3) of the Act, namely (a) that property held by him since his conviction, and property transferred to him since 18 November 1989, the appropriate date, was received as such a benefit; (b) that any expenditure of his since that date in 1989 was met out of payments received by him in connection with any drug trafficking carried on by him. I must do so unless either he shows on a balance of probabilities that the assumption is incorrect, or I am satisfied that there would be a serious risk of injustice to him if the assumption was made."

The judge commented generally that, in seeking to displace the assumption and to counter the prosecutor's allegations, the applicant had failed to take obvious, ordinary and simple steps which would clearly have been taken if his account of the facts had been true. For example, instead of calling as witnesses the alleged purchaser of the house, X, and other individuals for whom he claimed to have bought and sold cars, the applicant had called only himself, his father and a solicitor.

14. The judge found the prosecution's allegation that the applicant still owned the house to be correct and held that X's purported purchase payment of GBP 50,000 had in fact been a benefit of drug trafficking. The judge stated:

> "The assumption to be made is plain, and the accused has neither shown that it is incorrect nor demonstrated a risk of injustice.
>
> There are real indications on the civil basis of proof that [X] was complicit in the crime of which the accused was convicted. They travelled to Jamaica together at about the time when arrangements for shipment of the load of compressed herbal cannabis would be likely to be made. A mobile phone at the heart of the arrangements for the haulage of the drugs was registered in the name of [X]. Just as the jury did not believe Mr Phillips, neither do I. What has happened here, in my judgment, is a device of just the sort providing a cover to explain the transfer of money which one would expect to find in concealing benefit from drug trafficking. There is an apparently ordinary, formal, commercial transfer of property, appropriately done through solicitors in the ordinary way, which has never ultimately been formally finalised, and my judgment is that it was indeed a sham, that the property ... is still owned by the accused ..."

15. The prosecution alleged that the applicant had received a further GBP 28,000 in cash from X. The applicant accepted that he had received this money, but claimed that X had merely been cashing a cheque drawn by the applicant's father to buy out the applicant's share in the family business for a total of GBP 50,000. In connection with this transaction, the judge observed:

"No sensible explanation for the involvement of [X] in that cashing of that cheque was given to me at all, and it is impossible, in my judgment, to see any sensible reason other than that he did not cash a cheque; that it was a simple payment. It involves my disbelieving not only the accused but also his father, but I do. I think family loyalty has overcome his honesty.

Although the accused now has no formal interest in the remaining shop premises from which the family business is conducted, I do not accept the account of himself and his father that he has no interest in the business. Even within a family I find the purchase of a share of a business for GBP 50,000 entirely without documentation simply unbelievable. Again, on the balance of probabilities it is a device to conceal the true reason for the payment by [X] to the accused of GBP 28,000 which was that it was a payment for drug trafficking."

16. In respect of the applicant's dealings with cars, the judge remarked:

"Accepting his lowest estimates of those sums which he has paid out, a total of GBP 11,400 in cash is reached. He told the jury that he always dealt in cash in all his transactions, not only dealing with these but other transactions, he presenting himself to the jury as a general wheeler-dealer, having specialised at one stage in cars, more recently in mobile telephones, but willing to deal in anything which would offer a profit. He says he never kept records at all. He accepts and asserts that he dealt dishonestly in cars, as well as legitimately, and that is certainly so. He has been convicted during the relevant period of offences of dishonesty in relation to ringing cars and was sentenced to a substantial term of imprisonment in respect of that. There are also in the papers before me indications of earning legitimate commissions in ordinary sales of cars.

But the fact that he may have had other sources of cash, both legitimate and illegitimate, does not, in my judgment, displace the second assumption in a case such as this where no sort of account, complete or partial, is available or possible. I have seen what must have been a fraction of his dealings, and I am satisfied that the GBP 11,400 must be treated as a benefit."

17. The judge assessed the applicant to have benefited from drug trafficking to the extent of GBP 91,400.

He next calculated the value of the realisable property held by the applicant as follows:

"For the reasons that I have given above I am satisfied that [the applicant] is in fact the beneficial owner of [the house]. In the absence of a current valuation, but taking judicial notice of a recent modest recovery in the housing market after a long, flat period, I am satisfied that the GBP 50,000 which he said in evidence was what such a property was worth in 1992, that is to say during the long, flat period, I am satisfied that GBP 50,000 is a fair estimate of the likely net proceeds of a sale of that property now or in the relatively near future.

