HOUSE OF LORDS

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[2009] UKHL 19

on appeal from:[2008] EWCA Crim 146

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

R v Briggs-Price (Appellant) (On appeal from the Court of Appeal (Criminal Division))

Appellate Committee

Lord Phillips of Worth Matravers
Lord Rodger of Earlsferry
Lord Brown of Eaton-under Heywood
Lord Mance
Lord Neuberger of Abbotsbury

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LORD PHILLIPS OF WORTH MATRAVERS

My Lords,

1. Under the Drug Trafficking Act 1994 ("the 1994 Act") the assets of a defendant convicted of a drug trafficking offence are liable to confiscation to the extent that he has benefited from drug trafficking. The benefit in question is not restricted to the benefit derived from the offence or offences in respect of which the defendant has been convicted. In confiscation proceedings the prosecution has to satisfy the court that the defendant has benefited from drug trafficking and the extent of such benefit. The normal way of doing this is to prove that the defendant possesses, or has possessed, property and to invite the court to assume that the property in question represents or represented benefit derived from drug trafficking. The Act expressly provides that the court must make this assumption unless it is shown to be incorrect or would involve a serious risk of injustice.

2. The appellant is subject to a confiscation order imposed under the 1994 Act in the sum of £2,628,490. He appealed unsuccessfully against that order to the Court of Appeal and now appeals against the order of that court dated 22 January 2008.

3. In this case the prosecution adopted an unusual approach to proving that the defendant had benefited from drug trafficking and the extent of that benefit. They proved that the defendant had committed drug trafficking offences other than that in respect of which he was convicted and invited the court to estimate the profit that he must have derived from these offences.

4. Mr Owen QC for the appellant submitted that this approach was not permitted on the true construction of the 1994 Act. He submitted that, if the relevant statutory provisions are given their natural meaning, they do not permit the prosecution, in confiscation proceedings, to establish that a defendant has benefited from drug trafficking by proving that he has committed drug offences and then inviting the court to infer the monies expended or received in relation to those offences. Alternatively, he submitted that such an approach is incompatible with the requirements of the European Convention on Human Rights, so that the relevant provisions of the 1994 Act have to be read down so as to preclude its adoption.

The statutory provisions

5. By section 2(1) of the 1994 Act where a defendant appears before the Crown Court to be sentenced in respect of one or more drug trafficking offences, and the prosecutor asks the court to proceed under section 2, or the court considers that it is appropriate to do so, the court is required to proceed as follows:

> "(2) The court shall first determine whether the defendant has benefited from drug trafficking.
>
> (3) For the purposes of this Act, a person has benefited from drug trafficking if he has at any time (whether before or after the commencement of this Act) received any payment or other reward in connection with drug trafficking carried on by him or another person.
>
> (4) If the court determines that the defendant has so benefited, the court shall, before sentencing or otherwise dealing with him in respect of the offence or, as the case may be, any of the offences concerned, determine in accordance with section 5 of this Act the amount to be recovered in his case by virtue of this section.
>
> (5) The court shall then, in respect of the offence or offences concerned –
>
> (a) order the defendant to pay that amount;
>
> (b) take account of the order before–

(i) imposing any fine on him;

(ii) making any order involving any payment by him; or

(iii) making any order under section 27 of the Misuse of Drugs Act 1971 (forfeiture orders) or section 43 of the Powers [1973 c. 62] of Criminal Courts Act 1973 (deprivation orders); and

(c) subject to paragraph (b) above, leave the order out of account in determining the appropriate sentence or other manner of dealing with him."

6. Section 5 restricts the amount to be recovered under a confiscation order to the amount that the court certifies is capable of being realised from the defendant's assets at the time that the order is made. Subject to that limitation it provides that the amount to be recovered under the order shall be the amount that the court assesses to be the value of the defendant's proceeds of drug trafficking. Section 4 makes provision for assessing the proceeds of drug trafficking. It provides:

"4. – (1) For the purposes of this Act –

(a) any payments or other rewards received by a person at any time (whether before or after the commencement of this Act) in connection with drug trafficking carried on by him or another person are his proceeds of drug trafficking; and

(b) the value of his proceeds of drug trafficking is the aggregate of the values of the payments or other rewards.

(2) Subject to subsections (4) and (5) below, the Crown Court shall, for the purpose –

(a) of determining whether the defendant has benefited from drug trafficking, and

(b) if he has, of assessing the value of his proceeds of drug trafficking, make the required assumptions.

(3) The required assumptions are –

(a) that any property appearing to the court –

(i) to have been held by the defendant at any time since his conviction, or

(ii) to have been transferred to him at any time since the beginning of the period of six years ending when the proceedings were instituted against him,

was received by him, at the earliest time at which he appears to the court to have held it, as a payment or reward in connection with drug trafficking carried on by him;

(b) that any expenditure of his since the beginning of that period was met out of payments received by him in connection with drug trafficking carried on by him; and

(c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a reward, he received the property free of any other interests in it.

(4) The court shall not make any required assumption in relation to any particular property or expenditure if –

(a) that assumption is shown to be incorrect in the defendant's case; or

(b) the court is satisfied that there would be a serious risk of injustice in the defendant's case if the assumption were to be made;

and where, by the virtue of this subsection, the court does not make one or more of the required assumptions, it shall state its reasons."

7. Section 2(8) provides that the standard of proof required to determine any questions in relation to whether a person has benefited from drug trafficking and the extent of such benefit arising under the Act is that applicable in civil proceedings.

The facts

8. The relevant facts are set out in detail and with clarity in the judgment of the Court of Appeal delivered by Richards LJ [2008] EWCA Crim 146. I propose to reduce them to the outline that is necessary to understand the issues raised by this appeal.

9. The confiscation order was consequential to the appellant's conviction on 14 April 2003 in the Crown Court at Nottingham of conspiracy to import heroin. It was the prosecution case that the role of the appellant in the conspiracy was that of the purchaser and distributor of the drugs. In the event the conspiracy was never implemented. No heroin was imported into the United Kingdom, no payment for heroin was made by the appellant and he derived no benefit from the conspiracy.

10. It was the prosecution case that the appellant had been selected by the other conspirators to take part in the trafficking because he had already created a network for the transportation and distribution of cannabis. The appellant denied that he had ever dealt in cannabis and the judge gave permission for evidence on this issue to be adduced at his trial. This consisted of admissions made by the appellant that had been recorded by covert surveillance or made to an undercover agent. It was the appellant's case that he had never had any involvement in dealing with any class of drugs. Insofar as his recorded conversations suggested to the contrary, this was bragging that was untrue.

11. No charge was pursued against the appellant in relation to dealing in cannabis and the jury was directed that it was not necessary for them to resolve the cannabis distribution issue in order to find the appellant guilty in relation to the conspiracy to distribute heroin.

12. The appellant's conviction was followed by confiscation proceedings, conducted by the trial judge, His Honour Judge Stokes QC. There was agreement as to the amount of the appellant's assets. These included a large hotel and a portfolio of properties, some of which produced a substantial income. The appellant did not, of course, accept that these represented the proceeds of drug trafficking and was prepared to challenge the statutory assumptions under section 4(3) of the 1994 Act. This raised the prospect of a protracted and expensive dispute and, in order to avoid this, the prosecution agreed with the appellant that the statutory assumptions would not be made. The judge accepted this agreement. The prosecution did not seek to assert that the appellant had any hidden assets.

13. The judge gave a detailed ruling setting out his conclusions as to the benefits that the appellant had obtained from drug trafficking. He started by remarking that the appellant had faced a single count of

possession of one kilo of cannabis with intent to supply and that, while the prosecution had agreed that this would be left on the file, they had made it plain that they intended to pursue confiscation proceedings in relation to dealing in cannabis. He also remarked that he had afforded the appellant the opportunity to give evidence to rebut the Crown's case in the confiscation proceedings but that the appellant had not availed himself of this.

14. The judge accepted that it would not be right to infer from the appellant's conviction of the heroin conspiracy that the jury had been satisfied that he had been dealing in cannabis, albeit that this was an important feature of the Crown's case. He held, however, on the basis of his own appraisal of the evidence that he had heard, that he had no doubt that the appellant had been dealing in cannabis.

15. The judge restricted his assessment of the benefit that the appellant had derived from cannabis dealing to a period of six months. The prosecution submitted that the evidence established that in this period the appellant had dealt in 6 tons of cannabis, selling this for a total of approximately £8 million. The judge's findings were set out in the following passage of his judgment.

> "The fact that it is impossible to determine precisely the amount of cannabis this Defendant was trafficking does not mean that the court should not make any finding as to the amount of his benefit. If he had been involved with as much as 6 tons ie a ton every month for 6 months, I would be satisfied on the evidence of DC Hair that the amount of his benefit would have been £8.7 million. The absence of assets to this amount doe not deflect me from concluding that substantial profits were being made because I am by no means satisfied that the assets declared to the Receiver form the full extent of this defendant's wealth, but I do not propose to involve myself with that aspect of the matter and will leave it, as I have previously indicated I would, to the Receiver to investigate such matters fully. However, I do not think that I can reach the conclusion which the Crown invites me to reach and say that I am sure on the balance of probabilities that Briggs-Price has benefited from drug trafficking to the extent of 8.7 million pounds. I have to give effect to my conclusions that while substantial profits have been made by him from drug trafficking, an appropriate deduction should be made to

> take account of (1) the inconsistencies in his responses and statements on the covert tapes as to the amounts he was importing or otherwise obtaining, (2) the frequency of such importations and (3) the degree of exaggeration possibly present in some of the statements he makes on the covert tapes. Given the seriousness of the consequences of my findings, it seems to me that I should first reduce the Crown's figure to £8 million then discount that sum by 50 per cent to 4 million pounds. This represents a fair conclusion bearing in mind the defendant's own unguarded statements as to his activities and the value of the drugs he plainly admits he was dealing in."

The Appellant's case

16. Mr Owen QC submitted that, on its true construction, the Act restricts the approach that the court is permitted to adopt to determining whether a defendant has benefited from drug trafficking and assessing the value of the proceeds of such trafficking, if he has done so. The court must start by identifying property held or expenditure made by the defendant at any time. It must then, provided that the property was acquired or the expenditure made within six years of the commencement of proceedings against the defendant, apply to that property the assumptions in section 4(3) of the 1994 Act, subject to the safeguards in section 4(4). It is for the defendant to rebut those assumptions if he can. The same approach had to be adopted in respect of property acquired or expenditure made outside the six year period, save that in that case the burden of proving that the source of the property or the expenditure was drug trafficking fell on the prosecution. What was impermissible was for the court to deduce that the defendant had received property or incurred expenditure from evidence that he had committed drug trafficking offences.

17. Mr Owen accepted that the Act permitted one exception to this approach. The Act permitted the court to deduce that the defendant had benefited from drug trafficking, and the value of the benefit, from the fact that the defendant had committed the drug offence or offences of which he was convicted ("the index offences") and the evidence relating directly to that offence or those offences.

The natural meaning of the 1994 Act

18. Mr Owen submitted that the Act required that the starting point for the determination of benefit should be identified property, past or present, of the defendant. The existence and value of benefit derived from drug trafficking had to be determined by applying the assumptions to such property He emphasised that the provisions of section 4(3) were mandatory, subject to the exceptions in section 4(4). So they are, but it does not follow that they are the only way in which the Act permits the court to determine the extent of the defendant's benefit from drug trafficking. This is apparent from the fact that the assumptions do not apply to property received or payments made outside the six year period, albeit that, as Mr Owen conceded, the Act applies to benefit received outside that period. Nor is it possible to spell out from the wording of the Act the exception that Mr Owen accepted applied to his rule in relation to calculating the benefits received from or the payments made in respect of the index offences.

19. The origin of the mandatory assumptions is to be found in section 2 of the Drug Trafficking Offences Act 1986. The assumptions were not, however, mandatory at that stage. Plainly they were not then the exclusive route for determining benefit derived from drug trafficking. They were made mandatory by section 9 of the Criminal Justice Act 1993. This change was directed at making it more difficult for a defendant to avoid confiscation of his property. There is no basis for concluding that its effect was to restrict the evidence that could be relied upon to prove the benefit derived by the defendant from drug trafficking.

20. The construction that Mr Owen seeks to place on the 1994 Act would result in an anomaly. Section 4(4) assumes that defendants will seek to show that the statutory assumptions are incorrect, as indeed they do. Where an issue is raised as to the source of property held by a defendant, it would be strange if the prosecution were precluded from countering the defendant's assertion that it had a legitimate source by relying on evidence that, at the time, the defendant was involved in drug trafficking. Mr Owen did not submit that any such restriction applied. Yet it is hard to see why evidence of the defendant's criminal activities should be admissible for the purpose of proving the source of assets but not for the purpose of proving the existence of assets.

21. In summary it is impossible to deduce from the natural meaning of the relevant provisions of the 1994 Act the restrictions that Mr Owen submits that they impose on the manner in which the existence and value of benefit derived from drug trafficking is to be assessed. Mr Owen confronted this difficulty by arguing that, if the provisions did not naturally bear the meaning for which he contended, it was necessary to read them down so as to have that meaning in order to render them compatible with the Convention.

The requirements of the Convention

22. The European Court of Human Rights ("the Strasbourg Court") has twice considered the legislation that is the subject of this appeal and twice similar legislation that forms part of the Dutch Criminal Code. These decisions demonstrate that where, in confiscation proceedings after a defendant's conviction, the prosecution proves that the defendant possesses or has possessed property and invites the court to assume that this property represents or represented the benefit of criminal activity, this exercise does not involve charging the defendant with a criminal offence so as to engage article 6(2) of the Convention. Mr Owen submitted that this is not the position where the prosecution adopt the approach that they used in this case. He submitted that where the prosecution allege that the defendant has committed criminal offences in order to establish, by inference, the benefit flowing from those offences, this amounts to charging the defendant with criminal offences, so that article 6(2) is engaged. In so submitting he relied particularly on the decision of the Strasbourg Court in the second Dutch case, *Geerings v Netherlands* (2007) 46 EHRR 1222. Mr Owen did not spell out fully the implications of this submission. Before turning to consider the relevant authorities I propose to do so.

