



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

FOURTH SECTION

CASE OF BULLEN AND SONEJI v. THE UNITED KINGDOM

(Application no. 3383/06)

*This version was rectified on 27 January 2009
under Rule 81 of the Rules of Court*

JUDGMENT

STRASBOURG

8 January 2009

FINAL

08/04/2009

This judgment may be subject to editorial revision.

In the case of Bullen and Soneji v. the United Kingdom,

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

Lech Garlicki, *President*,

Nicolas Bratza,

Giovanni Bonello,

Ljiljana Mijović,

Ján Šikuta,

Mihai Poalelungi,

Nebojša Vučinić, *judges*,

and Fatoş Aracı, *Deputy Registrar*,

Having deliberated in private on 2 December 2008,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 3383/06) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two British nationals, Mr David Frederick Bullen and Mr Kamlesh Kumar Soneji (“the applicants”), on 19 January 2006.

2. The applicants were represented by Mr N. Seeley, a lawyer practising in Hertford. The United Kingdom Government (“the Government”) were represented by their Agent, Ms A. Sharif.

3. On 14 June 2007 the Acting President of the Chamber of the Fourth Section to which the case had been allocated decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 §3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. The applicants' conviction and sentence

4. The applicants were born in 1946 and 1962 respectively and live in London. They were charged with involvement in a money laundering scheme together with a third co-accused, Mr E.

5. On 24 March 2000 the second applicant pleaded guilty at a Crown Court to conspiracy to launder the proceeds of criminal conduct contrary to section 1 of the Criminal Law Act 1977. On 3 April 2000 the first applicant pleaded guilty to the same offence.

6. On 21 June 2000 the prosecution served notice under section 71(1)(a) of the Criminal Justice Act 1988 (CJA 1988, see paragraphs 40-41 below), as amended by the Proceeds of Crime Act 1995, indicating their intention to seek confiscation orders to recover the proceeds of the applicants' criminal conduct.

7. On 29 June 2000 counsel for the second applicant requested an early confiscation hearing and counsel for the co-accused, Mr. E., requested a confiscation hearing in September. The trial judge pencilled in a date on the week beginning 30 October 2000, as that was the first occasion on which he would be available. The trial judge further directed that the date would be considered again on the proposed date for sentence, 18 August 2000.

8. On 18 August 2000 the second applicant was sentenced to four and a half years' imprisonment and the first applicant was sentenced to six years' imprisonment. Prior to sentence the confiscation hearing was formally postponed until after passing sentence and was fixed for 30 October 2000, outside the six-month period required under section 72A of the CJA 1988.

2. Adjournment pending *R. v. Steele and Shevki*

9. On 30 October 2000 the case was listed for the confiscation hearing with a time-estimate of five working days. The applicants objected that the court lacked jurisdiction to hear the confiscation proceedings on the grounds that more than six months had elapsed since their convictions and that the judge had not considered whether there were "exceptional circumstances" warranting the imposition of the confiscation orders outside the statutory time-limit, as required by section 72A (3) of the CJA 1988, as amended (see paragraph 35 below).

10. On 3 November 2000 the trial judge held that he had jurisdiction to hear the confiscation proceedings. It was then agreed by the parties that the confiscation proceedings should be adjourned to await the outcome of a similar case which was due to be heard by the Court of Appeal, *R v Steele and Shevki*. The confiscation proceedings were adjourned until 5 February 2001.

11. On 21 November 2000 Mr E. was granted leave to appeal against his conviction. On 24 November 2000 both the applicants' applications for leave to appeal against sentence were refused by a single judge of the Court of Appeal.

12. On 14 December 2000 the Court of Appeal delivered its judgment in *R v. Steele and Shevki* ([2000] EWCA Crim 70). It found that although adjournments beyond the six-month period prescribed by statute should be avoided, exceptional circumstances such as the unavailability of a judge would not deprive a subsequent confiscation order of its validity.