Again for the reasons that I have given above, I am satisfied that the accused still has a one-third interest with his parents in the [newsagents business]. He and his father said that the business was worth GBP 150,000 in 1993. That is what was purported to be the basis of the GBP 50,000 he was to be given for it. There is no evidence that it is worth any less now, and I therefore find his realisable share in the equity in that business to be worth GBP 50,000. Since I am satisfied as to GBP 100,000 realisable

sums, that figure exceeds the GBP 91,400 and under section 5 I find the amount to be recovered to be that figure."

In view of the difficulties inherent in realising the applicant's share of the family business, the judge allowed him three years in which to pay the confiscation order, with a period of two years' imprisonment to be served in default of payment.

18. On 28 January 1997 the applicant was refused leave to appeal against conviction and sentence (including the imposition of the confiscation order). His application to renew leave to appeal against conviction and sentence was refused on 22 January 1998 after a full hearing before the Court of Appeal.

II. RELEVANT DOMESTIC LAW

A. The Drug Trafficking Act 1994

19. Section 2 of the 1994 Act provides that a Crown Court should make a confiscation order in respect of a defendant appearing before it for sentencing in respect of one or more drug-trafficking offences, whom the court finds to have received at any time any payment or other reward in connection with drug trafficking.

20. Under section 5 of the 1994 Act, the confiscation order should be set at a sum corresponding to the proceeds of drug trafficking assessed by the court to have been gained by the defendant, unless the court is satisfied that, at the time the confiscation order is made, only a lesser sum could be realised.

21. In determining whether and to what extent the defendant has benefited from drug trafficking, section 4(2) and (3) of the 1994 Act require the court to assume that any property appearing to have been held by the defendant at any time since his conviction or during the period of six years before the date on which the criminal proceedings were commenced was received as a payment or reward in connection with drug trafficking, and that any expenditure incurred by him during the same period was paid for out of the proceeds of drug trafficking. This statutory assumption may be set aside by the defendant in relation to any particular property or expenditure if it is shown to be incorrect or if there would be a serious risk of injustice if it were applied (section 4(4)).

22. The required standard of proof applicable throughout the 1994 Act is that applied in civil proceedings, namely on the balance of probabilities (section 2(8)).

23. Provisions broadly similar to the above were previously included in the Drug Trafficking Offences Act 1986 ("the 1986 Act", considered by the

Court in *Welch v. the United Kingdom*, judgment of 9 February 1995, Series A no. 307-A).

B. Recent British case-law on the application of the Convention to drug confiscation orders

1. McIntosh v. Her Majesty's Advocate – *judgment of the Scottish Court of Appeal*

24. In its judgment of 13 October 2000 the Scottish Court of Appeal, by a majority of two to one, held that a confiscation procedure similar to that applied in the present case was incompatible with Article 6 § 2 of the Convention. Lord Prosser, with whom Lord Allanbridge agreed, observed, *inter alia*:

> "... By asking the court to make a confiscation order, the prosecutor is asking it to assess the value of the proceeds of the petitioner's drug trafficking. It is therefore asking the court 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 unspecific and based on 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 vice as a virtue. With no notice of what he is supposed to have done, or of 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 ... I can see no basis upon which it could be said that [such] assumptions ... would not offend against the presumption of innocence, leaving it to the accused to show that these assumptions were incorrect. ..."

2. R. v. Benjafield and Others – *judgment of the English Court of Appeal*

25. On 21 December 2000 the Court of Appeal held unanimously that the imposition of a drug confiscation order did not give rise to a violation of Article 6 of the Convention. Giving judgment, the Lord Chief Justice examined the confiscation process on the basis that Article 6 as a whole, including Article 6 § 2, applied. He concluded that, considered as a whole, the confiscation scheme struck a fair balance between justice for the defendant and the public interest in controlling the proceeds of drug trafficking.

3. Her Majesty's Advocate v. McIntosh – *judgment of the Privy Council*

26. The prosecution appealed from the Court of Appeal's decision (see paragraph 24 above) and on 5 February 2001 the Judicial Committee of the

Privy Council held, unanimously, that Article 6 § 2 did not apply, since during the confiscation proceedings the accused was not "charged with a criminal offence" but was, instead, faced with a sentencing procedure in respect of the offence of which he had been convicted. Moreover, the Privy Council held that even if Article 6 § 2 could be said to apply, the assumption involved in the making of the confiscation order was not unreasonable or oppressive.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

27. The applicant alleged that the 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 relevant parts of Article 6 provide:

> "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. ...
>
> 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:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> ..."