23. Article 6 of the Convention provides:

> "Right to a fair trial
>
> 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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a

democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

24. Article 6(2) does not spell out the standard of proof that has to be applied in discharging the burden of proving that a defendant is guilty of a criminal offence. It does, however, provide that he has to be proved guilty "according to law". This requirement will not be satisfied unless the defendant is proved to be guilty in accordance with the domestic law of the State concerned. English law draws a clear distinction between the criminal and the civil standard of proof. The criminal standard requires proof beyond reasonable doubt. Section 2(8) of the Act provides that the standard of proof required to determine any questions in relation to whether a person has benefited from drug trafficking and the extent of such benefit arising under the Act is the civil standard. It is at least arguable that this will bring the Act into conflict with Article 6(2) if the prosecution adopt an approach to proving benefit that involves charging the defendant with a criminal offence. If so, the Act must be read down so as to prohibit such an approach.

25. A similar issue arises in relation to article 6(3). English law has specific procedural requirements that satisfy this article in relation to a criminal prosecution. They were not applied in this case in relation to the cannabis offences. If the approach adopted by the prosecution amounted to charging the defendant with those offences, it is arguable that this was in conflict with article 6(3).

The relevant jurisprudence

26. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Mance. He has referred in detail to the seminal decision on whether article 6(2) of the Convention applies to confiscation proceedings given by the Privy Council in *McIntosh v Lord Advocate* [2001] UKPC D1; [2003] 1 AC 1078 and to the relevant Strasbourg cases dealing with this issue. I do not propose to repeat that exercise but to set out my own conclusions on the effect of this jurisprudence.

27. In *McIntosh v Lord Advocate* Lord Bingham of Cornhill delivered the leading speech. He gave a number of reasons for concluding that article 6(2) did not apply to confiscation proceedings. He did so however on the premise that those proceedings involved determining whether identified property represented the benefit of drug trafficking. Thus he said in para 14:

> "The accused is at no time accused of committing any crime other than that which permits the application to be made…When, as is standard procedure in anything other than the simplest case, the prosecutor lodges a statement under section 9, that statement (usually supported by detailed schedules) is an accounting record and not an accusation…The process involves no inquiry into the commission of drug trafficking offences."

Lord Hope of Craighead, concurring with Lord Bingham in the only other substantive speech, said at para 43:

> "The assumptions on which the court is being asked to proceed do not require the court to hold that [the

> defendant] has been engaged in criminal conduct. They have much more to do with the civil process of tracing (a restitutionary remedy)…"

These comments cannot be applied to confiscation proceedings in which the prosecution found their case that the defendant has benefited from drug trafficking on allegations that he has committed drug trafficking offences.

28. In *Phillips v United Kingdom* (2001) 11 BHRC 280 the issue in confiscation proceedings had been whether identified property that had been proved to be or have been in the possession of the defendant represented benefits from drug trafficking. The court had determined that they were by applying the statutory assumptions. The relevant issue before the Strasbourg Court was whether the application of these assumptions infringed the presumption of innocence required by article 6(2). The Court decided that it did not because article 6(2) did not apply to the confiscation proceedings. In so finding the Court was influenced by the purpose of the proceedings. This was not to obtain a criminal conviction but was analogous to the determination of the penalty that should be imposed as a consequence of a conviction that had already been recorded. In these circumstances the defendant to confiscation proceedings could not be said to be "charged with a criminal offence". The Court held, at para 35, that Article 6(2) did not apply to the sentencing process unless this involved accusations "of such a nature and degree as to amount to the bringing of a new 'charge' within the autonomous Convention meaning" as defined in *Engel v The Netherlands* (1976) 1 EHRR 647.

29. The Strasbourg Court reached the same decision for the same reasons in an application that related to confiscation proceedings in the Netherlands in *Van Offeren v The Netherlands* (Application No 19581/04) decided 5 July 2005.

30. These two decisions establish that confiscation proceedings fall to be treated as part of the process of sentencing after conviction and do not, of themselves, involve charging the offender with offences other than that or those of which he has been convicted and which have given rise to the sentencing process. Thus they do not engage article 6(2) of the Convention. The decisions also establish that applying a reverse burden of proof to the source of identified assets is compatible with article 6(1). This was made clear by the decision in relation to two

further applications against the United Kingdom that were heard together.

31. In *Grayson & Barnham v United Kingdom* (Application Nos 19955/05 and 15085/06) each applicant had been held in confiscation proceedings to have benefited from drug trafficking to a specified amount. It is noteworthy that in the case of *Barnham* this amount was largely based on inference of the amounts that he must have paid to purchase two consignments of cannabis which he had mentioned to an undercover police officer but which had not formed the subject of the charges against him (para 14). The Court recorded that neither applicant seriously complained about the first stage of the confiscation procedure under which the benefit from drug trafficking was calculated (para 46).

32. The Court identified the following safeguards that were built into the system. In each case 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. Each applicant was represented by the counsel of his choice. The burden was on the prosecution to establish that the applicant had held the assets in question during the relevant period and that he had the opportunity to rebut the assumption that these represented benefit from drug trafficking (para 45). The Court held that, given the existence of these safeguards, it was not incompatible with the concept of a fair trial under article 6 to place the onus on the applicant, once he had been convicted of a major drug dealing offence, to establish that the source of money or assets that he had been shown to have possessed was legitimate (para 46).

33. What was particularly challenged in these cases was the fact that, in the absence of evidence that the applicants still possessed the benefits that they had derived from trafficking, the courts had held that the burden was on the applicants to establish to the civil standard of proof that the amount that could be realised from their assets was less than the amount assessed as benefit. This also the Court ruled to be compatible with article 6(1). It held that it was not unreasonable to expect the applicants to explain what had happened to all the money shown by the prosecution to have been in their possession, any more than it was unreasonable at the first stage of the procedure to expect them to show the legitimacy of the source of such money or assets. Such matters fell within the applicants' particular knowledge (para 49).

34. In this decision the Court followed its own decision in *Phillips*. It observed that in that case the judge had been satisfied, on the basis either of the applicant's admissions or of evidence adduced by the prosecution, in respect of every item taken into account, that the applicant had owned the property or spent the money and the obvious inference was that it had come from an illegitimate source. Thus

> "...the applicant demonstrably held assets whose provenance could not be established; …these assets were reasonably presumed to have been obtained through illegal activity; and…the applicant had failed to provide a satisfactory alternative explanation" (para 41)

35. This quote was from the decision of the Court in *Geerings* 46 EHRR 1222, para 44. The Court was there describing the facts of *Phillips* in order to distinguish them from those before it. I now turn to the decision in *Geerings.* In the Court of Appeal Richards LJ, at para 43, remarked that the decision had to be approached with some care and I agree with that observation.

36. Article 36(e) of the Dutch criminal code provides in paragraph 1 that any person who has been convicted of a criminal offence may be ordered in a separate judicial decision to pay a sum of money to the State so as to deprive him of any illegally obtained advantage. Paragraph 2 provides that the advantage in question is that obtained "by means of or from the proceeds of the criminal offence in question or similar offences or offences…in connection with which there exist sufficient indications that they were committed by him". The confiscation proceedings were based on estimated benefits obtained by the defendant from a series of offences with which he had been charged. He had been acquitted of a number of those offences. The Court of Appeal held that confiscation could none the less be founded on estimated benefits from these offences on the basis that there existed "sufficient indications that they were committed by him".

37. Lord Mance has set out the relevant passage of the reasoning of the Strasbourg Court in para 124 of his opinion. Mr Owen's submissions as to the effect of this passage were set out in his Case as follows:

> "So long as the extended benefit is referable to assets clearly shown to have been in the possession of the accused in circumstances where the accused fails to establish their lawful origin, then the fact that any confiscation order is based on a finding of criminal conduct beyond the index offence will not offend either Art 6(1) or 6(2). Where however *no* suspicious assets are capable of being identified so as to require an explanation from the accused, then an order which necessarily *assumes* the existence of suspicious hidden assets going beyond those obtained by the index offence will violate Art 6"

38. This reads too much into the passage in question. There are two ways of proving, with the aid of assumptions, the existence of benefit derived from drug trafficking. The first is to prove the existence of property and to make a reasonable assumption that it was derived from drug trafficking. The second is to prove the existence of drug trafficking and to make a reasonable assumption as to the benefit that must have been derived from it. In *Geerings* the prosecution attempted to adopt the latter approach. They sought to prove the existence of offences by charging the applicant with them. Article 6(2) applied. The offences had to be proved to the criminal standard, 'beyond reasonable doubt'. The prosecution failed to prove a number of offences but none the less successfully contended that there were "sufficient indications that they were committed by [the applicant]" and that the benefit derived from them could be inferred. What the Court found objectionable was that neither the commission of the offences nor the alleged benefits had been proved. In these circumstances the findings against the applicant had been based on a "conjectural extrapolation" and "a presumption of guilt" which was in conflict with article 6(2) (paras 46 and 47).

39. The passage in question supports two propositions. The first is that where a defendant is charged with criminal offences from which the prosecution seek to infer the derivation of benefit, article 6(2) applies, so that the defendant is presumed innocent of those offences. The second is that, if the defendant is acquitted of offences with which he is charged, it is not legitimate to infer that he has benefited from those offences. What one cannot deduce from the passage is that, if the prosecution seek to rely on proof of offences other than those with which the defendant is charged in order to prove the derivation of benefit, he is to be deemed to be charged with those offences also, so that article 6(2) applies in their case also. *Geerings* does not decide that question one way or another.

40. Your Lordships were not referred to other Strasbourg jurisprudence bearing on the question of whether the allegations of the cannabis offences that were advanced by the prosecution in this case constituted "criminal charges". There is authority that establishes that both the adjective "criminal" and the noun "charge" are autonomous concepts but that the Strasbourg Court attaches significance to the way in which they are treated in domestic law and looks to the substance rather than to the form. Not without hesitation, I have concluded that the allegations that were made in relation to the cannabis offences did not constitute "criminal charges". First they were not so treated under our law. Secondly, they could not and did not lead to criminal convictions. Thirdly, and most significantly, their consequence, the confiscation of the property of a convicted drug dealer, is precisely the same as that in *Phillips* and *Grayson & Barnham.* Those cases required a finding that the property confiscated was derived from criminal offending, albeit that the precise offences did not have to be specified but could be inferred. The Strasbourg Court accepted that the safeguards of article 6(2) did not apply in such circumstances. It would seem illogical to impose them where the details of the offending are alleged with more particularity.

41. Although I have concluded that the requirements of article 6(2) and 6(3) did not apply in this case, those of article 6(1) were none the less applicable. The requirements of a fair trial in confiscation proceedings are not poles apart from those imposed by article 6(2) and 6(3). Where, as here, the prosecution rely on criminal offending to prove the existence of benefit, they have to prove that offending. The defendant is presumed innocent until proved guilty, albeit by the civil standard of proof. When, in *Grayson & Barnham*, the Strasbourg Court set out the safeguards in our system that had led it to conclude that our procedure satisfied article 6(1) it might well have been carrying out a check list of the relevant requirements of article 6(3).

42. The facts of this case are unusual. The prosecution, as part of their case on the conspiracy to import heroin, gave the defence particulars of evidence that they intended to adduce of other drug offences. The appellant challenged these at his trial and could have challenged them again in the confiscation proceedings. The judge was sure on the evidence that the relevant offences were proved. He deduced the benefit from the proved offending. In the Court of Appeal Richards LJ held that the procedure adopted was compatible with article 6(2). There is no basis for suggesting that the fair trial requirements of article 6(1) were not satisfied.

43. For these reasons I reject the interpretation of section 4 of the 1994 Act advanced by Mr Owen. It is open to the prosecution to prove the derivation of benefit from drug trafficking by proving the commission of drug trafficking not charged on the indictment. In this case they did so. For these reasons this appeal should be dismissed.

LORD RODGER OF EARLSFERRY

My Lords,

44. The appellant stood trial on an indictment on which he appeared with three co-defendants. Two of them were acquitted. The fourth, John Barton, absconded and was tried in his absence. Both he and the appellant were convicted of a count of conspiracy to contravene section 170(2) of the Customs and Excise Management Act 1979, contrary to section 1(1) of the Criminal Law Act 1977. The offence covered a period from 1 September 1999 to 21 June 2000 and concerned a conspiracy to evade the prohibition on the importation of diamorphine, contrary to section 3(1) of the Misuse of Drugs Act 1971.

45. The general thrust of the prosecution case at trial was that the appellant had a pre-existing network for the supply of cannabis and was going to use it to distribute the diamorphine which Barton was going to import. So, much of the most important evidence was designed to prove that the appellant was indeed engaged in distributing cannabis through this network. That evidence tended to show – at the least - that the appellant had been concerned in the supplying of cannabis contrary to section 4(3)(b) of the 1971 Act. Despite this, for reasons which Mr Lucraft QC – who had not been instructed at that stage - understandably had difficulty in identifying, far less explaining, the indictment contained no section 4(3)(b) count. This is the first unsatisfactory aspect of the case.

46. In Scotland, the absence of a section 4(3)(b) charge would have rendered the evidence relating to the cannabis distribution network inadmissible, as being evidence of a crime not charged. In this case, however, the evidence was led at the trial and, on an application to the Full Court for leave to appeal on the basis that the judge should not have admitted evidence showing that the network was for the distribution of cannabis, the Court of Appeal (Thomas LJ, Jack J and HH Judge

Radford) [2005] EWCA Crim 368 were unable to see that there was an arguable ground of appeal.

47. Plainly, the evidence relating to the cannabis network was very relevant to the Crown's case. And, if the indictment had included a count relating to that matter, all would have been well. The absence of such a count means, however, that the appellant was never charged with an offence relating to the cannabis network. And, although the evidence about the network formed an important part of the prosecution case at trial, the judge, HH Judge Stokes QC, directed the jury that, even if they rejected that evidence, they could still convict the appellant of the count on the indictment. It is, accordingly, impossible to tell whether the jury were satisfied that the appellant was involved in the network. Putting the matter another way – and in the way that Mr Owen QC put it on behalf of the appellant - the approach adopted by the Crown meant that the jury were not given the opportunity, if so advised, to declare the appellant's innocence of any involvement in a cannabis network by acquitting him of a count relating to it.

48. Following the appellant's conviction on the conspiracy charge, the prosecutor asked Judge Stokes to proceed under section 2 of the Drug Trafficking Act 1994 ("the 1994 Act") – in other words, to consider whether to make a confiscation order. The judge was then obliged to do so. In terms of section 2(2) he had first to determine whether the appellant had benefited from drug trafficking. To determine that, subject to section 4(4) and (5), a court "shall… make the required assumptions" which are set out in subsection (3): see section 4(2).