13. On 31 January 2001 the confiscation proceedings were listed again for mention. Renewal of argument in relation to the Crown Court's jurisdiction to hear the confiscation proceedings, in light of the Court of Appeal's judgment in *R v. Steele and Shevki*, was listed for 8 and 9 March 2001. Following the hearing on 8 March 2001, the judge held that the court retained a common law power to adjourn beyond the statutory six-month time-limit in compelling circumstances such as where there was an illness or the judge was unavailable. In his opinion a statutory postponement citing exceptional circumstances was required only where the purpose of the postponement was to gather further information, and not in the instant case where the issue had been the unavailability of the judge.

3. Mr E.'s appeal and application for an adjournment

14. On 26 and 27 March 2001 the Court of Appeal heard and dismissed Mr E.'s appeal against conviction. On 30 March 2001 the confiscation proceedings were listed again for mention before the trial judge, to notify him of the result of Mr E.'s appeal. At this stage Mr E. was seeking leave to appeal to the House of Lords and was awaiting the decision of the Court of Appeal on his application for leave to appeal. The substantive hearing of the confiscation hearing was again adjourned.

15. On 2 May 2001 the Court of Appeal refused Mr E.'s application for leave to appeal to the House of Lords and declined to find that a question of law of general public importance was involved in the decision.

16. On 12 June 2001 the confiscation proceedings were listed for directions and with the agreement of all parties, the hearing was fixed to begin on 15 October 2001.

17. On 20 September 2001 the confiscation proceedings were again listed for mention at the request of Mr. E. who sought to adjourn the confiscation hearing that was fixed for 15 October 2001.

18. On 26 September 2001 the confiscation proceedings were again listed to consider Mr E.'s application for adjournment. The proceedings were adjourned to 28 January 2002 with a time estimate of three weeks.

4. The proceedings before the Court of Appeal

19. On 28 January 2002 the Crown Court imposed a confiscation order on the second applicant in the amount of GBP 75,350, to be paid within 18 months of the resolution of any appeal to the Court of Appeal, with a consecutive term of twelve months' imprisonment to be served in default.

20. On 4 February 2002 the second applicant lodged an application for leave to appeal, challenging the confiscation order on the ground that the Crown Court had no jurisdiction to make it because of the lapse of the six-month period provided by section 72A(3) of the CJA 1988.

21. On 7 February 2002 the Crown Court imposed a confiscation order on the first applicant in the sum of GBP 375,000, to be paid within 18 months of the resolution of any appeal to the Court of Appeal, with a consecutive term of 21 months' imprisonment to be served in default.

22. On 25 February 2002 the first applicant lodged an application for leave to appeal challenging the confiscation order on the same grounds as the second applicant (see paragraph 20 above).

23. On 12 December 2002 the second applicant obtained a Certificate of Inadequacy from the High Court. This entitled him to return to the Crown Court to seek a reduction of the confiscation order.

24. On 4 February 2003 the second applicant's case was listed before the Crown Court and the confiscation order was reduced to GBP 30,284, taking into account the Certificate of Inadequacy.

25. On 20 June 2003 the Court of Appeal allowed the applicants' appeals and quashed the confiscation orders and default sentences of imprisonment. They noted that on 29 June 2000, defence counsel for the second applicant and the co-accused Mr. E. had requested an early hearing at the Crown Court. However, the earliest date that the trial judge would be available was the week beginning 30 October 2000. That date was pencilled in by the trial judge, even though it was "more than four months away". The Court of Appeal considered that, given the importance attached by Parliament and the courts to the link between confiscation orders and sentencing, a high degree of judicial scrutiny was required before finding exceptional circumstances to justify the imposition of a confiscation order outside the six-month time-limit. In the present case, there was no evidence of any enquiry from 24 March 2000 (when the second applicant was the

first to plead guilty) onwards into whether a space could be found for the confiscation hearing during the six-month period.

