

[2007–09 Gib LR 304]**IN THE MATTER OF PITCHFORD**

SUPREME COURT (Pitto, Ag. J.): February 16th, 2009

Criminal Procedure—proceeds of criminal conduct—restraint order—variation—applicant to prove just to vary and no available assets to meet expenses—funds usually made available when real prospect of appeal—variation may be refused if appeals exhausted or evidence of other assets

Criminal Law—drugs—investigation into drug trafficking—confiscation of assets—UK confiscation order may be registered in Gibraltar under Drug Trafficking Offences Act 1995 (Designated Countries and Territories) Order 1999 notwithstanding initially made under 1990 Order—1995 and 1999 Orders contain provisions to preserve earlier proceedings

The defendant applied for variation of a restraint order made by the Supreme Court on November 28th, 1994.

The defendant was arrested and charged in England on September 25th, 1994 in connection with the importation and possession of cannabis resin. A restraint order was made against him in England and, on the application of the Attorney-General on behalf of the UK Government, subsequently in Gibraltar. A confiscation order was also made against him by the English court on August 13th, 1998, which the UK Government sought to register in Gibraltar under the Drug Trafficking Offences Act 1995 (Designated Countries and Territories) Order 1999. As preliminary issues, the defendant challenged the validity of the restraint order and the jurisdiction of the court to register the confiscation order. The defendant applied to vary the restraint order.

The defendant submitted that (a) the restraint order was invalid because it appeared to have been made at the request of H.M. Customs & Excise, rather than the Home Office, which was the appropriate authority empowered to issue such requests under the Drug Trafficking Offences Act 1988 (Designated Countries and Territories) Order 1990; (b) the court had no jurisdiction under the 1999 Order to register a confiscation order made in proceedings commenced under the 1990 Order; and (c) the restraint order should be varied so that the restrained assets could be used to meet the legal costs of his challenge to the registration of the confiscation order.

The UK Government submitted in reply that the court did have jurisdiction to register the confiscation order as the legislation created bridging provisions to save proceedings brought under the 1990 Order.

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The court further considered whether the restraint order had been requested by the Home Office and if variation of the order was warranted.

Held, dismissing the application:

(1) The application for variation of the restraint order would be refused as the defendant had not satisfied the court that he had no other assets or income to fund the challenge to the registration of the confiscation order or meet his business and living expenses. When an applicant had a real prospect of appeal then funds should be made available to make such a challenge. The onus was on the defendant to show that it would be just to make the variation sought and that he had no other assets with which to meet his expenses. Since he had exhausted his appeals in England, and had not proved to the court that he had no other assets to fund the challenge—given the inadequacy of his affidavit of means and his recent expenditure—the application would be dismissed. Further, the validity of the restraint order would be upheld as the court was satisfied on the balance of probabilities that it had been correctly requested by the Home Office (paras. 3–4; paras. 10–13).

(2) The court had jurisdiction under the Drug Trafficking Offences Act 1995 (Designated Countries and Territories) Order 1999 to register a UK confiscation order made in proceedings under the Drug Trafficking Offences Act 1988 (Designated Countries and Territories) Order 1990 since saving provisions had been inserted in para. 1(3) of both the 1995 and 1999 Orders to preserve such proceedings, given the importance of mutual legal assistance to combat the drugs trade (para. 8).

Cases cited:

- (1) *Customs & Excise Commrs. v. Norris*, [1991] 2 Q.B. 293; [1991] 2 W.L.R. 962; [1991] 2 All E.R. 395, referred to.
- (2) *P, In re*, English High Ct. (Admin. Ct.), November 6th, 1998, unreported, referred to.
- (3) *Serious Fraud Office v. X*, [2005] EWCA Civ 1564, *dictum* of Clarke, M.R. applied.

Legislation construed:

Drug Trafficking Offences Act 1995 (Designated Countries and Territories) Order 1995 (L.N. 1995/041), para. 1: The relevant terms of this paragraph are set out at para. 7.

Drug Trafficking Offences Act 1995, s.32 (as amended by Schedule 2 to the Drug Trafficking Offences Act 1995 (Designated Countries and Territories) Order 1999 (L.N. 1999/111)): The relevant terms of this section are set out at para. 9.