49. The second unsatisfactory feature of the case emerges at this point. Those representing the prosecution and the appellant simply agreed to proceed with the confiscation proceedings on the basis that the assumptions in section 4(3) of the 1994 Act should not be applied. The prosecution, at least, seems to have considered that the presentation of a case based on the assumptions would have involved extremely difficult accountancy issues and would have been lengthy and expensive. Plainly, if the position had been explained to the judge by counsel and he had then made his own decision that, for a reason covered by section 4(4), the assumptions should not be applied, there would have been no problem. Here, however, while apparently accepting that the assumptions should not be applied, the judge did not make any determination in terms of section 4(4).

50. In my view, the matter was mishandled. The requirement in section 4(2) to apply the assumptions binds the court. That is consistent with the wider position that it is the court which acts under section 2 - and which can indeed do so, even though the prosecutor has not asked it to. No unilateral action by the prosecution, or joint action by the parties, can relieve the court of its obligation under section 4(2) to apply the assumptions. But suppose that the prosecutor had indeed realised that, so far as the actual expenditure and property which the prosecution could identify were concerned, the appellant could show that they derived from his legitimate business as a hotelier etc. In that event, if the position had been explained to the court, in all probability the judge would indeed have disapplied the presumptions, on the ground that they had been shown to be incorrect (subsection (4)(a)). So the failure to observe the provisions of section 4(2) and (4) was probably one of form rather than of substance.

51. The statutory assumptions are fairly draconian – and are intended to be. Contrary to Mr Owen's submission, they are not conceived in favour of the defendant and a failure to apply them cannot be regarded as any kind of detriment to him. On the contrary, because the judge did not apply the assumptions in this case, the appellant enjoyed the (probably, fully justified) advantage of not having his hotel and other property, and all his expenditure over the preceding six years, deemed to be derived from drug trafficking.

52. What led to the confiscation order being made against the appellant was not the failure to apply the assumptions. Rather, it was the fact that, even without the help of those assumptions, the judge was satisfied that the appellant had benefited from drug trafficking. The judge's conclusion to that effect was based on the evidence which he had heard during the trial about the quantities of cannabis which were being bought for, and distributed through, the cannabis network. So far as the appellant's involvement in the distribution of cannabis was concerned, the judge had "no doubt that this was the case." The judge based his calculation of the benefit which the appellant had received from that involvement on two matters: first, police evidence about the value of various quantities of cannabis and, secondly, his estimate of the quantities of the drug in which – the evidence showed - the appellant had been trafficking over a six-month period. On these matters the judge applied the civil standard of proof, in accordance with section 2(8) of the 1994 Act. There is no appeal against the calculation which the judge made and so I need say no more about it, save that it worked out at £4 million.

53. Mr Owen accepted that, if the appellant had been convicted of a drug trafficking offence, then – even without the assistance of the presumptions – the court could consider evidence that he had benefited from that trafficking. So, for instance, if a defendant were convicted of an offence of supplying a bulk quantity of diamorphine and the supply had taken place, say, ten years before the proceedings began, the court could consider evidence as to the price which he could have been expected to receive for that quantity. Equally, the court could consider evidence of the purchase of an Aston Martin by the defendant the day after the supply. But, said Mr Owen, where the court was considering an alleged benefit not deriving from an offence of which the defendant had been convicted, the structure of the 1994 Act meant that it could proceed only on the basis of the assumptions in section 4(3).

54. That is an impossible contention. The mere fact that the assumptions are not applicable does not mean that the defendant has not benefited from drug trafficking: it merely means that the court cannot use the assumptions to determine either that he has benefited, or that he has benefited to a particular extent. If there is evidence to show the benefit, then the court can use it. If that were not so, as my noble and learned friend, Lord Mance, points out, it would mean, for instance, that, if the defendant had no property, there would be no way for a court to determine if he had received a benefit from drug trafficking offences committed more than six years before proceedings began. It would also mean that there was no way of determining whether a defendant had benefited from drug trafficking which did not constitute an offence. Yet both eventualities are contemplated by section 2(2) and (3).

55. Similarly, there is nothing in the provisions relating to prosecution statements in section 11 or the provision of information by defendants in section 12 to restrict their application to benefit derived from the offence of which the defendant has been convicted. On the contrary, as would be expected - given that the court is concerned with benefit from "drug trafficking" rather than from drug trafficking offences - section 11(1) envisages that the prosecutor's statement will concern matters which are relevant to determining whether the defendant has benefited from "drug trafficking" or to "assessing the value of his proceeds of drug trafficking". In the same way, under section 12(2) the court may order the defendant to give it specific information for "the purpose of obtaining information to assist it in carrying out its functions".

56. There is a more fundamental objection to Mr Owen's submission. As the definition in section 2(3) shows, a person has benefited from drug trafficking "if he has at any time ... received any payment or other reward in connection with drug trafficking carried on by him or another person." In other words, the benefit comprises any payment or other reward, irrespective of whether the recipient has actually made a profit from his trafficking. The law does not draw up an account of the defendant's income and expenditure on drug trafficking: it is concerned only with the payments and rewards which he receives. Lord Lane LCJ explained the position succinctly in *R v Smith (Ian)* [1989] 1 WLR 765, 769A-C:

> "The words 'any payments' are on the face of them clear. They must mean, indeed it is clear from the wording, any payment in money or in kind. It does not mean, in the judgment of this court, net profit derived from the payment after the deduction of expenses, whether the expenses are those of purchase, travelling, entertainment or otherwise. The same consideration applies to the words 'other rewards.' They also have to be valued."

The passage was cited with approval in this House in *R v Smith (David)* [2002] 1 WLR 54, 61-62, para 24.

57. Suppose, therefore, that someone buys a large quantity of cannabis which he intends to sell through his network of dealers. A rival distributor floods the market, with the result that prices collapse and the first distributor has to sell his cannabis at a loss. Despite this, by receiving the payments for the cannabis, the distributor has "benefited" from drug trafficking. The same applies to a distributor who deliberately sells his drugs at a loss in order to drive a rival from the market. In calculating the amount to be recovered under any confiscation order under section 5(1) and 4(1), the defendant's proceeds of drug trafficking comprise the sums he receives, even if he has never made a profit which he could spend on other things.

58. In such cases, the assumptions in section 4(3) have no role to play since (apart from expenditure on drugs etc) they presuppose that the drug trafficker has made a profit which he has used to finance his lifestyle and to purchase property. The legislation is designed, however, to strip even an unsuccessful drug trafficker of any money or other reward which he receives in connection with his trafficking. If,

therefore, the court is satisfied in any case that a defendant was selling quantities of drugs at a particular price, it may also infer that the value of the proceeds of his trafficking, for the purposes of section 5(1), was the aggregate of the sums he must have received for those drugs.

59. Of course, usually, there will be no point in making a confiscation order in such cases since the defendant will have no assets from which to extract the payment. So, usually, a confiscation order will be made only in cases where the defendant has been successful and has used his profits to buy assets which can be confiscated. Then the assumptions in section 4(3) are the obvious starting point. But, if the defendant's ownership of other assets actually makes it worthwhile, a confiscation order can properly be made simply on the basis of the payments or rewards which the defendant must have received from drug trafficking, even if he made no profit, or – whether due to concealment or otherwise - any profit cannot be identified. So the statutory assumptions are certainly not the only basis for confiscation proceedings under the Act.

60. For these reasons, I have no doubt that, under English domestic law, Judge Stokes was entitled to use the evidence led at the trial, and the additional information as to the selling price of bulk cannabis, first, to determine that the appellant had benefited from trafficking in cannabis and, secondly, to assess the value of his proceeds of drug trafficking at £4 million.

61. Mr Owen contended, however, that the appellant's article 6 Convention rights had been breached because the making of the confiscation order involved the court in holding that the appellant had committed an offence - in effect, being concerned in the supplying of cannabis - with which he had not been charged. In making this submission, Mr Owen necessarily conceded that there would have been no breach if the appellant had been charged with, and convicted of, that offence and the court had made a confiscation order relating to it.

62. In his written case, the appellant argued that there had been a violation of his article 6(2) Convention right, as a person charged with a criminal offence to be presumed innocent until proved guilty according to law. The decision of the Privy Council in *McIntosh v Lord Advocate* [2003] 1 AC 1078 is, however, authority that, for article 6(2) purposes, a person against whom an application for a confiscation order is made is not accused of any offence other than the trigger offence of which he

has been convicted – even if the court is asked to apply assumptions similar to those in section 4(3) of the 1994 Act.

63. In *Phillips v United Kingdom* (2001) 11 BHRC 280, the European Court of Human Rights endorsed that approach and held that article 6(2) can have no application to allegations made about the accused's character and conduct as part of the sentencing process, unless they are of such a nature and degree as to amount to the bringing of a new "charge" within the autonomous Convention meaning. The Court held, at paras 31-35, that the procedure was analogous to the procedure for determining an appropriate fine or period of imprisonment. It was to be regarded as part of the sentencing process of a convicted person under domestic law. Therefore the purpose of the procedure was not the conviction or acquittal of the applicant for any other drug-related offence and so the procedure did not amount to the bringing of a new charge. Article 6(2) was accordingly not engaged. The European Court reasoned along the same lines in its admissibility decision in *Van Offeren v The Netherlands* (application no 19581/04), 5 July 2005.

64. On that approach, apart from charges lying on the file, for the purposes of article 6(2), in the present case the appellant has only ever been "charged" with conspiring to contravene section 170(2) of the Customs and Excise Management Act 1979, contrary to section 1(1) of the Criminal Law Act 1977. Nothing said or done by the prosecution or the court in the course of the confiscation proceedings was designed to convict or acquit the appellant of any other drug-related offence. So article 6(2) was not engaged when the court was determining, as part of the sentencing procedure for the trigger offence, whether the appellant had benefited from drug trafficking, other than the drug trafficking comprising the trigger offence.

65. That said, it is important to notice that, even though article 6(2) does not apply to confiscation proceedings, the presumption of innocence does. This is because it is implied into article 6(1), which does, of course, apply to those proceedings. That point was made by the European Court in *Phillips v United Kingdom* (2001) 11 BHRC 280, para 40. The position was conveniently summarised recently in the Court's admissibility decision in *Grayson and Barnham v United Kingdom* (applications nos 19955/05 and 15085/06), 23 September 2008, where the applicant contended that the application of the statutory assumptions in his case had violated his right to the presumption of innocence under article 6(2). The Court said at para 39:

> "The making of a confiscation order under the 1994 Act was different from the standard imposition of a sentence following conviction by a criminal court because the severity of the order - both in terms of the amount of money which must be paid and the length of imprisonment to be served in default - depended upon a finding of benefit from past criminal conduct in respect of which the defendant had not necessarily been convicted. For this reason, the Court in *Phillips* observed 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) (*Phillips*, para 40 and see, *mutatis mutandis*, *Saunders v United Kingdom*, judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, para 68)."

So, even though article 6(2) does not apply, the Crown must show that the convicted person benefited from drug trafficking. In discharging that onus, the Crown can, of course, invoke appropriate presumptions both of fact and law: *Phillips*, para 40.

66. In both *McIntosh* and *Phillips* the relevant proceeds of drug trafficking comprised assets which the accused possessed. Here, however, the Crown accepts that it cannot show that the appellant's known property and expenditure derived from drug trafficking. But the court found that the appellant had organised the cannabis network and it then went on to assess the value of the proceeds which, it inferred, he had derived from trafficking through that network. Mr Owen argued that, so far as article 6(2) was concerned, this constituted a crucial difference from *McIntosh* and *Phillips* where the court had been able to proceed on the basis of the statutory assumptions.

67. In principle, I am unable to see how the use of evidence rather than assumptions could make the decisions in *McIntosh* and *Phillips* inapplicable, since the reasoning of the European Court in *Phillips* is not based on the assumptions or evidence relied on by the court when considering confiscation but on the very nature and purpose of confiscation proceedings.

68. In making his submission, Mr Owen relied, however, on a more recent judgment of the Strasbourg court in *Geerings v Netherlands* (2007) 46 EHRR 1222. In that case, the defendant had been convicted of a number of offences of theft, handling stolen goods and membership of a criminal gang. He appealed and the Court of Appeal quashed his convictions for most of the offences. The result was that he remained convicted of having participated in the theft of a lorry and trailer containing 120 laundry dryers, of having stolen a lorry combination and a number of printers and of handling a piece of clothing and a video camera, knowing that they had been obtained through crime.

69. The prosecutor sought an order from the Regional Court for the confiscation of illegally obtained advantage from the offences. The legislation allowed such an order to be made in respect not only of offences for which the defendant had been convicted, but of similar offences or certain other offences "in connection with which there exist sufficient indications that they were committed by him." The Regional Court made an order, the amount of which showed that it related only to the offences of which the defendant remained convicted after his appeal. He appealed. The Court of Appeal not only dismissed his appeal, but quashed the ruling of the Regional Court and replaced it with an order for a much higher sum by way of confiscation. It did so on the basis that, even though the defendant's convictions of other offences had been quashed, the defendant had illegally obtained advantage from the offences of which he had been acquitted on appeal, "in connection with which [offences] there exist sufficient indications that they were committed by him."

70. The European Court held that there had been a violation of article 6(2). This is scarcely surprising since the Dutch Court of Appeal's decision involved the clearest possible imputation that Mr Geerings had actually been guilty of offences with which he had been charged but of which he had been duly acquitted. At paras 48-51, the European Court applied the approach identified in *Asan Rushiti v Austria* (2001) 33 EHRR 1331, 1339, para 31:

> "The Court cannot but affirm the general rule stated in the Sekanina judgment that, following a final acquittal, even the voicing of suspicions regarding an accused's innocence is no longer admissible. The Court, thus, considers that once an acquittal has become final - be it an acquittal giving the accused the benefit of the doubt in accordance with Article 6(2) - the voicing of any

> suspicions of guilt, including those expressed in the reasons for the acquittal, is incompatible with the presumption of innocence."