26. Furthermore, on 3 November 2000, the trial judge had acknowledged with “admirable candour” when finding that he had jurisdiction to hear the confiscation proceedings outside the six-month time-limit that “no enquiry was made of the (applicants) as to the postponement” when the decision to hold the confiscation hearing in the week beginning 30 October 2000 was finally confirmed on 18 August 2000. Neither had there been any analysis of any factors which might amount to exceptional circumstances. The trial judge had also “candidly acknowledged more than once” that there were no exceptional circumstances. The Court of Appeal ultimately found that the failure to address the question as to whether the circumstances could properly be described as exceptional and to make a finding to that effect was fatal to the upholding of the confiscation orders. Though in principle confiscation orders should not be quashed for mere defects in procedure, if the statutory requirement of exceptional circumstances was to be more than a “mere incantation”, enquiry into the circumstances and the possibility and feasibility of a timely hearing were required.

27. On 30 July 2003 the Court of Appeal certified that a point of law of general public importance was involved in the decisions.

5. The proceedings before the House of Lords

28. On 1 April 2004 the House of Lords granted the prosecution leave to appeal against the decisions of the Court of Appeal.

29. On 21 July 2005 the House of Lords reversed the decisions of the Court of Appeal and ordered the latter to re-impose the confiscation orders in respect of both applicants.

30. The House of Lords observed that the core problem before it was whether, as a matter of statutory construction, failure to comply with a statutory time-limit would have the effect of invalidating an act. The fact that Parliament cast statutory requirements in imperative form without expressly specifying the consequences of a failure to comply had caused difficulty and had been the source of a great deal of litigation over the preceding 130 years. A distinction had first evolved between mandatory and directory requirements; where a requirement was mandatory, a failure to comply had the effect of invalidating the act in question but where a requirement was merely directory, a failure to comply did not invalidate the act. Over the years, a further distinction had been made between two types of directory requirements: requirements of a purely regulatory character, where a failure to comply would never invalidate an act, and requirements where a failure to comply would not invalidate an act provided that there was substantial compliance. In *London & Clydeside Estates Ltd v. Aberdeen*

District Council [1980] 1 WLR 182, 189E-190C, however, Lord Hailsham had emphasised that it was within the courts' inherently discretionary jurisdiction to determine the nature of a particular statutory requirement and to examine the consequences of non-compliance before determining whether Parliament had intended total invalidity. In the later case of *Wang v. Commissioner of Inland Revenue* [1994] 1 WLR 1286, the Privy Council followed and applied the dictum of Lord Hailsham in *London and Clydeside Estates* (cited above). The House of Lords also took into consideration a number of cases in which the Court of Appeal had adopted the same approach, and parallel developments in the courts of New Zealand, Australia and Canada.

31. In the present case, the House of Lords considered that the prime purpose behind the statutory provision for confiscation orders was the recovery of any financial benefit that an offender might have obtained from his criminal conduct. The Law Lords rejected the applicants' argument that, given the criminal law context, a strict approach to the construction of section 72A of the CJA 1988 should be adopted and instead applied a teleological approach. They noted that section 71(1) of the CJA 1988 imposed a positive duty to proceed with confiscation proceedings and that the time limits under section 72A were linked to the date of conviction rather than sentence. This was considered to be evidence that Parliament's intention was the early disgorgement of an offender's criminal gains. Though Parliament had envisaged that courts would make confiscation orders before sentencing, unless they exercised their postponement power under section 72(A)(1), it was of some significance that Parliament considered it more important that a confiscation order should be made than that it should be made before the defendant was sentenced. Though no common law power to adjourn existed, Parliament could not have intended to disable a court from making a confiscation order after sentence merely because the time-limits were not strictly adhered to.

32. In the present case, the Crown Court had postponed its final decision on confiscation orders in good faith. The prejudice to the applicants was not significant and was outweighed by the countervailing public interest in not allowing convicted offenders to escape confiscation for what were no more than *bona fide* errors in the judicial process. In any event, there would always be the safeguard of judicial review should there be an apparent abuse of process.

33. In October 2005 the Court of Appeal re-imposed the confiscation orders and sentences of imprisonment in default on the applicants.