A. Applicability of Article 6 § 2

28. The Government submitted that the confiscation order should be regarded as a penalty for the drug-trafficking offence for which the applicant had been tried and found guilty; the confiscation proceedings did not amount to his being charged with any additional offence and Article 6 § 2 did not, therefore, apply.

29. The applicant contended that, rather than simply forming part of the sentence for the crime of which he had been convicted, the proceedings leading to the setting of the confiscation order were a discrete judicial process which involved his being "charged with a criminal offence" within the meaning of Article 6 § 2 of the Convention. He relied on the analysis of

Lord Prosser in the Scottish Court of Appeal's *McIntosh* judgment (see paragraph 24 above).

30. It is not in dispute that, during the prosecution which led to his conviction on 27 June 1996 of being concerned in the importation of cannabis resin contrary to section 170(2) of the Customs and Excise Management Act 1979, the applicant was "charged with a criminal offence" and was therefore entitled to – and received – the protection of Article 6 § 2. The questions for the Court regarding the applicability of this Article to the confiscation proceedings are, firstly, whether the prosecutor's application for a confiscation order following the applicant's conviction amounted to the bringing of a new "charge" within the meaning of Article 6 § 2, and secondly, even if that question must be answered in the negative, whether Article 6 § 2 should nonetheless have some application to protect the applicant from assumptions made during the confiscation proceedings.

31. In order to determine whether in the course of the confiscation proceedings the applicant was "charged with a criminal offence" within the meaning of Article 6 § 2, the Court must have regard to three criteria, namely, the classification of the proceedings under national law, their essential nature and the type and severity of the penalty that the applicant risked incurring (see *A.P., M.P. and T.P. v. Switzerland*, judgment of 29 August 1997, *Reports of Judgments and Decisions* 1997-V, p. 1488, § 39, and, *mutatis mutandis*, *Welch*, cited above , p. 13, §§ 27-28).

32. As regards the first of the above criteria – the classification of the proceedings under domestic law – while recent United Kingdom judicial decisions have been divided as to whether the application by the prosecution for a confiscation order amounts to the bringing of a "criminal charge" within the autonomous meaning of Article 6 § 2 (see paragraphs 24-26 above), it is clear that such an application does not involve any new charge or offence in terms of the criminal law. As the Lord Chief Justice observed in *Benjafield and Others* (see paragraph 25 above), "[i]n English domestic law, confiscation orders are part of the sentencing process which follow upon the conviction of the defendant of the criminal offences with which he is charged".

33. Turning to the second and third relevant criteria – the nature of the proceedings and the type and severity of the penalty at stake – it is true that the assumption provided for in the 1994 Act, that all property held by the applicant within the preceding six years represented the proceeds of drug trafficking, required the national court to assume that he had been involved in other unlawful drug-related activities prior to the offence of which he was convicted. In contrast to the usual obligation on the prosecution to prove the elements of the allegations against the accused, the burden was on the applicant to prove, on the balance of probabilities, that he acquired the property in question other than through drug trafficking. Following the judge's inquiry, a substantial confiscation order – in the amount of

GBP 91,400 – was imposed. If the applicant failed to pay this amount he was to serve an extra two years' imprisonment, consecutive to the nine-year term he had already received in respect of the November 1995 offence.

34. However, 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, to which was added only his conviction for the November 1995 offence. 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.

35. The Court has also considered whether, despite its above finding that the making of the confiscation order did not involve the bringing of any new "charge" within the meaning of Article 6 § 2, that provision should nonetheless have some application to protect the applicant from assumptions made during the confiscation proceedings.

However, whilst it is clear that Article 6 § 2 governs criminal proceedings in their entirety, and not solely the examination of the merits of the charge (see, for example, *Minelli v. Switzerland*, judgment of 25 March 1983, Series A no. 62, pp. 15-16, § 30; *Sekanina v. Austria*, judgment of 25 August 1993, Series A no. 266-A; and *Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A no. 308), the right to be presumed innocent under Article 6 § 2 arises only in connection with the particular offence "charged". Once an accused has properly been proved guilty of that offence, Article 6 § 2 can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new "charge" within the autonomous Convention meaning referred to in paragraph 32 above (see *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, pp. 37-38, § 90).

