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АВТ. КОД. ДОК. ТИП

GET THAT
DUMB NEWSHAWK!
GIMME A GUN,
CHICK—GIMME
A GUN!



CHARLES
BIBRO

Almost everything in life has a bright and a dark side. Confiscation of criminal proceeds and asset recovery are not an exception to this rule.

Let's look at their dark side concerning human rights by means of the case *Paulet v. the United Kingdom*



CASE OF PAULET v. THE UNITED KINGDOM
(Application no. 6219/08)
STRASBOURG 13 MAY 2014

- ▶ The case originated in an application against the United Kingdom of Great Britain and Northern Ireland lodged with the European Court of Human Rights under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms by an Ivorian national, Mr Didier Pierre Paulet (who was born in 1984 and lived in Leeds) , on 4 February 2008.



Mr. Paulet arrived in the United Kingdom on 26 January 2001 and thereafter lived illegally at an address in Bedford.

Whilst living in the United Kingdom he successfully applied for three jobs using a false French passport. Between April 2003 and November 2004 he was employed by a recruitment agency. Between August 2004 and January 2006 he was employed in a cash and carry business and between January 2006 and February 2007 he was employed as a forklift truck driver.

He had used the false passport to support his assertion that he was entitled to work in the United Kingdom. All of his employers subsequently stated that they would not have employed him had they known of his true immigration status. Between April 2003 and February 2007 he earned a total gross salary of 73,293.17 pounds sterling (GBP) from his employment. At the end of this period he had total savings of GBP 21,649.60.



In January 2007 Mr. Paulet applied to the Driving and Vehicle Licensing Agency for a provisional driving licence. The application was accompanied by the same false French passport that the applicant had used to obtain employment in the United Kingdom. When the falsity of the passport was discovered, the police were informed.

On 4 June 2007 he pleaded guilty in the Crown Court at Luton to three counts of dishonestly obtaining a pecuniary advantage by deception (counts one, two and three on the indictment). He also pleaded guilty to one count of having a false identity document with intent (count four), one count of driving whilst disqualified (count five) and one count of driving a motor vehicle without insurance (count six).



On 29 June 2007 he was sentenced to concurrent terms of fifteen months' imprisonment for the first four counts together with a consecutive sentence of two months' imprisonment for the offence of driving whilst disqualified. No separate sentence was imposed for driving without insurance. The trial judge also recommended the applicant for deportation.

In addition to the custodial sentence and the recommendation for deportation, the prosecution sought a confiscation order under section 6 of the Proceeds of Crime Act 2002 in respect of Paulet's earnings. The trial judge accepted that Paulet had paid all the tax and national insurance due on his earnings and that the money he had made from his employment had been truly earned. After deducting tax and national insurance payments, it was calculated that the benefit he received from his earnings was GBP 50,000. It was agreed that of the GBP 50,000 he still had assets of GBP 21,949.60. On this basis, on 29 June 2007 the trial judge imposed a confiscation order in the sum of GBP 21,949.60 upon him, with a consecutive sentence of twelve months' imprisonment to be served in default of payment. Thus, the confiscation order had the effect of depriving the applicant of all of the savings that he had accumulated during the four years of employment.



After facing many difficulties, Paulet could appeal to the Court of Appeal against the imposition of the confiscation order.

The issue on appeal was whether it was oppressive and therefore an abuse of process for the Crown to seek and the court to impose a confiscation order for what amounted to the applicant's entire savings over nearly four years of genuine work. There would be an abuse of process where, on a correct application of the law to the facts, the resulting "benefit" figure yielded a disproportionate or oppressive result. It was noted that Parliament had intended the Proceeds of Crime Act 2002 to be applied in a manner compatible with the requirements of the Convention. Therefore, in light of Article 1 of Protocol No. 1, in order to remain proportionate the application of the confiscation regime had to remain rationally connected to the public interest aims pursued and go no further than necessary to achieve them.



On 28 July 2009, the Court of Appeal held that the decision to seek a confiscation order against the applicant did not constitute an abuse of process. The court therefore dismissed the applicant's appeal against the order.



His earnings, of course, reflected the fact that he had done the necessary work, as we shall assume, to the satisfaction of his various employers. But the opportunity for him to do so, that is the pecuniary advantage, was unlawfully obtained. If the employee worked to his employer's satisfaction, and he paid his tax and National Insurance contributions on his earnings, and his deception either lacked any significant wider public interest, or, perhaps because of the passage of time, but for whatever reason, had ceased to have any meaningful effect on his employers' decision to continue his employment, the resolution of the issue might well be different. As it is there was here a wider public interest. The appellant was deliberately circumventing the prohibition against him seeking remunerative employment in this country in any capacity. No basis for interfering with the order made in the Crown Court has been shown. In our judgment the appropriate link between the appellant's earnings and his criminal offences, in the context of the wider public interest, was plainly established.



The applicant, who unsuccessfully asked for asylum, complains that the confiscation order was a disproportionate interference with his right to peaceful enjoyment of his possessions within the meaning of Article 1 of Protocol No. 1, which reads as follows:

“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.”