II. RELEVANT DOMESTIC LAW

34. Section 1 of the Proceeds of Crime Act 1995 amends section 71 of the Criminal Justice Act 1988 as follows:

“Section 1 (2) – For subsections (1) to (3) (orders confiscating the proceeds of an offence) there shall be substituted the following subsections— (1) Where an offender is convicted, in any proceedings before the Crown Court or a magistrates’ court, of an offence of a relevant description, it shall be the duty of the court—

(a) if the prosecutor has given written notice to the court that he considers that it would be appropriate for the court to proceed under this section, or

(b) if the court considers, even though it has not been given such notice, that it would be appropriate for it so to proceed,

to act as follows before sentencing or otherwise dealing with the offender in respect of that offence or any other relevant criminal conduct.

(1A) The court shall first determine whether the offender has benefited from any relevant criminal conduct.

(1B) Subject to subsection (1C) below, if the court determines that the offender has benefited from any relevant criminal conduct, it shall then—

(a) determine in accordance with subsection (6) below the amount to be recovered in his case by virtue of this section, and

(b) make an order under this section ordering the offender to pay that amount.”

35. Section 28 of the Criminal Justice Act 1993 amends the Criminal Justice Act 1988 accordingly:

“28. The following section shall be inserted in the Criminal Justice Act 1988, after section 72—

Postponed determinations.

72A. — (1) Where a court is acting under section 71 above but considers that it requires further information before—

(a) determining whether the defendant has benefited as mentioned in section 71(2)(b)(i) above;

(b) determining whether his benefit is at least the minimum amount; or

(c) determining the amount to be recovered in his case by virtue of section 72 above,

it may, for the purpose of enabling that information to be obtained, postpone making that determination for such period as it may specify.

(2) More than one postponement may be made under subsection (1) above in relation to the same case.

(3) Unless it is satisfied that there are exceptional circumstances, the court shall not specify a period under subsection (1) above which—

(a) by itself; or

(b) where there have been one or more previous postponements under subsection (1) above or (4) below, when taken together with the earlier specified period or periods,

exceeds six months beginning with the date of conviction.”

36. The Human Rights Act 1998 (“1998 Act”) entered into force on 2 October 2000. Section 3(1) provides:

“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

Section 4 of the 1998 Act provides (so far as relevant):

“(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility. ...

(6) A declaration under this section ... -

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it was given; and

(b) is not binding on the parties to the proceedings in which it is made.”

Section 8 provides (so far as relevant):

“(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining—

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.”

Section 10 provides:

“(1) This section applies if –

(a) a provision of legislation has been declared under section 4 to be incompatible with a Convention right and, if an appeal lies –

(i) all persons who may appeal have stated in writing that they do not intend to do so; or

(ii) the time for bringing an appeal has expired and no appeal has been brought within that time; or

(iii) an appeal brought within that time has been determined or abandoned; or

(b) it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights made after the coming into force of this section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.

(2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

37. The applicants complained that the length of the criminal proceedings against them had contravened the “reasonable time” requirement. They further complained that they had been deprived of their right to a fair trial by the domestic courts’ failure to abide by the statutory time-limit for the imposition of confiscation orders. They invoked

Article 6 § 1 of the Convention, which reads, in so far as relevant, as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by [a] ... tribunal...”

38. The Government contested that argument.

A. As regards the length of the proceedings

1. Admissibility

39. The Government contended that the applicants had failed to exhaust domestic remedies as they did not complain about the alleged unreasonable length of the proceedings before the national courts. The applicants’ argument before the domestic courts had been that the Crown Court had lost its jurisdiction to impose confiscation orders by failing to comply with the statutory requirements of the CJA 1988, and not that there had been a breach of the reasonable time requirement under Article 6 of the Convention.

40. The Government argued further that the applicants could have sought to expedite their confiscation hearings, by relying on the Human Rights Act 1998. The applicants had agreed that the confiscation hearing should be conducted by the trial judge and had not applied at any stage for their cases to proceed to a confiscation hearing on the basis that there would otherwise be a breach of the reasonable time requirement. Furthermore, they had not sought to sever their case from that of their co-accused Mr E., which might have speeded up the process.

41. The applicants contended that their argument before the domestic courts, which centred on the statutory time-limit provided by section 72A of the CJA 1988, was in effect a complaint concerning the reasonable time requirement under Article 6 § 1 of the Convention.