Like the Austrian court in *Sekina v Austria* Ser A, No 266-A, 25 August 1993, the Dutch Court of Appeal had done much more than merely voice suspicions about Mr Geerings' innocence of the charges of which he had been acquitted: they had proceeded on the basis that he had committed the offences in question. In the present case, by contrast, the appellant never stood trial for any offence arising out of the cannabis network. So there is no verdict of acquittal which the making of the confiscation order based on the cannabis network would contradict and so violate article 6(2). It follows that this aspect of the European Court's ruling in *Geerings* has no relevance to the appellant's case.

71. In *Geerings* the European Court also considered, at para 47, that confiscation, following on from a conviction, was a measure inappropriate to assets which are not known to have been in the possession of the person affected,

> "the more so if the measure concerned relates to a criminal act of which the person affected has not actually been found guilty. If it is not found beyond a reasonable doubt that the person affected has actually committed the crime, and if it cannot be established as fact that any advantage, illegal or otherwise, was actually obtained, such a measure can only be based on a presumption of guilt. This can hardly be considered compatible with article 6(2)."

72. The essence of the European Court's reasoning is to be found at the end of the penultimate sentence: the Court concluded that what the Dutch court had done could only be based on a presumption of guilt – so what it had done was incompatible with article 6(2). The Court reached that conclusion because, in their view, it had not been shown either that the applicant had committed the crimes in question or that he had derived any advantage from them. That being so, what other basis, apart from a presumption of guilt, was there for saying that the applicant had illegally obtained an advantage?

73. In the particular context of an order made in respect of offences of which the applicant had been acquitted, the reasoning causes no particular difficulty. But, if it were applied more generally, as my noble and learned friend, Lord Mance, shows, it would run counter to the Court's approach in *Phillips* and *Van Offeren.* In any event, in my view, it does not assist the appellant in the present case.

74. Although the appellant was not "charged" with the cannabis network offence, evidence of his involvement in the network was led by the prosecution at his trial for the conspiracy count. The appellant was represented by counsel. Before trial, he would have been supplied with police statements and other material from which it would have been clear that the prosecution was intending to lead evidence about his involvement in the cannabis distribution network at his trial. The appellant has never suggested otherwise. The trial judge held that that evidence was admissible and the Court of Appeal held that there was no arguable appeal against that ruling. Counsel for the appellant had every opportunity to cross-examine the relevant witnesses and to lead evidence to counter the prosecution evidence relating to the cannabis distribution network. At the trial, accordingly, any requirements of article 6(1) and (3) were surely satisfied in respect of the allegations relating to his involvement in that network.

75. In the context of the confiscation proceedings the judge had regard to this evidence which had been led at the trial and, on that basis, had "no doubt" that the appellant had indeed been involved in running the network. So, in this case, there is no question of the judge proceeding on a presumption that the appellant had been involved in the cannabis network – indeed, the judge plainly thought that the appellant's involvement had been proved to the criminal standard, beyond a reasonable doubt. On any view, therefore, the presumption of innocence in article 6(1) was fully respected in the confiscation proceedings.

76. Nevertheless, there is a division of opinion among your Lordships as to the standard of proof which article 6 requires in a case like the present where the judge is considering whether a convicted person has benefited from some specific drug trafficking offence with which he has not been charged. My noble and learned friends, Lord Phillips of Worth Matravers and Lord Mance, consider that proof on the balance of probabilities is all that article 6(1) would require, while Lord Brown considers that, since article 6(2) applies, proof beyond reasonable doubt is required, because that is how people are "proved guilty according to law" in this country.

77. Although I do not share his view that article 6(2) applies, I have none the less reached the same conclusion as Lord Brown on the standard of proof. If a presumption of innocence is implied into article 6(1), then it, too, must require that the person be proved guilty according to law. In the context of a criminal trial, the standard of proof, according to our law, is beyond reasonable doubt. Indeed, if that were not the position, the Crown could ask the court to make a confiscation order on the basis of an alleged benefit from a specific offence of which the defendant would have been acquitted if he had been prosecuted for it.

78. Lord Mance points out that, in *Phillips*, the European Court refers to the terms of section 2(8) of the 1994 Act and does not suggest that the civil standard of proof violates article 6(1). The force of that observation is blunted, however, by the fact that, as is clear from para 41, the Court was concerned only with the assumptions in section 4(3) of the 1994 Act and, in particular, with whether the way they were applied in the applicant's case offended the basic principles of a fair procedure in article 6(1). So the compatibility of proving criminal offending on the balance of probability for the purpose of a confiscation order was simply never considered. For what it is worth, the fact that the European Court seems to envisage the use of the criminal standard in *Geerings*, para 47, suggests that it would have favoured that standard in the present situation.

79. By virtue of section 3 of the Human Rights Act 1998, I would accordingly read section 2(8)(a) of the 1994 Act as applying the civil standard of proof to any question as to whether a person has benefited from drug trafficking, but not to any question as to whether a person has committed a specific drug trafficking offence.

80. Admittedly, Judge Stokes could not point to any assets or expenditure of the appellant which were directly linked to the trafficking through the cannabis distribution network. But, as I have explained, expenditure and assets are only the likely indicia of profitable drug trafficking. What the judge had to determine was not whether the appellant had profited from drug trafficking, but whether the appellant had benefited from drug trafficking, within the meaning of section 2(3). Even in the absence of such indicia, it was open to the judge, on the available evidence, to find that the appellant must have benefited from drug trafficking – in the sense that he had received payments or rewards from his involvement. Such a finding involves no violation of article 6 (1) or (2). So far as the amount of the benefit is concerned, the judge

was careful to reduce his estimate so as to allow for any margin of error in that calculation. Again, it is hard to see how that calculation could possibly give rise to a violation of article 6(1) or (2), especially given that the appellant does not criticise the judge's estimate or the way that it was arrived at. In no sense can it be said, in this case, that the court's conclusions as to the benefit derived by the appellant from drug trafficking were based on a presumption of guilt: they were based on evidence.

81. In short, nothing in the European Court's judgment in *Geerings* suggests that what the judge did in this case involved a violation of any of the appellant's article 6 Convention rights. More particularly, when making the confiscation order as part of the sentencing process, the judge did not proceed on the basis of any presumption as to the appellant's guilt. There was accordingly no violation of the presumption of innocence as contained in either article 6(1) or 6(2).

82. For these reasons I would dismiss the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

83. This appellant was convicted of conspiracy to import heroin from which it is accepted that he derived no benefit. (It is an oddity of our law, although irrelevant to the appeal, that had he in fact paid for the heroin which he was conspiring to import he would be treated, not as being out of pocket, but rather as having to that extent benefited from the offence.) As part and parcel of the case against him was evidence, largely in the form of covertly recorded admissions, that for some years he had been engaged in distributing cannabis. From this, uncharged, drug-trafficking offence, the Crown contended in post-conviction confiscation proceedings, the appellant *had* benefited—to the extent of £8.7m as calculated by the Crown, £4m as found by the judge. In the event, confiscation orders were made against the appellant (i) uncontentiously, for £510,000 under the Criminal Justice Act 1988 in respect of benefit from the evasion of duty on the importation of cigarettes (an offence to which the appellant had pleaded guilty), and (ii) for £2,628,000 under the Drug Trafficking Act 1994, with eight years' imprisonment in default, the order now under appeal. The two orders

together amount to £3,138,000—the total of the appellant's realisable assets and thus the ceiling for such orders as provided by legislation.

84. There was no dispute that the appellant owned a large hotel and a number of other properties which generated a very substantial income and it may well be that his entire realisable assets could have derived from legitimate income. No doubt with that in mind, both sides were content not to apply the statutory assumptions ordinarily required to be made under section 4(3) of the 1994 Act.

85. The point of law of general public importance certified for your Lordships' decision on this appeal is:

> "In determining the value of a defendant's proceeds of drug trafficking under section 4 of the Drug Trafficking Act 1994, is it compatible with article 6(2) of the European Convention on Human Rights to take into account drug trafficking that the judge has found proved to the criminal standard on the evidence given at the defendant's trial, in circumstances where (a) such conduct was not itself the subject of a charge against the defendant and was not a necessary basis for the jury's verdict convicting him on the charge he did face at trial, (b) the Court had not made the assumptions contained in section 4(3) in relation to the defendant's known property and expenditure, and (c) there is no finding or allegation that the defendant had hidden assets?"

Although the question as certified is confined to compatibility with article 6(2), it was agreed that compatibility with article 6(1) is also in issue.

86. Others of your Lordships have already set out the relevant legislation and made extensive reference to both the domestic and Strasbourg authorities in point and none of this material do I propose to repeat. With regard to the position under domestic law, I am in full agreement with all your Lordships that the appellant is certainly wrong to contend that the only way of determining the benefit from drug trafficking (except, of course, in respect of an offence of which the defendant has been convicted) is on the basis of the section 4(3) assumptions, and I am content to assume that the course adopted in the

present case is consistent with our legislation—notwithstanding the obvious discordance between the judge's finding of cannabis dealing to the criminal standard of proof and section 2(8) of the 1994 Act which provides that it is the civil standard of proof which is to apply to the determination of any question arising as to whether a person has benefited from drug trafficking.

87. I confess, however, to somewhat greater difficulty regarding the compatibility of the confiscation proceedings here with article 6(2). My noble and learned friend Lord Rodger of Earlsferry suggests (at para 63) that the reasoning in *Phillips v United Kingdom* (2001) 11 BHRC 280 (which endorsed the Privy Council's decision in *McIntosh v Lord Advocate* [2003] 1 AC 1078) is conclusive of the article 6(2) argument. With respect, however, I question whether it goes this far. *McIntosh*, as my noble and learned friend Lord Phillips of Worth Matravers points out at para 27, was based squarely on confiscation proceedings where the benefit of drug trafficking was determined by reference to identified property (a process, as Lord Hope put it at para 43, akin rather to tracing than to finding the defendant to have been engaged in criminal conduct). And *Phillips* too was concerned with the statutory assumptions under which benefits are calculated by reference to identifiable property.

88. It is true that the core reasoning in *Phillips* is that the confiscation procedure, being for the purpose of fixing the amount of the order, is "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" (para 34). And in para 35 the Court drew a distinction between "allegations made about the accused's character and conduct as part of the sentencing process" and "accusations . . . of such a nature and degree as to amount to the bringing of a new 'charge'"—article 6(2) of course, applying only to the latter.

89. That reasoning was later repeated in *Van Offeren v The Netherlands* (Application No. 19581/04) and *Grayson & Barnham v United Kingdom* (Applications 19955/05 and 15085/06), both of which, as my Lords have demonstrated, appear on their facts to have taken the *Phillips* approach yet further. The Court in *Van Offeren*, declaring the application inadmissible, appears actually to have sanctioned the calculation of the applicant's benefit from drug trafficking by reference to an offence of which he had actually been acquitted. And, as Lord Phillips explains (paras 31-33), the Court in *Grayson & Barnham* (notably in *Barnham's* case) appears to have approved the calculation of benefit by reference to specific uncharged offences.

90. The one Strasbourg decision going the other way—the decision understandably relied upon by Mr Owen QC—is *Geerings v Netherlands* (2007) 46 EHRR 1222, the substance of which is set out by Lord Mance at para 124. It is, as others of your Lordships have pointed out, in certain respects a difficult decision. However it clearly stands for one proposition at least: whatever may have been decided in *Van Offeren* (as Lord Mance points out, by an almost identically constituted chamber), benefit is not to be calculated by reference to an offence with which the defendant was charged and of which he has been acquitted. That, the Court held (para 50), "amounts to a determination of the applicant's guilt without the applicant having been 'found guilty according to law'" and thus violates article 6(2). Is that, however, the only limitation imposed by Strasbourg upon the calculation of benefit in confiscation proceedings following a drug trafficking conviction? Are there no circumstances in which reliance on offences other than those of which the defendant has been convicted will amount to the bringing of a new charge for article 6(2) purposes? (I say "the only limitation". It is, of course, plain—and repeatedly noted by the ECtHR—that even were confiscation proceedings to be regarded merely as part of the sentencing process, article 6(1) applies to them and requires that the proceedings be in all respects fair. That, however, is not a problem arising here or indeed in any of the cases discussed above: the critical question in all these cases is rather whether or not article 6(2)'s presumption of innocence has been breached.)

91. As I understand it, some at least of your Lordships would answer the questions posed above in the affirmative, albeit on Lord Phillips' part "not without hesitation". With no less hesitation I have come to a different conclusion. *Geerings* seems to me to stand for more than merely the prohibition against reliance on criminality of which the defendant has actually been acquitted. That was separately identified as the second of the two reasons given by the Court for distinguishing *Phillips* and (rightly or wrongly) *Van Offeren*—the subject of paras 48-50 of the Court's judgment. The first reason is that contained in paras 46 and 47 of the Court's judgment, to be read in the context of para 44 which identifies as common features of *Phillips* and *Van Offeren* "that the applicant demonstrably held assets whose provenance could not be established; that these assets were reasonably presumed to have been obtained through illegal activity; and that the applicant had failed to provide a satisfactory alternative explanation."

92. In para 46 the Court stated what was objectionable in the Dutch court's findings in *Geerings* which distinguished it from *Phillips* and

Van Offeren: "that the applicant had obtained unlawful benefits from the crimes in question although [he] was never shown to hold any assets for whose provenance he could not give an adequate explanation, [such finding having been reached] by accepting a conjectural extrapolation based on a mixture of fact and estimate contained in a police report".

93. That seems to me to describe the present case precisely. Then, in para 47, the court ruled out the confiscation of benefit calculated by reference to "assets which are not known to have been in the possession of the person affected, the more so if the measure concerned relates to a criminal act of which the person affected has not actually been found guilty." The Court continued, "If it is not found beyond a reasonable doubt that the person affected has actually committed the crime, and if it cannot be established as fact that any advantage, illegal or otherwise, was actually obtained, such a measure can only be based on a presumption of guilt. This can hardly be considered compatible with article 6(2)."

94. That again (with one important exception, the standard of proof, to which I shall return) seems to me to describe this case. I cannot with respect accept Lord Mance's analysis (at para 127) of paragraph 47 of *Geerings*, an analysis which effectively equates the Court's first reason for distinguishing *Phillips* and *Van Offeren* with its second reason: that the applicant had in fact been acquitted of the very crimes the proceeds of which were imputed to him as benefits received. Rather I understand the Court's reasoning in paras 46 and 47 to amount to this: the prosecution must either demonstrate that the defendant holds or has held assets the provenance of which he cannot satisfactorily explain (as in *Phillips* and *Van Offeren*—see para 44), or must establish beyond reasonable doubt that the defendant has committed some other offence (or offences) from which it can be presumed that he obtained advantage. In the latter case, of course, article 6(2) applies but is satisfied.