36. In conclusion, therefore, the Court holds that Article 6 § 2 of the Convention was not applicable to the confiscation proceedings brought against the applicant.

B. Applicability of Article 6 § 1

37. Although the applicant did not rely on the right to a fair trial under Article 6 § 1 in his original application, at the hearing before the Court his counsel submitted that this provision was also applicable and had been violated. The Government did not deny that Article 6 § 1 applied, although they disputed that there had been a breach.

38. In any event, the Court reiterates that it is master of the characterisation to be given in law to the facts of a case and is not bound by the approach taken by an applicant or Government (see, for example, *Guerra and Others v. Italy*, judgment of 19 February 1998, *Reports* 1998-I, p. 223, § 44). It considers that, given the nature of the proceedings in question, it is appropriate to examine the facts of the present case from the standpoint of the right to a fair hearing under Article 6 § 1 of the Convention.

39. Article 6 § 1 applies throughout the entirety of proceedings for "the determination of ... any criminal charge", including proceedings whereby a sentence is fixed (see, for a recent example, *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports* 1997-I, p. 279, § 69). The Court recalls its above finding that the making of the confiscation order was analogous to a sentencing procedure (see paragraph 32 above). It follows, therefore, that Article 6 § 1 of the Convention applies to the proceedings in question.

C. Compliance with Article 6 § 1

40. The Court considers that, in addition to being specifically mentioned in Article 6 § 2, a person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her forms part of the general notion of a fair hearing under Article 6 § 1 (see, *mutatis mutandis*, *Saunders v. the United Kingdom*, judgment of 17 December 1996, *Reports* 1996-VI, p. 2064, § 68). This right is not, however, absolute, since presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the Convention, as long as States remain within certain limits, taking into account the importance of what is at stake and maintaining the rights of the defence (see *Salabiaku v. France*, judgment of 7 October 1988, Series A no. 141-A, pp. 15-16, § 28).

41. The Court is not called upon to examine *in abstracto* the compatibility with the Convention of the provisions of the 1994 Act, which require a court sentencing a person convicted of a drug-trafficking offence to assume that any property appearing to have been held by him at any time since his conviction, or during the period of six years before the date on which the criminal proceedings were commenced, was received as a

payment or reward in connection with drug trafficking, and that any expenditure incurred by him during the same period was paid for out of the proceeds of drug trafficking. Instead, the Court must determine whether the way in which this assumption was applied in the applicant's case offended the basic principles of a fair procedure inherent in Article 6 § 1 (see *Salabiaku*, cited above, pp. 17-18, § 30, and *Saunders*, cited above, pp. 2064-65, § 69).

42. The Court's starting-point in this examination is to repeat its above observation that the statutory assumption was not applied in order to facilitate finding the applicant guilty of an offence, but instead to enable the national court to assess the amount at which the confiscation order should properly be fixed (see paragraph 34 above). Thus, although the confiscation order calculated by way of the statutory assumption was considerable – GBP 91,400 – and although the applicant risked a further term of two years' imprisonment if he failed to make the payment, his conviction of an additional drug-trafficking offence was not at stake.

43. Further, whilst the assumption was mandatory when the sentencing court was assessing whether and to what extent the applicant had benefited from the proceeds of drug trafficking, the system was not without safeguards. Thus, the assessment was carried out by a court with a judicial procedure including a public hearing, advance disclosure of the prosecution case and the opportunity for the applicant to adduce documentary and oral evidence. The court was empowered to make a confiscation order of a smaller amount if satisfied, on the balance of probabilities, that only a lesser sum could be realised. The principal safeguard, however, was that the assumption made by the 1994 Act could have been rebutted if the applicant had shown, again on the balance of probabilities, that he had acquired the property other than through drug trafficking. Furthermore, the judge had a discretion not to apply the assumption if he considered that applying it would give rise to a serious risk of injustice.