Ms. K. Khubchand, Crown Counsel, for the UK Government;
C. Salter for the defendant.

1 **PITTO, Ag. J.:** This is an application by the defendant for variation of a restraint order made by this court on November 28th, 1994. The defendant has raised three preliminary points before dealing with the substantive application. These are:

- (i) the validity of the Gibraltar restraint order;
- (ii) the jurisdiction of the Supreme Court to entertain the application for registration; and
- (iii) the prospect of the applicant justifying the delay.

2 The defendant was arrested in England on September 25th, 1994 in connection with the importation and possession of 125kg. of cannabis resin. He and nine others appeared in court the next day. A restraint order against the defendant was sought and granted by the English court on October 7th, 1994. On November 28th, 1994, this court made a similar restraint order against the defendant. This was on the application of the Attorney-General acting on behalf of the Government of the United Kingdom. It is common ground that this court's jurisdiction arose from the Drug Trafficking Offences Act 1988 (Designated Countries and Territories) Order 1990. The appropriate authority under the 1990 Order empowered to issue requests for assistance on behalf of the Government of the United Kingdom is the Home Office.

Validity of the Gibraltar restraint order

3 The defendant submits that the Gibraltar restraint order was made at the request of H.M. Customs & Excise as appears to be the case on the face of the existing documents. If that submission is correct, the order made by this court would be a nullity. Not all of the original documentation has been found. What I have been shown is evidence that the then acting Attorney-General, Mr. Peter Dean, requested H.M. Customs & Excise to transmit the letter of request through the Home Office. Although there is no documentary proof that this was done, there is evidence to suggest it was.

4 Mr. John Ballantine, the then head of the Investigation Branch at the Customs Department, submitted two affidavits in support of the application. The second one cannot be found but it was made after Mr. Dean's request that the letter of request was transmitted via the Home Office. It was made shortly before the hearing in front of Kneller, C.J. It is not hard to adopt the view that a second letter was sent, as requested, via the Home Office. To take the contrary view is to conclude that Mr. Dean knowingly misled the court and that an experienced judge such as the then Chief Justice failed to notice the procedural failure. Further, there is no apparent reason for Mr. Ballantine to submit a second affidavit when there appears to be nothing wrong with the first. These three factors lead me to conclude

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on a balance of probabilities that a second request was received from the Home Office. I therefore rule that the order of November 28th, 1994 was validly made.

The jurisdiction of the court to register the confiscation order

5 Ms. Khubchand is instructed by the Government of the United Kingdom to apply for the registration of the confiscation order made against the defendant at the Crown Court at Bristol on August 13th, 1998. The defendant submits that the court lacks jurisdiction to register the confiscation order. He was charged and arrested on September 25th, 1994.

6 The application to register the confiscation order is made under the Drug Trafficking Offences Act 1995 (Designated Countries and Territories) Order 1999. The defendant submits that this court lacks jurisdiction to register the order because the defendant committed the offence which led to the making of the confiscation order on September 25th, 1994 and the 1999 Order does not apply to proceedings brought under the Drug Trafficking Offences Act 1988 (Designated Countries and Territories) Order 1990. The 1999 Order replaced that of 1995 at the same time as it revoked both the 1995 Order and the 1990 Order. The defendant accepts the 1999 Order contained a provision saving proceedings initiated before March 20th, 1995, by virtue of the fact that they were saved by the 1995 Order, but that since no reference is made to proceedings under the 1990 Order, no proceedings may be brought under that order. It is submitted that proceedings against the defendant were brought under the 1990 Order and this court therefore lacks jurisdiction to register the confiscation order made against the defendant. The Government of the United Kingdom submits that the effect of the legislation is to create bridging provisions which grant the court jurisdiction to register the confiscation order.

7 Paragraph 1(1) of the 1995 Order provides that the order comes into effect on March 20th, 1995. The paragraph continues:

“(2) This Order shall not apply—

- (a) in relation to any proceedings for, or in respect of, an offence committed . . . in respect of which the person accused (or, as the case may be, convicted) of that offence was charged with that offence . . . before the effective date specified in sub-paragraph (1),
- (b) in relation to any proceedings not within (a) instituted before that date,

and references in this sub-paragraph to proceedings include a reference to any order made by a court in the proceedings.