95. The difference, of course, between *Geerings* and the present case is that in the present case the appellant, so far from having been acquitted of the cannabis offence, was found by the judge beyond reasonable doubt to have committed it. On this basis and on this basis alone I would regard *Geerings* as distinguishable and article 6(2), albeit engaged here, to be satisfied. The fact that the cannabis offence was not treated under domestic law as a criminal charge and did not lead to a criminal conviction is not in my judgment a sufficient basis for holding it not to be a charge within the autonomous Convention meaning.

96. Certain of your Lordships suggest that it would be strange if the Crown could rely on statutory assumptions and the reverse burden of proof to establish benefit by reference to demonstrable property held or expenditure incurred and yet not be entitled to prove drug trafficking and its likely benefits. I agree, but I agree only on the basis that, unless the possession of property or expenditure can otherwise be established, the Crown must indeed prove the offending, even if not formally charged, to the criminal standard, as in this very case. As I understand it, some at least of your Lordships will have regarded it as sufficient for the Crown to have proved the cannabis offence on the balance of probabilities (as, indeed, section 2(8) of the 1994 Act stipulates). And certainly that view would be implicit in the suggestion that (consistently perhaps with *Van Offeren* although not, of course, with *Geerings*) confiscation can be ordered even in respect of benefits derived from offences of which the defendant had been acquitted provided only that the judge nevertheless decides that the defendant was probably guilty.

97. At one stage in the preparation of this opinion I wondered whether, assuming for Convention purposes the appellant was indeed to be regarded as charged with a criminal offence, he can properly be said to have been "proved guilty according to law", not least given the terms of section 2(8). Given, however, the obvious overall fairness of the confiscation proceedings here—see, for example, para 42 of Lord Phillips' opinion and paras 64 and 65 of Lord Rodger's opinion—I cannot think that Strasbourg would regard the procedure in fact adopted as unlawful. Having swallowed the camel of accepting that our confiscation proceedings generally are compliant with article 6, Strasbourg are in my opinion unlikely to strain at this gnat.

98. I too, therefore, if for rather different reasons than the other members of the Committee, would dismiss this appeal.

LORD MANCE

My Lords,

99. I would dismiss this appeal. Two issues arise: first, the interpretation of Part I of the Drug Trafficking Act 1994, construed without reference to s.3 of the Human Rights Act 1998 and, second, the impact, if any, on such interpretation of the Convention rights

incorporated into domestic law by that Act. The appellant submits that articles 6(1) and (2) are potentially infringed and that, if Part I is otherwise inconsistent with them, it needs to be read down or alternatively declared incompatible.

100. As to the first issue, the scheme of Part I is clear. It aims, so far as current realisable assets allow, to deprive a defendant convicted of a drug trafficking offence of the proceeds of any drug trafficking carried on by him or another person and from which he has benefited in the past (ss.2(2) and (3)). In this connection, a person has benefited from drug trafficking if he has "at any time …..received any payment or other reward in connection with drug trafficking carried on by him or another person" (s.2(3)) – and in that regard it was common ground in argument before the House that *mens rea* consisting of some form of knowledge is required before a person could be said to have received any such payment or other reward "in connection with drug trafficking carried on by …. another person"; further, the aggregate value of any such payments or other rewards constitutes "the value of the proceeds of drug trafficking" (s.4(1)); and the court is required to make a confiscation order in the amount assessed (that is, under s.4(1)) to be the value of such proceeds (s.5(1)) - subject to the important qualification that if the amount realisable is less than the amount so assessed, the confiscation order is to be the amount so realisable (or, if that is nil, a nominal amount) (s.5(3)).

101. This scheme is reinforced by assumptions which the court is required to make in circumstances not falling within specified exceptions: s.4(2) to (5) ,which read:

> "The required assumptions are—
>
> (a) that any property appearing to the court—
>
> (i) to have been held by the defendant at any time since his conviction, or
>
> (ii) to have been transferred to him at any time since the beginning of the period of six years ending when the proceedings were instituted against him,

was received by him, at the earliest time at which he appears to the court to have held it, as a payment or reward in connection with drug trafficking carried on by him;

(b) that any expenditure of his since the beginning of that period was met out of payments received by him in connection with drug trafficking carried on by him; and

(c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a reward, he received the property free of any other interests in it.

(4) The court shall not make any required assumption in relation to any particular property or expenditure if—

(a) that assumption is shown to be incorrect in the defendant's case; or

(b) the court is satisfied that there would be a serious risk of injustice in the defendant's case if the assumption were to be made;

and where, by virtue of this subsection, the court does not make one or more of the required assumptions, it shall state its reasons.

(5) Subsection (2) above does not apply if the only drug trafficking offence in respect of which the defendant appears before the court to be sentenced is an offence under section 49, 50 or 51 of this Act *[that is, various moneylaundering offences, now to be found replaced under the Proceeds of Crime Act]*."

102. Drug trafficking is defined in wide terms which include not only specified offences under the law of England and Wales and offences under corresponding laws elsewhere (s.1(1)) but also entering into or being otherwise concerned in England and Wales or elsewhere "in an arrangement whereby (a) the retention or control by or on behalf of another person of the other person's proceeds of drug trafficking is facilitated; or (b) the proceeds of drug trafficking by another person are used to secure that funds are placed at the other person's disposal or are used for the other person's benefit to acquire property by way of investment" (s.1(2)).

103. It follows from these provisions that a person convicted of a drug trafficking offence may be subject to a confiscation order by benefiting

by and receiving proceeds from (a) the drug trafficking offence of which he is convicted, (b) other drug trafficking offences which he has committed here or under corresponding foreign laws, (c) other drug trafficking offences which other people have committed here or under corresponding foreign laws, (d) drug trafficking in which he has been involved here or abroad not amounting to any such drug trafficking offence here or abroad and (e) drug trafficking in which another person has been involved not amounting to any such drug trafficking offence here or abroad. The scheme of the Act does not distinguish in any essential respect between any of these possibilities, but embraces them all. There is nothing to support Mr Owen's submission that in case (a) the Crown is free to prove any actual benefit made and proceeds received in any way it can, whereas in all or any of the other cases the only way the Crown can proceed is by invoking the assumptions. There is nothing in the statutory language to make the assumptions the only or exclusive means of proving benefit made or proceeds received in any circumstances.

104. The assumptions required under s.4(2) et seq. are simply one aspect of one and the same overall scheme. The scheme operates by reference to the benefit made from drug trafficking and the value of the proceeds of drug trafficking. The assumptions, where they apply, do no more than assist to prove these matters. It is a fallacy to describe them as some form of separate assets-based recovery. They are means of proving the receipt of proceeds from drug trafficking by pointing to particular property or expenditure and requiring an explanation for its origin. The defendant is entitled to rebut the assumptions in relation to any particular property or expenditure, by showing them to be incorrect in its case. S.4(3)(b) caters for cases where there may be a serious risk of injustice if the assumptions are made - take a defendant suffering from some mental infirmity or whose records have all been destroyed in a fire and s.4(5) specifies cases where the assumptions can never be made.

105. The assumptions are for the Crown's and so the community's benefit. Parliament's resolve is underlined by the requirement to make them under the 1994 Act, in contrast with the predecessor legislation where they were discretionary (Criminal Justice Act 1988, s.72AA(3)). But the assumptions are no more than one way of proving that a defendant has benefited by drug trafficking and the value of his proceeds of drug trafficking for the purposes of s.2(4), 5(1) and 4(1). That the Crown is entirely free to prove such benefit in other ways or at a time preceding the six year period covered by the assumptions is clear from the general structure of Part I. If the assumptions were to be the only way of proving benefit by or the proceeds from drug trafficking,

there would be no point in much of s.2. Yet s.2(3) and s4(1) both deliberately emphasise that a defendant may benefit by and receive proceeds of drug trafficking "at any time", in obvious contrast with the assumptions under s.4(3) which are limited to "at any time since the beginning of the period of six years". Further, in cases where the assumptions are not permitted to be made either under the statutory provisions or in the interests of justice by the court, the Crown must be able to prove the benefits and proceeds by other means. And, since the assumptions only assist to prove proceeds "in connection with drug trafficking carried on by him" (see s.4(3)(a) and (b)), it would never be relevant or possible to establish the proceeds consisting of payments or other rewards received by him "in connection with drug trafficking carried on by …. another person" to which s.2(3) and 4(1) refer, unless it were open to the Crown to do this without relying on the assumptions.

106. It is therefore clear, almost beyond sensible argument, that Part I involves a single overall scheme, in which the assumptions play a potential evidential role. But the assumptions are no more than one way of proving certain aspects of the benefit and proceeds at which the scheme aims. They apply only in relation to property held or acquired or expenditure made since a date six years before the institution of proceedings. To the extent that they do not apply, the Crown has to make its case without their assistance. But the essential enquiry is the same: what if any benefit was made and proceeds received? And the ultimate order is always limited to the lesser of the proceeds received and the amount realisable at the date of the order.

107. Is there anything in this scheme which limits it in any way to benefit made or proceeds received in connection with the offence of which the defendant is convicted? Obviously not: see paragraph 5 above. To introduce any such limit would involve rewriting Parliament's scheme, legislating rather than interpreting. The scheme is broad and thorough. Mr Owen QC for the appellant shakes the spectre of confiscation orders made on the basis of evidence of past drug trafficking called for the first time at the sentencing stage and having nothing to do with the issues or evidence at trial. That is not how the real world operates; and it has nothing to do with the present case, where the evidence of past cannabis dealings was admitted, without objection, as relevant and appropriate under English law in relation to the heroin importation charge (and was, one might add, evidence which, although not strictly essential to the jury's verdict, left the judge in no doubt about its truthfulness). A criminal judge always has a power, and duty, to restrain abusive conduct by the prosecution, and, if Mr Owen's spectre

were ever to emerge from a cupboard, the trial judge would know how to exorcise it.

108. In the present case, I share the feeling that it is undesirable that a defendant should be charged only with an offence of conspiring to import heroin, that the Crown should in order to prove that offence adduce extensive evidence (in the form of covertly taped admissions) of the defendant having a pre-existing distribution network for the transportation and distribution of cannabis, in order to show why the defendant was approached to import heroin, and that the judge should then be invited to make a confiscation order on the basis of the benefit made and proceeds received from the cannabis dealings proved to his satisfaction by such evidence. I understand that, in the absence of any charge relating to the cannabis dealings, the evidence of the appellant's admissions of such dealings would not have been admissible in Scotland. But criminal law and procedure vary widely among European countries, and, within the parameters of the European Convention on Human Rights and of the common principles governing proper prosecutorial conduct (neither of which it has been suggested were exceeded in this particular respect), it is not for us to proceed on the basis of some instinctive preference for an approach different from that here actually adopted. If there was any objection to the course taken at trial or at the stage when the confiscation order was sought, it was open to the defence to apply to stay or limit further proceedings or to exclude the proposed evidence accordingly. This was done, but the trial judge held that the evidence that the defendant had a pre-existing cannabis distribution network was relevant and had, though prejudicial, considerable probative value and should be admitted, and went on to give directions in his summing up which accurately explained the nature and potential significance of the evidence, and which made clear that it was for the jury to decide whether there was in fact such a network. The judge's ruling was challenged unsuccessfully on appeal to the Court of Appeal. The correctness of what the Court of Appeal described as the judge's "very clear ruling" and "careful summing-up" are no longer in issue before your Lordships' House. In these circumstances, there was nothing irregular or abusive in what was done during the confiscation proceedings if it fell within the statutory provisions, as in my opinion it clearly did.

109. The statutory assumptions were not made in this case. They were not made because the appellant objected that a case based upon them "would involve extremely difficult accountancy issues and would be lengthy and expensive". The Crown "therefore decided to restrict the confiscation claim to assessing the benefit derived from the provable

cannabis trafficking". Thus, the confiscation proceedings were conducted "on the agreed basis that the ….. assumptions regime ought not to be applied to the Appellant's known assets/expenditure" (appellant's case, par. 4.1). The appellant was a wealthy man, with interests including a hotel and other income-yielding properties, and Mr Owen argued in the Court of Appeal that the Crown must be taken to have recognised either under s.4(4)(a) that the assumptions were entirely incorrect in his case or under s.4(4)(b) that there would be a serious risk of injustice if they were to be made. The latter proposition fails to recognise that this would at once open the door to precisely what the Crown in fact did, namely accept the onus of proof and positively establish the benefit from and proceeds of drug trafficking, without reliance on any assumptions. For present purposes what matters is that the Court of Appeal rejected both aspects of Mr Owen's argument, and accepted that it was for "purely pragmatic reasons" that the assumptions were not relied upon. Richards LJ in his clearly reasoned judgment went on: "Whether it was permissible to deal with the matter in this way by agreement and without considering whether the statutory conditions for dis-applying the assumptions were fulfilled, is doubtful, but is not the question before us". It is to be noted that in this regard also no ground of appeal, based on procedural irregularity or unfairness, has ever been advanced - I think for good reason.

110. The assumptions are not some form of procedural safeguard for defendants. They are intended to assist the Crown and the public in the task of stripping convicted drug traffickers of the proceeds of drug trafficking, and they were only made compulsory (subject to the statutory exceptions) in order to ensure that the Crown and public received this assistance from the courts. A defendant who seeks and obtains agreement that the assumptions should not be applied cannot plausibly claim to have suffered prejudice, still less unfairness. He has obtained a benefit, which the Crown was in my view able to waive. The contrary view means that the judge should have insisted on making assumptions against the defendant which neither the defendant nor the Crown wished to make or should at least have insisted in considering whether either of the reasons available under s.4(4) for not making assumptions applied and have given its reasons for so concluding if it concluded that they did. If that is what the law requires, then the only person with any cause for complaint that the judge did not do so this is the public. There was and is on no view any basis for complaint by the defendant, for whom the application of the assumptions could only be prejudicial. It remained open to the defendant on the way the Crown chose to put its case to adduce any evidence he wanted to establish his wealth, the legitimacy of his business dealings or (more materially in this case) the absence of any prior cannabis dealings or of any benefit or

proceeds deriving from them. This he singularly failed to do, declining to give evidence at the confiscation stage.