44. The Court notes that there was no direct evidence that the applicant had engaged in drug trafficking prior to the events which led to his conviction. In calculating the amount of the confiscation order based on the benefits of drug trafficking, therefore, the judge expressed himself to be reliant on the statutory assumption (see paragraph 13 above). In reality, however, and looking in detail at the steps taken by the judge to reach the final figure of GBP 91,400, the Court notes that in respect of every item taken into account the judge was satisfied, on the basis either of the applicant's admissions or of evidence adduced by the prosecution, that the applicant owned the property or had spent the money, and that the obvious inference was that it had come from an illegitimate source. Thus, the judge found "real indications on the civil basis of proof" that the sale of the house to X had not been genuine and was instead a cover for the transfer of drug money (see paragraph 14 above). As for the additional GBP 28,000 which

the applicant admitted receiving in cash from X, the judge said: "No sensible explanation for the involvement of [X] … was given to me at all, and it is impossible, in my judgment, to see any sensible reason other than that ... it was a simple payment." Similarly, when assessing the amount of the applicant's expenditure on cars, the judge based himself on the lowest of the applicant's estimates as to how much he had spent (see paragraph 16 above). Since the applicant was not able to provide any record explaining the source of this money, the judge assumed that it was a benefit of drug trafficking. On the basis of the judge's findings, there could have been no objection to including the matters in a schedule of the applicant's assets for the purpose of sentencing, even if the statutory assumption had not applied.

45. Furthermore, the Court notes that, had the applicant's account of his financial dealings been true, it would not have been difficult for him to rebut the statutory assumption; as the judge stated, the evidentiary steps which he could have taken to demonstrate the legitimate sources of his money and property were "perfectly obvious and ordinary and simple" (see paragraph 13 above). It is not open to the applicant to complain of unfairness by virtue of the fact that the judge may have included in his calculations assets purchased with the proceeds of other, undocumented forms of illegal activity, such as "car ringing".

46. Finally, when calculating the value of the realisable assets available to the applicant, it is significant that the judge took into account only the house and the applicant's one-third share of the family business, specific items which he had found on the evidence still to belong to the applicant. The judge accepted the applicant's evidence when assessing the value of these assets. Whilst the Court considers that an issue relating to the fairness of the procedure might arise in circumstances where the amount of a confiscation order was based on the value of assumed hidden assets, this was far from being the case as regards the present applicant.

47. Overall, therefore, the Court finds that the application to the applicant of the relevant provisions of the Drug Trafficking Act 1994 was confined within reasonable limits given the importance of what was at stake and that the rights of the defence were fully respected.

It follows that the Court does not find that the operation of the statutory assumption deprived the applicant of a fair hearing in the confiscation procedure. In conclusion, there has been no violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

48. The applicant also alleged that the powers exercised by the court under the 1994 Act were unreasonably extensive, in breach of Article 1 of Protocol No. 1, which states:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

He submitted that the principles raised under the above Article were almost identical to those under Article 6 § 2, and that a fair balance had not been struck between public policy and individual rights.

49. The Government stated that the 1994 Act was designed to combat the serious problem of drug trafficking, by punishing convicted offenders, deterring other offences and reducing the profits available to fund future drug-trafficking ventures. The application of the statutory assumption was proportionate to this aim given, *inter alia*, the difficulty in establishing the link between assets and drug trafficking.

50. The Court observes that the "possession" which forms the object of this complaint is the sum of money, namely GBP 91,400, which the applicant has been ordered by the Crown Court to pay, in default of which payment he is liable to be imprisoned for two years. It considers that this measure amounts to an interference with the applicant's right to peaceful enjoyment of his possessions and that Article 1 of Protocol No. 1 is therefore applicable.

51. As previously stated, the confiscation order constituted a "penalty" within the meaning of the Convention. It therefore falls within the scope of the second paragraph of Article 1 of Protocol No. 1, which, *inter alia*, allows the Contracting States to control the use of property to secure the payment of penalties. However, this provision must be construed in the light of the general principle set out in the first sentence of the first paragraph and there must, therefore, exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, among many examples, *Allan Jacobsson v. Sweden (no. 1)*, judgment of 25 October 1989, Series A no. 163, p. 17, § 55).

52. As to the aim pursued by the confiscation order procedure, as the Court observed in *Welch* (judgment cited above, pp. 14-15, § 36), these powers were conferred on the courts as a weapon in the fight against the scourge of drug trafficking. Thus, the making of a confiscation order operates in the way of a deterrent to those considering engaging in drug trafficking, and also to deprive a person of profits received from drug trafficking and to remove the value of the proceeds from possible future use in the drugs trade.