42. The applicants further asserted that all parties had agreed that the confiscation proceedings should be conducted by the trial judge. Moreover, the procedure under national law was that the trial judge should hear the confiscation proceedings. They contested the Government’s suggestion that they should have sought to sever their cases from that of their co-accused Mr E. Mr E. had at all material times been in a different position, as the Crown Court had retained its statutory jurisdiction to impose a confiscation order on him.

43. The Court reiterates that Article 35 § 1 of the Convention requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but that no recourse need be had to remedies which are

inadequate or ineffective (see, for example, *Kucheruk v. Ukraine*, no. 2570/04, § 108, 6 September 2007). The existence of the remedy must be sufficiently certain, failing which it will lack the requisite accessibility and effectiveness. Article 35 of the Convention also provides for a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V; and *Mifsud v. France* (dec.), no. 57220/00, § 15, ECHR 2002-VIII).

44. The Court will address the Government's submissions on non-exhaustion in turn. First, as regards the Government's preliminary objection that the applicants never complained about the length of the confiscation proceedings domestically, the Court finds that in contesting the Crown Court's jurisdiction to act outside the statutory time-limit contained in the CJA 1988, the applicants invoked the reasonable time requirement under Article 6 § 1 of the Convention in substance.

45. Second, in relation to the Government's assertion that the applicants failed to expedite the confiscation proceedings by relying on the Human Rights Act 1998, the Court finds that the Government have neither cited with sufficient clarity a particular remedy that was available to the applicants, nor a similar case in which such an alleged remedy had been successfully pursued before the domestic courts. It follows that the Government have failed to identify a sufficiently certain remedy which was available to the applicants and which they failed to exhaust. They have therefore failed to discharge the burden of proof incumbent on them in claiming non-exhaustion. It follows that the Government's objection on non-exhaustion must therefore be dismissed.

46. Finally, as to the Government's submissions that the applicants agreed to their confiscation hearings being heard by the trial judge and did not seek to sever their cases from that of their co-accused, Mr E., the Court finds that these issues go to the merits of the application.

47. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. *Merits*

48. The periods to be taken into consideration began on 24 March 2000 and 3 April 2000, respectively, when the second and first applicants were each convicted and became liable to have confiscation orders made against them. The periods ended in October 2005 when the Court of Appeal re-imposed the confiscation orders and sentences of imprisonment in

default, following the House of Lords' order of 21 July 2005. The relevant proceedings thus lasted approximately five years and six months.

(a) The parties' submissions

i) The Government

49. The Government submitted that the Crown Court and the Crown Prosecution Service were in a position to deal with the confiscation hearing in October 2000. This was just six months from the date of the applicants' convictions and less than three months after they had been sentenced to imprisonment. The period of time was entirely reasonable having regard to the complexity of the case and the desirability of allowing the parties time to prepare for the confiscation hearing. They further maintained that any subsequent delay was attributable to the applicants' conduct, as they had put in question the Crown Court's jurisdiction to make confiscation orders against them, and that of Mr E., who had sought leave to appeal against his conviction.

50. As to the complexity of the case, the Government asserted that the confiscation proceedings in the applicants' case involved an extremely complicated issue of law, which eventually had to be determined by the House of Lords. The factual issues were complicated by the proceedings against the co-accused, Mr E., against whom a confiscation order was also being sought.

51. The Government cited the following instances as examples of delay attributable to the applicants' conduct. First, the applicants' request for an adjournment pending the Court of Appeal's decision in *R. v. Steele and Shevki*, following their challenge to the Crown Court's jurisdiction to impose confiscation orders against them outside the statutory time-limit. Second, the second applicant's changing of his legal representative in January 2001, which led to a new timetable being agreed between the parties, with the substantive confiscation hearing fixed to take place between 2 April 2001 and 11 May 2001. Thirdly, the applicants did not press for the confiscation hearing to take place in April and May 2001, but rather agreed to the hearing being fixed for 15 October 2001. Finally, the Government asserted that it was the third co-accused, Mr E., who was responsible for the adjournment of the confiscation hearing from 15 October 2001 to 28 January 2002.