111. Not surprisingly in these circumstances, Mr Owen's emphasis was on the supposed effect and consequences of European Court of Justice case-law which, he submits, requires the court, through the prism of s.3 of the Human Rights Act, to put some different interpretation on the scheme of the Drug Trafficking Act (or, possibly, simply to declare it incompatible, although he did not stress this aspect, since it would not have any immediate domestic effect on the order made against his client).

112. The relevant case-law starts with *Engel v. The Netherlands (No. 1)* (1976) 1 EHRR 647 in which the European Court of Human Rights ruled that article 6(2) of the Convention ("Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law") "deals only with the proof of guilt and not with the kind or level of punishment" and that a court was "for the sole purpose of determining their punishment [i.e. the punishment of the two convicted applicants] in the light of their character and previous record" entitled to take into consideration "certain similar, established facts the truth of which they did not challenge".

113. In *Welch v. United Kingdom* (Application 17440/90) (1995) 20 EHRR 247, the issue was whether a confiscation order made retrospectively under the 1986 Act amounted to a penalty within article 7 of the Convention. The Court identified several aspects of the regime as in keeping with the idea of a penalty, including "the sweeping statutory assumptions ….., the fact that the confiscation order is directed to the proceeds involved in drug dealing and is not limited to actual enrichment or profit ….., the discretion of the trial judge in fixing the amount of the order, to take into account the degree of culpability of the accused …… [I note in parenthesis that this so-called "discretion" was explained in par. 13 of the judgment as a reference to the possibility that the judge might conclude that different defendants had played unequal roles and had as a result profited to different extents]; and the possibility of imprisonment in default of payment by the offender. The Court was however careful to stress that its conclusion that a penalty had been imposed in breach of article 7(1) "concerns only the retrospective application of the relevant legislation and does not call into question in any respect the powers of confiscation conferred on the courts as a weapon in the fight against the scourge of drug trafficking" (par. 36).

114. Next is *McIntosh v. Lord Advocate* [2001] UKPC D1, a devolution case decided on 5th February 2001, after a hearing on 24-25th January 2001. Assumptions had been made against a convicted defendant under s.3 of the Scottish Proceeds of Crime Act 1995 which was in similar terms to s.4 of the English and Welsh 1994 Act, with the important difference that the making of assumptions was discretionary. It was argued that in relation to an application for a confiscation order a convicted defendant was a person "charged with a criminal offence" and so entitled to rely on the presumption of innocence under article 6(2) of the Convention. Allowing an appeal from the Appeal Court of the High Court of Justiciary, Lord Bingham of Cornhill, giving the leading speech with which all other members of the Privy Council agreed, rejected the argument, listing "compelling reasons" why this would not be the correct analysis under Scottish law, and finding nothing in Strasbourg jurisprudence, including *Engels* and *Welch*, pointing towards a different result.

115. Lord Bingham's compelling reasons merit quotation in full:

> "(1) The application is not initiated by complaint or indictment and is not governed by the ordinary rules of criminal procedure.
>
> (2) The application may only be made if the accused is convicted, and cannot be pursued if he is acquitted.
>
> (3) The application forms part of the sentencing procedure.
>
> (4) The accused is at no time accused of committing any crime other than that which permits the application to be made.
>
> (5) When, as is standard procedure in anything other than the simplest case, the prosecutor lodges an application under section 9, that application (usually supported by detailed schedules) is an accounting record and not an accusation.
>
> (6) The sum ordered to be confiscated need not be the profit made from the drug trafficking offence of which the accused has been convicted, or any other drug trafficking offence.
>
> (7) If the accused fails to pay the sum he is ordered to pay under the order, the term of imprisonment which he will be

> ordered to serve in default is imposed not for the commission of any drug trafficking offence but on his failure to pay the sum ordered and to procure compliance.
>
> (8) The transactions of which account is taken in the confiscation proceedings may be the subject of a later prosecution, which would be repugnant to the rule against double jeopardy if the accused were charged with a criminal offence in the confiscation proceedings.
>
> (9) The proceedings do not culminate in a verdict, which would (in proceedings on indictment) be a matter for the jury if the accused were charged with a criminal offence."

Lord Bingham continued:

> "It is of course true that if, following conviction of the accused and application by the prosecutor for a confiscation order, the court chooses to make the assumptions specified in section 3(2) of the 1995 Act or either of them, an assumption is made (unless displaced) that the accused has been engaged in drug trafficking which, as defined in section 49(2), (3) and (4), may (but need not) have been criminal. But there is no assumption that he has been guilty of drug trafficking offences as defined in section 49(5). The process involves no inquiry into the commission of drug trafficking offences. Unless Strasbourg jurisprudence points towards a different result, I would not conclude that a person against whom application for a confiscation order is made is, by virtue of that application, a person charged with a criminal offence."

It is clear that Lord Bingham regarded a domestic scheme like the present as a composite unity, with the assumptions, where made, as only one element, and nothing turning on whether or not they were made. Lord Hope of Craighead in a brief judgment added the observation that, by the time the judge was concerned with confiscation, the article 6(2) stage was "passed" and "The court is concerned only with confiscation of the kind which the law prescribes where the conviction is for a drug trafficking offence. The respondent is not now being charged with another offence, nor is he at risk in these proceedings of being sentenced again for the offence of which he has been convicted" (par.43).

116. Three days later the European Court of Rights commenced its deliberations on another United Kingdom case, *Phillips v. United Kingdom* (Application no. 41087/98) decided 5th July 2001. Again, the argument was that the confiscation order proceedings were "a discrete judicial process which involved [the convicted defendant] being 'charged with a criminal offence' within the meaning of article 6(2)". The Court in paragraph 31 identified three relevant criteria: the classification under national law (under which in this case no new charge or offence was involved – the Court cited *R. v Benjafield and Revzi* in the Court of Appeal: [2003] 1 AC 1099), their essential nature and the type and severity of the penalty that the defendant risks incurring. Considering the second and third criteria, it noted – obviously as factors *favouring* the view that a penalty was involved – the statutory assumptions and the onus of proof on the defendant, as well as the substantial size of the relevant order (£91,400) and of the two-year consecutive sentence ordered to be served in default of its payment. But it went on decisively to reject the applicant's case, saying:

> "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* …. 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 ….. , 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)."

Once again, it is clear that the assumptions made were regarded as a factor militating potentially *in favour of* the applicant's argument that a new charge or offence was involved, but that this factor was outweighed by the overall purpose and effect of the scheme. Judges Bratza and Vajić dissented on the issue whether article 6(2) could have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless they amounted to the bringing of a new "charge".

117. The Court in its judgment in *Phillips* also rejected submissions that the scheme for making confiscation orders infringed article 6(1) or article 1 of the first protocol. The Court noted that the requirement that the prosecution bear the onus of proof formed "part of the general notion of a fair hearing under article 6(1)", but added that this was "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" (para. 40). It accepted as legitimate the shifting of the onus of proof to the defendant under the statutory assumptions required to be made by s.4(3) of the Drug Trafficking Act 1994. It referred repeatedly to the standard of proof applicable to the confiscation order proceedings (under, at that time, the 1994 Act) as being "that applied in civil proceedings, namely on the balance of probabilities" (para. 22; see also the recital of the sentencing judge's express references to this in paras. 13 and 14, as well as paras. 43-44). It recited at paragraph 13 the trial judge's statements that:

> "It is for the prosecution to establish, of course, on a balance of probabilities that he has benefited from 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 ……"

As well as his further statements that the defendant "had failed to take obvious, ordinary and simple steps [to take to displace the assumptions and counter the prosecutor's allegations] which would clearly have been taken if his account of the facts had been true". The Court at paragraphs 44-45 summarised these statements as part of the reasoning leading it to conclude that there had been no violation of article 6(1). Nowhere does the Court suggest that it saw or had any problem with the application of the civil standard to all issues involved in the question whether a defendant has engaged in and benefited from drug trafficking (see paras. 40-47). On the contrary, it is clear that the only difference that the Court identified or saw between proof by "direct evidence" and circumstances where the statutory assumptions were applicable lay in the onus, not the standard, of proof (see especially paras. 43-45 referring to and read with para. 13).

118. *R v. Benjafield and Rezvi* came to the House on appeal and was decided on 24th January 2002 [2002] UKHL and [2003] 1 AC 1099. Although the Convention rights were not strictly engaged (because the appeal related to a criminal trial concluded before 2nd October 2000 when the Human Rights Act 1998 came into force), the House of Lords focused primarily on the resolution of the issues on an assumption that the Convention rights did apply. Lord Steyn, giving the leading speech with which all other members of the House agreed, followed and endorsed the majority decision in *Phillips*, underlined the national and international policy objectives behind the 1988 Act, rejected the submission that its terms were disproportionate or inconsistent with the Convention rights and rejected an argument based on the principle of legality, saying that "There is …. no scope for the application of this principle in this case. the legislation is explicit in its terms and represents a fair balance between the interests of the individual and those of the community" (par. 19). For similar reasons he rejected an argument of abuse of process to the effect that "in making the confiscation order the court took into account counts that were undetermined", saying: "The premise of this argument is wrong: the judge rightly relied on the evidence before him in relation to confiscation and not on any undetermined counts. The confiscation regime is a fair procedure which takes account of the offender's rights as well as the public interest" (par. 20).

119. The next case is *van Offeren v The Netherlands* (Application no. 19581/04) an admissibility decision on 5th July 2004 by the Third Section of the European Court of Human Rights presided over by Judge Zupančič. Article 36e of the Dutch Criminal Code provided that "any person convicted of a criminal offence might be ordered in a separate judicial decision to pay a sum of money to the state in order to deprive him of illegally obtained advantage" (art. 36e par.1) and that such an order might be imposed on a person "who has obtained advantage by means of or from the proceeds of the said criminal offence or similar offence or offences for which a fifth-category fine may be imposed, in connection with which there exist sufficient indications that they were committed by him" (art. 36e par.2). In the case of a conviction of a fifth-category offence which had been preceded by a relevant criminal financial investigation the confiscation order could extend to any illegally obtained advantage if, having regard to that investigation, "it is likely that other indictable offences led in any other way to the convicted person obtaining illegal advantage" (art. 36e par.3). Article 511f of the Code of Criminal Procedure enabled the judge to derive the assessment of the actual amount of such advantage from any "legal means of evidence", including the accused's own statements.

120. Mr van Offeren was charged with various offences, but convicted on 13th September 1999 of only four fifth-category offences, consisting of one weapon offence and three drug offences (transporting cocaine between 1st June and 8th October 1998 and holding cocaine and mannitol, destined to dilute cocaine, on 9th October 1998). Nonetheless, the Dutch courts by separate judicial decisions under article 36e concluded that he had engaged in cocaine trafficking, and that the considerable capital in the form of jewellery and cars, which he was shown to have held in the period between 1st January 1997 and 31st May 1998 when he was in receipt of welfare benefits, derived from cocaine trafficking (rather than an illegal trade in gold and cars, as the defendant maintained). The Court of Appeal (which evidently conducted a full rehearing, hearing evidence from seven witnesses, one of them subsequently charged as a result with perjury) reached the same conclusion, while varying the confiscation order in amount (pp.3-4). An appeal to the Dutch Supreme Court complaining that the confiscation order was based on an offence of which he had been acquitted, in violation of article 6(2) of the Convention, was dismissed. The Supreme Court held the procedure under both art. 36e pars. 2 and 3 of the Criminal Code and art. 511b was compatible with article 6(2). It made clear, inter alia, that "the circumstance that the suspect has been acquitted of specific offences does not automatically constitute an obstacle for considering those offences, in the framework of the confiscation procedure, as 'similar offences' or 'offences for which a

fifth-category fine may be imposed' as referred to in Article 36e par. 2 of the Criminal Code" (p.8). Mr van Offeren complained to the European Court on the same basis as he had complained to the Supreme Court, viz that the confiscation order infringed article 6(2) "since it was based on a judicial finding that he had committed an offence of which he had been acquitted in criminal proceedings that had been brought against him" (p.9).

121. The Court of Human Rights quoted and applied the reasoning in its previous decision in *Phillips* to resolve the case. It held that, although the confiscation proceedings were disconnected from the principal criminal proceedings, "only a criminal conviction can trigger off a confiscation order procedure", so that the latter "must be regarded as forming a part of the sentencing process under domestic law" (p.10). It noted that it was for the prosecution, in the confiscation order procedure, to "establish a prima facie case that the convicted person has benefited from crime, i.e. from the offence(s) of which he has been found guilty and/or other offences of a similar nature", the onus then being on the convicted person to rebut such case. The Court said that, although the Dutch Court of Appeal had concluded that the capital acquired by the applicant between 1st January 1997 and 31st May 1998, by reference to which the confiscation order was made, must stem from drug trafficking:

> "….. the purpose of this procedure was not the conviction or acquittal of the applicant for any other offences, but to assess whether assets demonstrably held by him were obtained by or through drug-related offences and, if so, to assess the amount at which the confiscation order should properly be fixed. In these circumstances, the Court is of the opinion that the confiscation order procedure must therefore be regarded as 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 person properly convicted of one or more drug offences and did not involve the bringing of any new "charge" within the meaning of Article 6 § 2 of the Convention (see, *mutatis mutandis*, *Phillips v. the United Kingdom*, cited above, §§ 32-35."

122. The confiscation order in *van Offeren* was based on specific evidence of benefit by and of proceeds from drug trafficking of which the defendant had not been convicted. The Dutch Court of Appeal saw

and relied on extensive evidence from the prosecution, including financial reports drawn up both before and during the proceedings and, in addition to the defendant, the seven witnesses to whom reference has already been made (p.4). The Court of Human Rights, reviewing the consistency of this procedure with the Convention, started with Dutch law, which it summarised as permitting a confiscation order to be based "also on the similar offence(s) of which he has been acquitted but in respect of which the judge is satisfied, on a balance of probabilities, that there exist sufficient indications that he has committed them"; it went on to refer to article 511f (p.9). Later, in applying the Convention, it described the Dutch legal position as being that "the prosecution must establish a prima facie case that the convicted person has benefited from crime, i.e. from the offences of which he has been found guilty and/or other offences of a similar nature" and that "It is then for the convicted person to rebut the prosecution's case by proving on the balance of probabilities, that the benefits in question were not obtained through such offences but have another origin not related to the offence(s) of which he was convicted or to any offence of a similar nature" (pp.10-11). This reference to a shifting of onus would seem to derive from the wording of arts. 36e pars. 2 and 3. The Court on any view accepted that it is entirely legitimate for a confiscation order to be made to strip a defendant of benefits from other similar offences (than those of which the defendant has been convicted) established by reference to a civil standard of proof; this, despite the shifting of onus to the defendant's prejudice which the Court identified.