53. The Court has already noted that the sum payable under the confiscation order was considerable, namely GBP 91,400. However, it

corresponded to the amount which the Crown Court judge found the applicant to have benefited from through drug trafficking over the preceding six years and was a sum which he was able to realise from the assets in his possession. The Court refers to its above finding that the procedure followed in the making of the order was fair and respected the rights of the defence.

54. Against this background, and given the importance of the aim pursued, the Court does not consider that the interference suffered by the applicant with the peaceful enjoyment of his possessions was disproportionate.

It follows that there has been no violation of Article 1 of Protocol No. 1.

FOR THESE REASONS, THE COURT

1. *Holds* by five votes to two that Article 6 § 2 of the Convention is not applicable;

2. *Holds* unanimously that Article 6 § 1 of the Convention is applicable but has not been violated;

3. *Holds* unanimously that there has been no violation of Article 1 of Protocol No. 1.

Done in English, and notified in writing on 5 July 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Sir Nicolas Bratza joined by Mrs Vajić is annexed to this judgment.

G.R.
V.B.

PARTLY DISSENTING OPINION OF JUDGE Sir Nicolas BRATZA JOINED BY JUDGE VAJIĆ

While I agree with the majority of the Court in their conclusion that there has been no violation of the Convention in the present case, I cannot fully share the reasoning of the majority in respect of the complaint under Article 6. In particular, I cannot accept the majority's view that Article 6 § 2 had no application to the confiscation proceedings against the applicant.

The view of the majority is based on the proposition that, while Article 6 § 2 governs criminal proceedings in their entirety and not solely the examination of the merits of the charge, once an accused has been proved guilty of the offence charged Article 6 § 2 can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless the allegations are of such a nature and degree as to amount to the bringing of a new "charge" within the autonomous meaning of Article 6.

In my opinion, this is to take too narrow a view of the role of Article 6 § 2 in the context of proceedings relating to a criminal charge.

In his judgment in the Privy Council in *H.M. Advocate and Advocate General for Scotland v. McIntosh*, Lord Bingham of Cornhill correctly observed that the European Court's judgment in *Engel and Others v. the Netherlands* (judgment of 8 June 1976, Series A no. 22) was "plainly unhelpful" to the respondent, suggesting as it did in the passage quoted from paragraph 90 of that judgment that Article 6 § 2 becomes irrelevant once a person is found guilty according to law, and that, as part of the sentencing process, a court can take into account facts, including those suggesting the commission of other criminal offences, without the risk of violating the requirements of that paragraph.

However, the passage from *Engel and Others* should, I consider, be read with some caution for several reasons.

It is clear from the passage that the facts which were taken into account in fixing the sentence were not in dispute – they were "established facts the truth of which [the two applicants] did not challenge". In this respect they did not differ materially from other "facts" which a sentencing court routinely takes into account in fixing sentence, as for instance a defendant's previous convictions. In *Engel and Others*, the undisputed "facts" in question were the distribution by the applicants on previous occasions of two writings which had been "provisionally forbidden under the 'Distribution of Writings Decree' ". These prior examples of misconduct on the part of the applicants were taken into account by the sentencing court in fixing the sentence only as being an "indication of [the applicants'] general behaviour", that is, apparently, a readiness to break rules and a general disrespect for authority. Hence the Court's reference to their being "factors

relating to the individual['s] personality".

Here the situation, as the applicant correctly argues, is very different. The essential "facts", namely whether property or assets in the applicant's possession were the proceeds of drug trafficking, are directly in issue. They are at the heart of the confiscation proceedings and are facts which the sentencing court is required to determine. Moreover, unlike the position in *Engel and Others*, the underlying facts are determined and taken into account not merely for the purpose of assessing the applicant's personality in fixing the period of detention, but for the purpose of stripping him of substantial sums of money which the court determines, with the assistance of the statutory presumptions, have been derived from essentially criminal activities.

Engel and Others was in any event decided in the relatively early days of the Court and was the first case in which Article 6 § 2 had been directly addressed. The scope and field of application of paragraph 2 of Article 6 have undergone substantial development in the more recent case-law. In particular, in *Minelli v. Switzerland* (judgment of 25 March 1983, Series A no. 62) and *Sekanina v. Austria* (judgment of 25 August 1993, Series A no. 266-A), Article 6 § 2 was held to have an application even after the acquittal of a person on a criminal charge and where the proceedings against the defendant were at an end.