(3) Without prejudice to . . . the Drug Trafficking Offences Act

1988 (Designated Countries and Territories) Order 1990 and any instrument made under it shall continue to apply in relation to any proceedings within sub-paragraph (1)(a) or (b) (and, in particular, in relation to any external confiscation order, within the meaning of that Order, made in any such proceedings) as if this Order had not been brought into effect.”

8 The 1995 Order thus continues to apply to proceedings commenced before March 20th, 1995. This order was replaced by the 1999 Order which contains near-identical provisions (identically numbered), the difference being that the reference in para. 1(3) is to the 1995 Order. Paragraph 10 of the 1999 Order revokes both the 1990 and the 1995 Orders. The only possible effect of para. 1(3) in the 1999 Order is to save the proceedings saved by the 1995 Order. There is no other purpose. Mr. Salter, counsel for the defendant, submits that the court cannot transfer to delegated legislation the presumption that Parliament does not legislate in vain. I do not see why it should not. The 1995 Order saves proceedings brought under the 1990 Order and those proceedings are once again saved by the 1999 Order. Given the importance of mutual legal assistance to the combating of crime and in particular to the drugs trade, it is not surprising that the saving provision was included. Such a construction reflects the ordinary meaning of the words in the Orders. To hold to the contrary is to leave the saving provision in the 1999 Order without a purpose when it is carefully inserted.

Application for variation

9 The defendant applies for a variation of the order made by this court on November 28th, 1994. Section 32 of the Drug Trafficking Offences Act 1995, as modified by the 1999 Order, sets out that the courts provide—

“(2) . . . the power shall be exercised with a view to recovering property which is liable to be recovered under an External Confiscation Order . . . or, as the case may be, with a view to making available for recovery property which may become liable to be recovered under any External Confiscation Order . . .

(5) In exercising the powers, no account shall be taken of any obligations of the defendant or of the recipient of any such gift which conflict with the obligation to satisfy the External Confiscation Order.”

10 A clear distinction is drawn both in legislation and in the authorities between the position pre- and post-conviction. Where there is a real prospect of appeal then money should be made available to fund such an appeal (see *Customs & Excise Commrs. v. Norris* (1)). The position is different once appeal avenues have been exhausted (see *In re P* (2)). The onus is on the defendant seeking a variation to show that “it would be just

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for the court to make the variation sought” (*Serious Fraud Office v. X* (3) ([2005] EWCA Civ 1564, at para. 35, *per* Clarke, M.R.)). The defendant has to show that he has no other assets with which he could meet his legal expenses.

11 The defendant in this case has exhausted his domestic (*i.e.* England and Wales) appeals. He refers to this court’s discretion whether or not to register the confiscation order made against him as an appeal which could be legitimately funded out of the restrained assets.

12 The defendant has throughout been aware of the English proceedings and done nothing about them. He filed a certificate of inadequacy which he later withdrew. He presented an affidavit of means to this court which is self-serving and, given the nature of these proceedings and the affidavit’s purpose, begs more questions than it answers. What happened to his previous property at Pitman’s Alley? What is his income from Lider Cars of which he is the 100% shareholder? What is the business worth? The defendant has recently been on a Mediterranean cruise—scarcely compatible with the picture of poverty presented in his affidavit of means.

13 The defendant’s track record with regard to the confiscation order, his withdrawal of the certificate of inadequacy, his stating to this court that he knew nothing of the English proceedings when he did, and the inadequacy of his affidavit of means leads me to conclude that he is not a man who can be relied on to tell the truth. In the circumstances, I cannot be satisfied that he has no other assets or income with which to fund any challenge to the registration of the confiscation order in this court, and indeed to fund the running of Lider Cars or his own living expenses. The application for variation is dismissed.

14 The third preliminary point raised by the defendant properly belongs to the application for registration. Having found as I have, there is no need to consider it at this stage as urged to do by Mr. Salter.

Application dismissed.