123. It is impossible to think that, if there had been no shifting of onus, the defendant would in the eyes of the Court, have been *better able* to invoke article 6(2) of the Convention. It is impossible to conclude that the procedure followed was only permissible in the eyes of the Court because of the evidence of the defendant's possession of jewellery and cars between 1st January 1997 and 31st May 1998. That evidence was only part of the documentary and oral evidence adduced before the Dutch courts; and there is no logical reason why a confiscation order procedure should be legitimate if it starts with evidence of unexplained property which it may then be inferred (or assumed) was acquired with the proceeds of drug trafficking, but illegitimate if it starts with direct evidence (including admissions) of the receipt of the proceeds of illegitimate drug trafficking. The European Court of Human Rights' decision in *van Offeren* is thus authority that in a case mirroring the present a confiscation order does not involve "the bringing of a new charge".

124. The next decision of the Court requiring analysis is *Geerings v. The Netherlands* (Application no. 30810/03) (2008) 46 EHRR 49, decided less than two years later by a section again presided over by Judge Zupančič and five of whose seven members had also participated in *van Offeren*. The applicant was accused of serial thieving between 1st August 1996 and 28th October 1997, but in the event he was on appeal on 29th January 1999 acquitted of all but two thefts and one charge of handling. Nonetheless, in the separate confiscation procedure following such convictions, the Court of Appeal held on 30th March 2001 that, although he had been acquitted him of most of the charges, there remained sufficient indications that he had committed them to justify a confiscation order based on their assessed benefit. The Dutch Supreme Court upheld the order made on this basis, by similar reasoning to that which they had adopted in *van Offeren*. The European Court held that there had been a violation of article 6(2). I set out the relevant reasoning in full:

> "44. The Court has in a number of cases been prepared to treat confiscation proceedings following on from a conviction as part of the sentencing process and therefore as beyond the scope of Article 6 § 2 (see, in particular, *Phillips*, cited above, § 34, and *Van Offeren v. the Netherlands* (dec.), no. 19581/04, 5 July 2005). The features which these cases had in common are that the applicant was convicted of drugs offences; that the applicant continued to be suspected of additional drugs offences; that the applicant demonstrably held assets whose provenance could not be established; that these assets were reasonably presumed to have been obtained through illegal activity; and that the applicant had failed to provide a satisfactory alternative explanation.
>
> 45. The present case has additional features which distinguish it from *Phillips* and *Van Offeren*.
>
> 46. Firstly, the Court of Appeal found that the applicant had obtained unlawful benefit from the crimes in question although in the present case he was never shown to be in possession of any assets for whose provenance he could not give an adequate explanation. The Court of Appeal reached this finding by accepting a conjectural extrapolation based on a mixture of fact and estimate contained in a police report.

> 47. The Court considers that "confiscation" following on from a conviction – or, to use the same expression as the Netherlands Criminal Code, "deprivation of illegally obtained advantage" – is a measure (*maatregel*) inappropriate to assets which are not known to have been in the possession of the person affected, the more so if the measure concerned relates to a criminal act of which the person affected has not actually been found guilty. If it is not found beyond a reasonable doubt that the person affected has actually committed the crime, and if it cannot be established as fact that any advantage, illegal or otherwise, was actually obtained, such a measure can only be based on a presumption of guilt. This can hardly be considered compatible with Article 6 § 2 (compare, *mutatis mutandis*, *Salabiaku v. France*, judgment of 7 October 1988, Series A no. 141-A, pp. 15-16, § 28).
>
> 48. Secondly, unlike in the *Phillips* and *Van Offeren* cases, the impugned order related to the very crimes of which the applicant had in fact been acquitted.
>
> 49. In the *Asan Rushiti* judgment (cited above, § 31), the Court emphasised that Article 6 § 2 embodies a general rule that, following a final acquittal, even the voicing of suspicions regarding an accused's innocence is no longer admissible.
>
> 50. The Court of Appeal's finding, however, goes further than the voicing of mere suspicions. It amounts to a determination of the applicant's guilt without the applicant having been "found guilty according to law" (compare *Baars v. the Netherlands*, no. 44320/98, § 31, 28 October 2003)."

125. Starting with the second point (paras. 48-50), the correctness in principle of such an approach was in fact clearly raised both by the reasoning of the Dutch courts and by the complaint made to the European Court in *van Offeren*, in which case the European Court did not in any way disapprove it. In *van Offeren* the drug trafficking found by the Dutch courts and on the basis of which the European Court saw no objection to a confiscation order related to the period between 1st January 1997 and 31st May 1998, and the date(s) of the trafficking in respect of which there was an acquittal are not specifically given. But the reasoning of the Court of Appeal and Supreme Court as well as of

the complaint to the European Court assumes that they were one and the same. The Court in *Geerings* believed that it could distinguish its previous decision in *van Offeren* as addressing a different factual situation, when in fact it was, and was certainly presented as, addressing a precisely parallel situation. Further, in justification of the approach taken in *van Offeren*, it can be said, as the Dutch courts said, that a distinction exists between being acquitted because the standard of criminal proof, beyond reasonable doubt or so as to be sure, has not been achieved, and being found liable on the civil balance of probabilities. In some contexts (e.g. the use of similar fact evidence in "brides in the bath" type cases: see *R v Z (Prior Acquittal)* [2000] 2 AC 483. and now Part 11 of the Criminal Justice Act 2003) great injustice could be done if courts were bound to treat acquittals as positive proof of innocence.

126. However, one can, like Richards LJ in the Court of Appeal (par. 43) understand a court's reluctance to endorse a confiscation order relating to "the very crimes of which the defendant has been acquitted". That, as it seems to me, must represent the point of public policy or public appearance which is the key to paragraphs 47-50 and to the approach taken in *Geerings* (however inconsistently with *van Offeren*). If so, the present case is clearly different. There was no charge or acquittal here in respect of any of the drug trafficking offences which led the judge to conclude that the appellant had benefited and received the proceeds in relation to which the confiscation order was made. The potential affront to public perception involved in confiscation proceedings relating to the proceeds of offending of which the defendant has been acquitted is not present.

127. Whether the first and second points made by the Court in *Geerings* are separate or interdependent is left unclear. But on any view the first point (pars. 46-47) involves problematic reasoning. In saying that the applicant "was never shown to hold any assets for whose provenance he could not give adequate explanation", the Court cannot have been suggesting that a confiscation order is only admissible in respect of current assets representing the proceeds of drug trafficking as at the date of the relevant order. Such a suggestion would undermine most previous domestic and Strasbourg decisions: e.g. *Benjafield*, *Phillips* and *van Offeren*, in each of which it is clear that much of the proceeds of drug trafficking to which the order related must long since have been spent. In the English and Welsh context, it would make it necessary, when applying the assumptions, to determine whether the property appearing to have been transferred to the defendant during the six year period prior to proceedings was still held by him (often most

unlikely) and it would render entirely nugatory the provision assuming past *expenditure* during that period to have been made out of the proceeds of drug trafficking. So the Court must be taken still to accept as legitimate a scheme like the present English and Welsh scheme under which, if a convicted defendant is shown to have held unexplained assets at some past time or during some past period, then at least his current assets may, however innocently acquired, be confiscated up to the value of the previously held unexplained assets.

128. Assuming this to be legitimate, what of the next sentence, in which the Court dismissed the Dutch Court of Appeal's finding as a "conjectural extrapolation based on a mixture of fact and estimate contained in a police report"? This may well be a comment confined to the particular facts and the inadequacy of the proof adduced in *Geerings*. The disparaging reference to "conjectural extrapolation" based on "a police report" suggests as much, as Richards LJ also thought (par. 44). In its next paragraph (47), the Court also said that "confiscation" following on a conviction is "a measure inappropriate to assets which are not known to have been in the possession of the person affected". If this means that it is necessary when making a confiscation order to establish that the defendant has benefited by and received proceeds from (here, drug) offending, and perhaps also that any resulting confiscation order should be limited to his realisable assets, there is no problem.

129. The last two sentences of paragraph 47 in *Geerings* are particularly difficult. Breaking them down and adding the bracketed lettering for convenience of reference, the Court says that [a] "If it is not found beyond a reasonable doubt that the person affected has actually committed the crime", and [b] "if it cannot be established as fact that any advantage, illegal or otherwise, was actually obtained", then [c] a confiscation order measure "can only be based on a presumption of guilt". Taken literally, if [a] and [b] are read cumulatively, the Court is reversing its previous case-law (*Phillips* and *van Offeren*), by holding that any application for a confiscation order involves a charge within article 6(2). The Court did not say this and clearly did not mean it, since it expressly accepted and distinguished *Phillips* and *van Offeren*. Secondly, read literally, the conjunction of [a] and [b] would also suggest that the Court thought that confiscation orders should be confined to benefit actually obtained from charges actually brought and proved beyond reasonable doubt. Again, that would reverse the whole previous jurisprudence. Thirdly, it is clear a "presumption" both of involvement in and of benefit from past drug trafficking can legitimately be derived from proof to the civil standard of assets at present or past dates (see e.g. *Phillips* and *van Offeren*, above, and *Grayson &*

Barnham v. United Kingdom, Application nos. 19955/05 and 15085/06). The conditions must of course be read in context, and [a] can be seen as reflecting and repeating the fact that the confiscation order in *Geerings* related to the proceeds of offences of which the applicant was charged but acquitted (i.e. "not found beyond a reasonable doubt" to have committed). I suspect that [b] was simply added as a corollary of the inability to prove the charges of which Mr Geerings was acquitted, emphasising that, after such an acquittal, it is not permissible to suggest ("cannot be established") as a fact that any advantage was actually obtained thereby.

130. However that may be, I do not find in *Geerings* any support or coherent justification for Mr Owen's submission to the House that so long as what is being confiscated are "assets clearly shown to have been in the possession of the accused in circumstances where the accused fails to establish their lawful origin, then the fact that any confiscation order is based on a finding of criminal conduct beyond the index offence will not offend either article 6(1) or 6(2)", but that where "*no* suspicious assets are capable of being identified so as to require an explanation from the accused, then an order which necessarily *assumes* the existence of suspicious assets going beyond those obtained by the index offence will violate article 6" (Case par. 6.18). The submission seeks to derive European conclusions from particular assumptions forming part of the United Kingdom's domestic legislation. It attaches an irrational magic to the possession of assets (over a period which under English law stretches back at least six years prior to the criminal proceedings).

131. Under the domestic legislation, the possession of such assets (consisting of property or evidenced by expenditure) is no more than the trigger to the transfer of the onus of proof on the overall issue whether and what benefit and proceeds existed to the defendant to disprove assumptions that particular property or expenditure reflects the benefit and proceeds of drug trafficking. The assumptions are legislative features introduced to counteract the difficulty of establishing drug trafficking, its benefits and proceeds. The best form of proof of drug trafficking and of its benefits and proceeds is direct evidence, including (as here) admissions by the defendant. If article 6(2), which enshrines the presumption of innocence in respect of criminal charges, has any application to confiscation order proceedings, one would expect it to apply more, not less, readily to proceedings where assumptions were made against a defendant. But it is accepted that article 6(2) of the Convention has no application to the confiscation order procedure where the Crown relies on assumptions derived from the possession of property or making of expenditure over the last six years and on that

basis shifts to the defendant an onus of proof to disprove his assumed drug trafficking to a civil standard. I see no logic in, and no justification in Strasbourg jurisprudence for, a conclusion that article 6(2) becomes applicable to a confiscation order procedure where the Crown cannot or does not rely on the statutory assumptions and so has itself to accept the onus of proving the relevant benefit from drug trafficking to a civil standard by more direct means (here, admissions). If the former exercise involves the "kind or level of punishment" (see *Engels*, paragraph 14 above) and is "part of the sentencing process under domestic law", as the European Court of Human Rights stated in *Phillips* and *van Offeren*, then so too does the latter. I would only add that Richards LJ summarised most of the above points very neatly in a way with which I agree in paragraphs 43-44 of his judgment in the Court of Appeal.

132. Some of your Lordships take the view that, where the statutory assumptions are not deployed, then the prosecution must prove any relevant drug trafficking on which reliance is placed (other than that consisting in the offences of which the defendant has been convicted) to the criminal standard (although, if I have understood correctly, any benefit resulting from such trafficking would still only need to be proved to the civil standard). There is, in my view, no basis under article 6(1) or (2) for such distinctions. They would be inconsistent with the unitary nature of the scheme which I have explained in paras 103-106 above. The standard of proof of every aspect of benefit by drug trafficking is in my view the civil standard, whether such benefit is established by direct or indirect evidence. The indirect route provided by the assumptions merely involves a shifting of the onus of proof. Further, as I have explained in para 117 above, any suggestion that such a distinction exists by reason of the requirement of a "fair hearing" under article 6(1) is inconsistent with the clear reasoning of the European Court of Human Rights under that article in *Phillips*.

133. The most recent Strasbourg authority is *Grayson & Barnham v. United Kingdom* (Application nos. 19955/05 and 15085/06) decided 23rd September 2008. In each of the two cases involved, the English court had, following convictions of drug offences (consisting in Mr Grayson's case of an unsuccessful attempt to supply heroin which the police seized and in Mr Barnham's case of two unsuccessful conspiracies to import drugs), concluded in later confiscation proceedings that the defendants had benefited by and received the proceeds of extensive drug trafficking over the six year period preceding the proceedings (in Mr Barnham's case evidenced by, inter alia, the £840,000 cost of two cannabis consignments, the purchase of which he had admitted to an undercover police officer, but had *not* been charged with). The statutory

assumptions were applied. Complaints were made of violation of article 6(1) as well as of article 1 of the first protocol, both of which the Court rejected. The Court recited its reasoning on the similar complaints made in *Phillips*, and noted once again that "the making of a confiscation order under the 1994 Act was analogous to a sentencing procedure", but remained subject to article 6 § 1 "which applies throughout the entirety of proceedings for 'the determination of ... any criminal charge', including proceedings whereby a sentence is fixed" (para. 37). After further detailed analysis of the scheme and procedure, the court concluded that there had been no breach of either article 6(1) or the first protocol, despite the reversal of the onus of proof where the assumptions applied.