52. The Government argued that both the prosecution and Crown Court had acted with reasonable expedition at all times and that any delays were not attributable to the State. Had the applicants not raised objections to the Crown Court's jurisdiction, the confiscation proceedings would have been concluded much earlier.

ii) The applicants

53. The applicants submitted that the ultimate imposition of the confiscation orders against them did not take place until October 2005. They highlighted that, according to the relevant provisions of the CJA 1988, the confiscation order and sentence in default should have been imposed against the first applicant by 3 October 2000. In the case of the second applicant this should have been done by 24 September 2000. There was therefore a delay of over five years between when the confiscation orders should have been imposed and when they were eventually imposed. Relying on this Court's judgment in *Howarth v. the United Kingdom*, (no. 38081/97, 21 September 2000) they argued that this delay constituted a breach of the reasonable time requirement under Article 6 § 1 of the Convention.

54. As to the Government's contention that the confiscation proceedings would have been concluded by October 2000 but for the applicants' conduct, the applicants replied that they were entitled in law to raise the argument that the Crown Court lacked jurisdiction to make the confiscation orders against them. They therefore could not be blamed for delaying the process by exercising their legal right. All parties had agreed that arguments in connection with the jurisdiction point should be adjourned to await the Court of Appeal's decision in *R. v Steele v Shevki*. As the confiscation proceedings had been partly heard already it was also agreed that the same judge, prosecution counsel and defence counsel should be available to attend when the proceedings were eventually resumed. All parties had agreed that the confiscation hearing should be conducted by the trial judge and the procedure under domestic law was that the trial judge should hear the confiscation proceedings.

55. The applicants contested the Government's assertion that the Crown Court and prosecution had acted at all times with reasonable expedition. They cited two specific examples of delay attributable to the State: first, the Crown Court failed to provide a confiscation hearing within six months of their convictions as required by statute and, secondly, the prosecution failed to serve the statutory notices that they intended to pursue confiscation proceedings against the applicants until 21 June 2000.

56. As regards the complexity of the case, the applicants submitted that their cases were not complicated by the presence of the third co-accused, Mr E. His case was to be distinguished from theirs in that he did not plead guilty but rather continued with his trial. Moreover, he was on 30 October 2000 still within the "six months from the date of conviction" time period required by section 72A of the CJA 1988. The applicants contested the Government's assertion that the fact that the Crown Court's jurisdiction to make confiscation orders outside the statutory time-limit was being challenged in a number of cases before the Court of Appeal was evidence of complexity. The issue in the present case was fairly straightforward:

whether the Crown Court had complied with the statutory regime which governed the imposition of confiscation orders in the applicants' case.

57. They asserted the importance of what was at stake for them, namely that they faced a return to prison after having served their original sentences and having been released in July 2005. They also argued that in the case of sentences of imprisonment in default of payment, offenders were not entitled to remission of their sentences and were obliged to serve full terms. Furthermore, the passage of time since their convictions had impaired their ability to pay the confiscation orders and thus rendered them more vulnerable to having to serve their respective sentences of imprisonment in default.

b) The Court's assessment

58. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II and *Çaplik v. Turkey*, no. 57019/00, § 37, 15 July 2005).

59. The Court recalls its judgment in the case of *Crowther v. the United Kingdom*, (no. 53741/00, §§ 24 and 25, 1 February 2005) which also concerned a complaint concerning the length of criminal proceedings where a confiscation order had been imposed. The Court re-affirmed the principle that "Article 6 § 1 applies throughout the entirety of proceedings for... the determination of ... any criminal charge, including proceedings whereby a sentence is fixed" and went on to find that "confiscation proceedings of the type brought against the applicant are 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."

60. As to the complexity of the case, the Court observes that the issue in question, namely the exact legal consequences of non-compliance with the statutory time-limits under section 72(A) (3) of the CJA 1988, had been a point of contention for many years. Indeed, the Court of Appeal had certified in June 2003 that a point of law of general public importance was involved (see paragraph 27 above). The matter eventually fell to be resolved by the House of Lords, who were called upon to conduct a difficult and complex exercise of statutory interpretation, for which they examined the legislative history behind the provision for confiscation orders and the intention of Parliament in the event that the statutory time-limits were not complied with (see paragraphs 30 to 32 above).