The ECHR concluded that *in assessing whether or not the confiscation order in the present case was “oppressive” and thus an “abuse of process”, the Court of Appeal did ask whether or not the order was in the public interest. However, having decided that it was, they did not go further by exercising their power of review so as to determine “whether the requisite balance was maintained in a manner consonant with the applicant’s right to ‘the peaceful enjoyment of his possessions’, within the meaning of the first sentence of Article 1”*

The foregoing considerations are sufficient to enable the Court to conclude that in the circumstances of the applicant’s case there has been a violation of Article 1 of Protocol No. 1 to the Convention.



The Court recalls that the violation found in the present case was procedural in character, based as it was upon the lack of a review of the confiscation order capable of satisfying the requirements of Article 1 of Protocol No. 1 to the Convention. It cannot be excluded that, had a sufficiently wide review been conducted by the domestic courts, this Court would have found an outcome involving confiscation of the applicant's remaining assets, as occurred in the present case, to be consistent with the Convention. The sum claimed by the applicant in respect of pecuniary damage as just satisfaction under Article 41 is in the region of the amount of the confiscation order made against him ((...)). However, in the absence of a proximate causal link between the procedural violation found and financial loss sustained by the applicant by reason of the confiscation order, the Court cannot make an award to the applicant under this head. Nevertheless, the Court recognises that the applicant must have suffered some anguish and frustration as a result of the failure of the domestic courts to conduct a Convention-compliant review of the confiscation order. It would therefore award him EUR 2,000 in respect of such non-pecuniary prejudice.



The ECHR

Held, by six votes to one, that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

Held, by five votes to two,

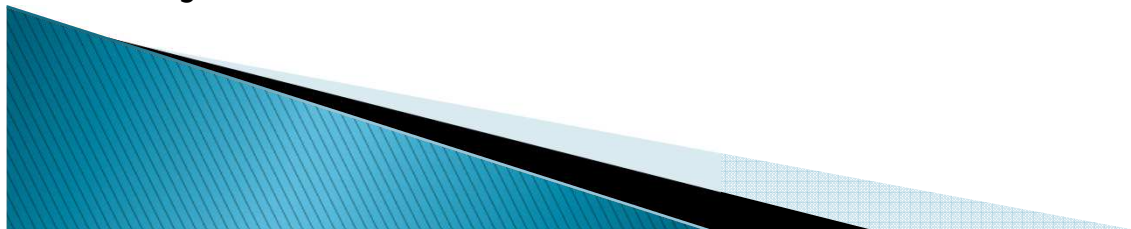
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into pounds sterling at the rate applicable at the date of settlement:

(i) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;


(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

Dismissed unanimously, the remainder of the applicant's claim for just satisfaction.



SEPARATE OPINION OF JUDGE KALAYDJIEVA JOINED BY JUDGE
BIANKU AS REGARDS ARTICLE 1 OF PROTOCOL NO. 1 TO THE
CONVENTION

Unlike in Phillips, however, it has not been submitted that such employment constituted itself a crime on the part of the applicant, or that the regulation of the domestic labour market went so far as to make any irregularly obtained employment criminal or punishable in any manner. Likewise, it has not been contended that the applicant's work caused any public or private harm rather than contributing to the public welfare. Notwithstanding this situation, the applicant's genuinely earned savings were defined and confiscated as the "proceeds of the crime" of using a false passport – an act for which the applicant was punished in separate proceedings. The difference between the reasonable assumption as to the criminal origin of the confiscated property in the case of Phillips and the remote or indeed non-existent link between the use of a false passport and the genuine earning of the confiscated amounts in the present case appears quite obvious.



(...)Limiting the scope of the present case to only some of its “procedural aspects”, the majority failed to express any views on whether the applicable legislation was sufficiently precise as to the conditions for forfeiture, whether the domestic courts were required to analyse the link between the assets proposed for forfeiture and the specific crime, and whether they did so in the present case.

(...) For these reasons I also disagree with the majority’s view as to the “absence of a proximate causal link between the procedural violation found and financial loss sustained by the applicant by reason of the confiscation order” (see paragraph 73). In the absence of any subsequent examination of this causal link and/or the proportionality of the uncontested interference, the applicant should have been awarded compensation in pecuniary damage, and not merely for moral damage.



DISSENTING OPINION OF JUDGE WOJTYCZEK

I respectfully disagree with the view of the majority that there has been a violation of Article 1 of Protocol No. 1 and I also disapprove of the methodology applied in the reasoning of the judgment.

(...) The paradox of the approach adopted by the majority is that possessions obtained as a result of crime enjoy protection under Article 1 of Protocol No. 1 against excessive interference. According to the approach proposed by the majority, they may be retained by a criminal if their confiscation would not strike a fair balance between the individual and public interests at stake.

Moreover, the approach taken by the majority opens the way to the review of the proportionality of punishments imposed by the domestic courts in criminal matters, and may transform the Court into a further instance assessing the merits of criminal cases.