Perhaps more importantly, in *Engel and Others* the Court considered the complaint concerning the violation of presumption of innocence exclusively under paragraph 2 of Article 6 and did not view that paragraph in the light of the general obligation of a fair trial in paragraph 1. Since the Court's decision in that case there have been two important developments.

In the first place it is now well established that the general requirements of Article 6 apply at all stages of criminal proceedings until the final disposal of any appeal, including questions of sentencing. This was established by the Court in *Eckle v. Germany* (judgment of 15 July 1982, Series A no. 51) in relation to the requirement that proceedings should be determined within a reasonable time. This principle was applied in *Findlay v. the United Kingdom* (judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I) in the context of a complaint about the independence and impartiality of a tribunal before which the applicant pleaded guilty and where the only issue was one of sentence. More recently, it was applied in *T. v. the United Kingdom* ([GC], no. 24724/94, 16 December 1999, unreported) and *V. v. the United Kingdom* ([GC], no. 24888/94, ECHR 1999-IX), where the fixing of the tariff was held to be part of the determination of a criminal charge, which therefore had to be carried out by a judicial body satisfying the requirements of independence and impartiality.

The other development has been the readiness of the Court to see the requirements in other paragraphs of Article 6 as but specific aspects of the

requirements of fairness in paragraph 1. This is particularly so as regards the provisions of paragraph 3, where the Court has invariably considered complaints of violations of the requirements of individual sub-paragraphs in conjunction with the overall requirement of fairness in paragraph 1. Admittedly, one does not find case-law which so clearly spells out the link between paragraph 2 and paragraph 1. But such a link plainly exists, the presumption of innocence being a fundamental element of a fair trial. Moreover, there are clear indications to this effect in the Court's case-law. In *Lutz v. Germany* (judgment of 25 August 1987, Series A no. 123, p. 22, § 52), the Court noted that it had "consistently held paragraph 1 to embody the basic rule of which paragraphs 2 and 3 represented specific applications". In *John Murray v. the United Kingdom* (judgment of 8 February 1996, *Reports* 1996-I), the drawing of adverse inferences from an accused's silence was considered by the Court in terms of both paragraphs 1 and 2, the right to silence, the right not to incriminate oneself and the principle that the prosecution should bear the burden of proof being seen as aspects of a fair trial in paragraph 1, as well as specific requirements of the presumption of innocence in paragraph 2. Closer to the present case, in *Salabiaku v. France* (judgment of 7 October 1988, Series A no. 141-A) and *Pham Hoang v. France* (judgment of 25 September 1992, Series A no. 243), the Court examined the applicants' complaints about the application of presumptions against them under both paragraphs, noting in the former case that it started its examination under paragraph 2 because "the presumption of innocence, which is one aspect of the right to a fair trial secured under paragraph 1 of Article 6 ... is the essential issue in the case" (paragraph 25; see also paragraph 31).

It is true that in *Salabiaku* and *Pham Hoang*, in contrast to the present case, the Court was concerned with the application of presumptions not at the stage of sentencing but in the course of a trial on the merits and before the applicants had been convicted. However, as the Court of Appeal pointed out in *R. v. Benjafield and Others*, the European Court in *Minelli* emphasised that Article 6 § 2, like Article 6 § 1, "governs criminal proceedings in their entirety irrespective of the outcome of the prosecution and not solely the examination of the merits of the charge". More specifically, I see a close relationship between cases where presumptions are applied at the trial stage for the purpose of determining a defendant's guilt of the offence charged and cases such as the present where presumptions are applied after conviction and as part of the sentencing process for the purposes of determining what assets of the defendant are to be regarded as derived from the proceeds of drug trafficking and thus liable to confiscation. In my view, the Court of Appeal in *Benjafield and Others* was correct in holding that the confiscation procedure had to be considered on the basis that it was subject to the requirements of both paragraph 1 and paragraph 2 of Article 6 read together and in seeing the requirement of

"fairness" in this context as substantially importing the requirements laid down by the Court in *Salabiaku* and *Pham Hoang*.

As to the question whether the statutory presumptions as applied in the applicant's case exceeded the reasonable limits within which they are required to be confined and whether the rights of the defence were respected, I fully share the conclusion and reasoning of the majority of the Court.