61. As for the period prior to 30 October 2000, the Court notes the Court of Appeal's criticisms of the trial judge for not conducting any enquiry from 24 March 2000 (when the second applicant was the first to plead guilty)

onwards into whether a space could be found for the confiscation hearing during the six-month statutory period (see paragraph 25 above). It further takes into account the Court of Appeal's observation that the trial judge had neither consulted the applicants about the postponement beyond the six-month period nor made any attempt to consider whether there existed any exceptional circumstances for the delay as required by statute (see paragraph 26 above). The Court finds no reason to disagree with the findings of the Court of Appeal on this matter and consequently considers that this period of delay is attributable to the conduct of the State authorities.

62. As regards the adjournment pending the Court of Appeal's decision in *R. v Steel and Shevki* which was delivered on 14 December 2000, the Court notes that all parties agreed to it. Moreover, the applicants cannot be blamed for exercising their legal entitlement to have the question of the Crown Court judge's jurisdiction resolved. It therefore finds that any delay that arose as a consequence cannot be attributed to the applicants' conduct. Nor, however, can the State be criticised in respect of this delay.

63. As to the period after 14 December 2000, the Court does not find any evidence to substantiate the Government's assertion that the second applicant's changing his legal representatives significantly delayed the proceedings.

64. Nor, in the Court's opinion, can the applicants be criticised for agreeing that their respective confiscation hearings should be conducted by the trial judge. In this vein, the Court notes that the Government do not contest the applicants' assertion that all the parties had agreed that the trial judge should preside over the confiscation hearings. Moreover, examination of the applicable legislation, in particular, section 71 of the CJA 1988 as amended by section 1 of the Proceeds of Crime Act 1995 (see paragraph 34 above) demonstrates that it is for the Crown Court trial judge to make a confiscation order.

65. Finally, as regards the Government's submissions that the applicants did not press for the confiscation hearing to take place in April and May 2001, but rather agreed to the hearing being fixed for 15 October 2001, and their preliminary objection that the applicants failed to exhaust domestic remedies by not seeking to sever their cases from that of their co-accused, Mr. E., the Court has had regard to its findings in the cases of *Price and Lowe v. the United Kingdom* (nos. 43185/98 and 43186/98, § 23, 29 July 2003) and *Crowther v. the United Kingdom* (no. 53741/00, § 29, 1 February 2005) where it held:

“a principle of domestic law or practice that the parties to civil proceedings are required to take the initiative with regard to the progress of the proceedings, does not dispense the State from complying with the requirement to deal with cases in a reasonable time...The manner in which a State provides for mechanisms to comply with this requirement, whether by way of increasing the numbers of judges, or by automatic time-limits and directions, or by some other method, is for the State to

decide. If a State lets proceedings continue beyond the “reasonable time” prescribed by Article 6 of the Convention without doing anything to advance them, it will be responsible for the resultant delay.”

66. The domestic court could have decided to sever the applicants’ cases of its own motion at the hearing of 30 March 2001 and cannot rely on the applicants’ omission to apply for severance in attributing the delay entirely to the latter’s conduct. Similarly, it was open to the domestic court to expedite the confiscation hearing itself. The Government cannot therefore attribute delay to the applicants’ conduct in agreeing to the hearing being fixed for October 2001, when the domestic authorities did nothing to advance the proceedings themselves. This being so, the Government’s argument concerning the alleged failure of the applicants to sever their cases from that of their co-accused Mr E. cannot be accepted (see paragraph 46 above).

67. As to the conduct of the authorities, the Court notes certain periods of delay which appear to be attributable to the conduct of the State. First, there was a lapse of 11 months between the Crown Court’s decision on 8 March 2001 that it had jurisdiction to make the confiscation orders and their actual imposition of the orders against the applicants on 28 January 2002 and 7 February 2002.

68. Second, there was a delay of 18 months between the lodging of the applicants’ appeals in February 2002 and the Court of Appeal’s eventual delivery of its judgment on 20 June 2003.