134. In summary:

> "(1) The jurisprudence of the European Court of Human Rights has clearly accepted the legitimacy of a confiscation order based on conclusions about drug trafficking other than that of which the defendant was convicted, and has held that the making of such an order does not of itself involve a charge within article 6(2).
>
> (2) Rather, such an order is regarded as part of the sentencing process, designed and permitted in order to strip from the defendant benefit in the form of proceeds of his own or other's offending, at least to the extent that he has current assets sufficient in value to cover the amount of such benefit.
>
> (3) The Strasbourg case-law also shows the European Court of Human Rights taking a similar approach to the United Kingdom courts in this regard, without drawing any distinction between cases of confiscation orders based on direct proof of the benefit made and proceeds received and cases where they are based on assumptions drawn from the possession at some time of unexplained assets (see the analysis above of the reasoning and decisions in *van Offeren*, *Phillips* and *Grayson and Barnham*).
>
> (4) *Geerings* stands for a possible exception, in the case of an order based on benefit and proceeds from an offence with which the defendant was charged and of

> which he was acquitted, although it is in apparent, unremarked conflict on this point with the previous decision of an almost identically constituted chamber in *van Offeren*.
>
> (5) That possible exception has no relevance in this case. Here the fact that the appellant had benefited was established beyond doubt as the judge said by his own admissions adduced in evidence at trial. He had the opportunity then and again during the confiscation procedure to explain or dispel such admissions, but chose not even to give evidence during the latter procedure. There was in these circumstances no breach of article 6(2.)
>
> (6) I see no basis for complaint about the fairness of the present confiscation order procedure in terms of article 6(1). The fact that the assumptions were not made makes any such complaint even weaker here than it was in *Phillips* and *Grayson and Barnham*."

135. None of the Strasbourg authority to which the House has been referred on article 6(2) involves a Grand Chamber decision and it may be that one day the Grand Chamber will have a look at its application in the context of confiscation orders. But I certainly do not think that such a re-examination would be likely to lead, still less that the House can or should now anticipate that it would lead, to any revision of the basic principles established by *Benjafield*, *Phillips*, *van Offeren* and *Grayson and Barnham*. The not entirely easy authority of *Geerings* fails to persuade that the House should, in pursuance of its duty to "take account" of the Strasbourg case-law, conclude that clear domestic legislation requires any qualification or reformulation in the way for which Mr Owen contends. Mr Owen's submission is that the House should, in the light of the Convention rights as incorporated and to some complicated and undefined extent, "read down" the clear scheme of the 1994 Act to render illegitimate what occurred, or alternatively declare the scheme incompatible with such rights in so far as it permitted the making of the present confiscation order. But, in my judgment, there is nothing inconsistent with the Convention rights in the scheme of the 1994 Act and I would decline both invitations. For these reasons I would dismiss this appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

136. This appeal raises two questions in connection with the interpretation of Part I of the Drug Trafficking Act 1994. First, its meaning and consequent effect disregarding section 3 of the Human Rights Act 1998; secondly, the impact of article 6 of the European Convention on Human Rights on that meaning and effect.

The background

137. The provisions of the 1994 Act and the history of these proceedings are fully set out in the opinion of my noble and learned friend, Lord Phillips of Worth Matravers, which I have had the privilege of reading in draft. I gratefully adopt what he says in that connection. It is nonetheless appropriate to summarise the effect of section 2 of the 1994 Act, as it is so central to this appeal.

138. First, by section 2(1), when a defendant falls to be sentenced for a "drug trafficking offence", then, if (a) the prosecution asks or (b) even if the prosecution does not ask, the court considers it appropriate, the court must follow the procedure under that section. Secondly, by section 2(2), if the court proceeds under section 2, it must determine whether the defendant has "benefited" from "drug trafficking". Section 2(3) provides that a person has so benefited if "at any time" he has received "any payment or other reward" in connection with drug trafficking. Thirdly, if the defendant has so benefited, section 2(4) requires the court to "determine in accordance with section 5 …. the amount to be recovered …". Section 5(1) provides that that amount is to be "the value of the defendant's proceeds of drug trafficking", as assessed by the court, albeit that, by section 5(3), this is to be adjusted if the defendant's realisable assets are less than that that amount. Fourthly, by section 2(5)(a), the defendant is to be required to pay "that amount" "in respect of the offence or offences" for which he is to be sentenced. Fifthly, by section 2(8), the civil burden of proof is to be applied to the questions to be determined under the section.

139. It is also appropriate to refer to sections 3 and 4 of the 1994 Act. Section 3(1) provides that where the court needs further information, it

may postpone the determination of whether the defendant has benefited from drug trafficking or the amount to be recovered "for the purpose of enabling the information to be obtained". Section 4(1) states that "any payments or other rewards received by a person at any time" in connection with drug trafficking are "his proceeds of drug trafficking". When determining whether a person has benefited from drug trafficking, and, if so, the value of his proceeds there from, section 4(2) requires the court to make the assumptions set out in section 4(3), subject to section 4(4). There are two principal assumptions in section 4(3). First, by paragraph (a), any property held by the defendant since his conviction or transferred to him within the period beginning six years before the institution of the proceedings are assumed to be proceeds of drug trafficking. Secondly, section 4(3)(b) provides that any expenditure by the defendant in that period is assumed to be from such proceeds. However, by section 4(4), those assumptions are not to be adopted (a) if the defendant shows them to be incorrect or (b) if making them would involve "a serious risk of injustice in the defendant's case".

The 1994 Act disregarding section 3 of the 1998 Act

140. Three arguments were raised by the appellant. First, that section 4 represents the exclusive basis upon which the court must assess whether a defendant has benefited from drug trafficking, and, if so, the amount he should be ordered to pay, so that the failure in this case to invoke that "mandatory regime" invalidates the confiscation order. The appellant's second argument was that, even if section 4 does not have to be invoked in every case in which the court makes a confiscation order, there was a failure of procedure in this case in not proceeding under section 4, which vitiated the confiscation order. The third argument was that the procedure adopted in this case was unfair, as the confiscation order was based on alleged drug trafficking which was the subject of evidence, but not of any charge, in the criminal proceedings which led to the conviction which triggered the confiscation procedure.

141. I do not accept the contention that section 4 represents an exclusive code governing the exercise to be carried out by the court under section 2. Such a contention flies in the face of the general words of subsections (2) to (5) of section 2, which make it clear that the purpose of Part I of the 1994 Act is to confiscate any sums which represent the proceeds of drug trafficking. In other words, once a defendant is convicted of a drug trafficking offence, section 2 envisages that the court should ascertain whether, and if so to what extent, he has profited from drug trafficking generally, as it were, as opposed to

ascertaining merely whether he had profited from the specific offence of which he has just been convicted.–This is a potentially wide-ranging enquiry, and, if section 4 was intended to be the sole statutory basis upon which the payment under section 2(5)(a) was to be assessed, much of sections 2 and 5 would be otiose. In contrast with section 5, which is an integral part of the exercise mandated by section 2 and hence its incorporation in section 2(4), section 4 merely introduces a presumption (albeit a rebuttable one) which is to be made when carrying out that exercise.

142. The appellant's case is also in conflict with his concession that the court can assess the extent of any benefits received by the defendant from the drug trafficking offence(s) for which he is to be sentenced. That (plainly correct) concession is logically irreconcilable with the notion that section 4 contains an exclusive formula for the purposes of subsections (2) and (4) of section 2. The appellant's case runs into further problems with the temporal limits in section 4(3) – (a) since conviction and (b) from six years before institution of proceedings – given that -sections 2(3) and 4(1) apply to drug trafficking "at any time". Finally, it would appear little short of absurd if a defendant could escape liability under section 2(5)(a) by relying on section 4(4), which would be the consequence of section 4 representing an exclusive method of assessing a defendant's proceeds of drug trafficking.

143. In my opinion, therefore, section 4 is a tool, which is presumptively to be used, but is neither mandatory nor exclusive for assessing whether, and if so to what extent, a defendant has benefited from drug trafficking. Having said that I agree with the view of my noble and learned friend Lord Rodger of Earlsferry, whose opinion I have seen in draft, that it should only be in exceptional cases that the section 4(3) assumptions are not pressed by the prosecution, at least where it is apparent that the defendant has assets. This opinion seems to be plainly consistent with the terms of sections 4(2) and 4(4) of the 1994 Act.

144. As to the appellant's second argument, I do not consider that a defendant can challenge a confiscation order on the ground that section 4 ought to have been relied on by the court, but was not. It seems plain that the purpose of section 4(2) and (3) is to require the court to make certain assumptions against a defendant when considering whether, and if so to what extent, he has received, or currently retains, any proceeds from drug trafficking. It would therefore seem little short of absurd if a defendant could object to a confiscation order on the ground that those

assumptions were not made against him. The effect of the prosecution's approach in this case was as if it had been determined that section 4(4) applied. If section 4(4) would have applied after evidence and argument, then the concession was rightly made. If it would not have applied, then the appellant would not have been better off, as the figures produced by making the assumptions would not have been the only permissible basis for assessing the sum to be confiscated.

145. Given the provisions of section 4(4), I do not consider that there was any failure in the procedure adopted by the prosecution in relation to section 4. In their skeleton argument in the confiscation procedure, prosecution counsel specifically accepted Mr Briggs-Price's submission that "the presentation of a case based on the assumptions would involve extremely difficult accountancy issues and would be lengthy and expensive". In practice, that meant that the prosecution (a) was not prepared to incur the cost and risk of meeting Mr Briggs-Price's case that he had evidence which enabled him to rebut the assumptions, and/or (b) considered that it would be disproportionate to put Mr Briggs-Price to the expense and effort of rebutting the assumptions. In other words, the prosecution accepted that section 4(4)(a) and/or section 4(4)(b) applied. In those circumstances, the court was, at least on the face of it, entitled not to make the assumptions required by section 4(3).

146. However, a mistake was made in that, in the light of the closing words of section 4(4), it ought to have pointed out to the Judge that he was obliged to state his reasons for not making the assumptions. I suspect that another, connected and more significant, mistake was made: even where the prosecution concedes that section 4(4) applies and the assumptions need not be made, the court should satisfy itself of the correctness of that concession, and it does not appear that the Judge investigated the concession in this case. Section 4(4) has the important effect of emphasising that it is the court, rather than the prosecution, which is to decide whether to disapply the assumptions. That is consistent with the provisions of section 2(1)(b), and, indeed, with the notion that a confiscation order is part of the sentencing process. However, for the reasons already given, these mistakes did not invalidate the confiscation order.

147. I turn to the appellant's third argument. As already mentioned, it is plain that a confiscation order under Part I of the 1994 Act is not to be limited to the proceeds obtained by the defendant from the drug trafficking offence(s) for which he is to be sentenced: it can, indeed it must, be based on any drug trafficking proceeds which the defendant has

obtained. Accordingly, it is hard to see why, when proceeding under Part I of the 1994 Act, the court should not be able to rely on evidence given during the trial, even if it related to alleged drug trafficking activities of the defendant which were not the subject of any charge.

148. However, that does not mean that, where such evidence has been given at trial, the Judge must take it into account in the confiscation procedure without giving the defendant any opportunity to rebut that evidence, or any inference which may be drawn from it. The court must plainly conduct the confiscation procedure in a manner which is fair to the defendant, and in many cases that may well include giving him an opportunity, or a further opportunity, to deal with evidence given at the trial which is relevant in the confiscation issue. That is no doubt one of the principal reasons for including section 3(1) and section 4(4)(b).

149. In this case, there was evidence given at the trial relating to the appellant's alleged trafficking in cannabis, although he was only charged and convicted for conspiring to import diamorphine. The Judge was entitled, indeed, I think, required, to take into account the evidence relating to the trafficking in cannabis. However, he would have been obliged to consider any application by the appellant for an opportunity to deal further with that allegation: the fact that the appellant had had a chance to deal with the allegation at trial would by no means automatically mean that he should not have a further opportunity to deal with it during the confiscation procedure. Whether to accord a defendant such an opportunity, and if so the nature of the opportunity and the terms on which it is accorded, must depend very much on the facts of the particular case.

150. I have some sympathy with the argument, developed more fully by Lord Rodger, that it was surprising that the prosecuting authorities decided to charge the appellant only with the diamorphine conspiracy if evidence of his cannabis trafficking was intended to be given at trial, and then invoked for the purposes of any subsequent confiscation order. However, I would not want to say much about that aspect, as the detailed facts and implications of that issue were not debated before your Lordships. Indictments should not be overloaded, and it would be more than unfortunate if any criticism of the course taken in this case led to the prosecuting authorities feeling obliged to charge a defendant with every conceivable drug-trafficking offence they might be relying on in any contingent confiscation proceedings. Such a course would be inappropriate and inconsistent with the purpose of the 1994 Act. All I would say is that, without suggesting that I think that there would have

been anything in the argument, it would have been open to Mr Briggs-Price to argue either that he should be charged with cannabis trafficking if it was to be relied on in any subsequent confiscation procedure, or that the cannabis trafficking should not be relied on in any such procedure. If such an argument had been raised, the Judge no doubt would have considered it on its merits.

Part I of the 1994 Act and article 6 of the Convention

151. Having ascertained the meaning and effect of Part I of the 1994 Act disregarding section 3 of the 1998 Act, it is necessary to consider whether its provisions, as so interpreted conflict with article 6 of the Convention, as the appellant has suggested. His argument amounts to this, that his article 6 rights were infringed by his assets being confiscated by reference to a crime of which he had not been convicted, namely trafficking in cannabis. The approach adopted by the Crown Court in this case in relation to the confiscation procedure is said by the appellant to amount to inappropriately convicting him of a fresh charge, upon which the confiscation order was based.

152. On this aspect of the appeal, I had prepared some observations of my own to explain why I do not accept the appellant's case. However, having read what Lord Rodger says, I do not think there is anything I can usefully add to what he says in paras 62 to 81 of his opinion, with which I fully agree.

Conclusion

153. In these circumstances, I agree that this appeal should be dismissed.