69. Finally, the Court notes a delay of two years between the Court of Appeal’s certification of the case on 30 July 2003 and the House of Lords’ judgment of 21 July 2005.

70. As for what was at stake for the applicants during these proceedings, it is observed that the first and second applicants faced confiscation orders for substantial sums of money, namely GBP 375,000¹ and GBP 30,284 respectively. In the event that they were unable to pay these sums, they would be liable to considerable terms of imprisonment of 21 months’ and 12 months’ respectively. Due to the earlier quashing of the confiscation orders by the Court of Appeal and their subsequent re-imposition following the direction by the House of Lords, the applicants faced this prospect after the lapse of over five years since their convictions in early 2000 and at a time when they had both already served their original sentences of imprisonment and had been released from prison. The Court recalls its judgment in the case of *Howarth v. the United Kingdom* (no. 38081/97, §§ 29 and 30, 21 September 2000), relied on by the applicant at paragraph 58 above. There it found a delay of two years between the applicant’s original sentence which was non-custodial and his subsequent custodial sentence, following the Attorney General’s reference to the Court of Appeal

¹ Rectified on 27 January 2009: “GBP 75,350” was changed to read “GBP 375,000”.

for review of his sentence, to be in breach of the reasonable time requirement under Article 6 § 1 of the Convention. The Court also takes into consideration the applicants' submission (see paragraph 57 above) that the passage of time had made it significantly more difficult for them to pay the sums involved in the confiscation orders.

71. In light of the importance of what was at stake for the applicants in this case and without discounting the complexity of the legal issue in question, the Court finds the periods of delay attributable to the State, when taken cumulatively, to be unreasonably long and in breach of the reasonable time requirement as provided by Article 6 of the Convention.

72. There has accordingly been a violation of Article 6 § 1 of the Convention.

B. As regards the unfairness of the proceedings

73. The applicants further complained that the imposition of the confiscation orders against them outside the statutory time-limit, without consideration as to whether there were any exceptional circumstances, rendered the proceedings against them unfair.

74. The Government submitted that the House of Lords had authoritatively decided the fact that the confiscation orders were made outside the six-month statutory time period did not deprive them of their validity. The applicants' arguments were an attempt to use the Court as a fourth instance appeal against the House of Lords' statutory interpretation of the relevant provisions of the CJA 1988.

75. The Court recalls at the outset that it is not its task to act as an appeal court of "fourth instance" by calling into question the outcome of the domestic proceedings. The domestic courts are best placed to interpret and apply rules of substantive and procedural law (see, amongst many authorities, *Gurepka v. Ukraine*, no. 61406/00, § 45, 6 September 2005).

76. The Court further recalls its judgment in the case of *C.R. v the United Kingdom*, (22 November 1995, § 34, Series A no. 335-C), which with regards to Article 7, held that it "cannot be read as outlawing gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could be reasonably foreseen."

77. The House of Lords gave full and reasoned arguments in support of their interpretation of section 72A of the CJA 1988, giving careful consideration in particular to Parliament's intention as to the consequences of non-compliance with the applicable statutory provisions and the ultimate purpose behind the provision for confiscation orders (see paragraphs 30 to 32 above).

78. The applicants acknowledged that the Crown Court's jurisdiction to impose confiscation orders outside the statutory time-limit was a contested

issue which had resulted in a spate of related cases being heard before the Court of Appeal. There are no grounds to suggest that the ultimate re-imposition of the confiscation orders against the applicants, albeit significantly delayed, was inconsistent with the essence of the offences to which they had pleaded guilty or that they were not reasonably foreseeable, given the contentious legal debate over the domestic courts' jurisdiction outside the time-limit provided by section 72A(3) of the CJA 1988. In sum, the Court finds no evidence to substantiate the applicants' complaint that the imposition of the confiscation orders against them outside the statutory time-limit rendered the proceedings unfair within the meaning of Article 6 § 1 of the Convention.

79. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

81. The applicants did not submit a claim for just satisfaction.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the excessive length of the proceedings admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 8 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Lech Garlicki
President