# Case in focus:

## Gale v SOCA [2011] UKSC 49

26th October, 2011

**This is an extremely important case with which everyone who deals with Part V of POCA should familiarise themselves.**

## Facts

The Supreme Court dismissed the appeal of two appellants who sought to argue that, for the purposes of Recovery Orders, the determination of whether property was derived from crime (and therefore whether it represented *unlawful property* for the purposes of POCA) triggered the protections of Article 6(2) ECHR; they argued that the criminal standard of proof should apply. A subsidiary appeal against on order to pay the SOCA's costs, which included the costs incurred by the Receiver instructed by SOCA, was also dismissed.

### Issue 1: The Applicability of Article 6(2)

In civil recovery proceedings against the appellants, Mr. and Mrs. Gale, SOCA claimed that the property held by them represented property derived from criminal activity, namely drug trafficking, money laundering and tax evasion, both in the UK and in foreign jurisdictions. Neither had ever been convicted of such an offence but Mr. Gale had been *acquitted* of a drugs offence in Portugal, whilst proceedings in Spain had been discontinued.

The judge found that he was satisfied on the *balance of probabilities* that their property was *property obtained through unlawful conduct*.

The appellants argument was threefold:-

(1) that proving that the property was the product of crime required proof that they had been guilty of criminal conduct, meaning that they were entitled to the presumption of innocence under the European Convention on Human Rights 1950 art.6(2);

(2) that in order to defeat that presumption, proof of guilt to the *criminal* standard was required;

(3) that no adverse finding could be made against Mr. Gale in respect of conduct of which he had been *acquitted* in Portugal.

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As part of his "preliminary observations" to the analysis of the case law that followed, Lord Phillips noted, at para. 19:-

> *"In this jurisdiction the standard is proof beyond reasonable doubt. In such circumstances it is perfectly obvious that failure to establish guilt according to the required standard does not demonstrate that the defendant did not commit the criminal act. It demonstrates simply that the evidence adduced against him was insufficient to discharge the enhanced burden of proof."*

He observed that the European Court had found that it is not unlawful to require a defendant who had been acquitted to satisfy some additional criterion in order to qualify for, for example, reimbursement of his costs. Nor was there a bar to a civil claim for compensation in proceedings that apply a lesser burden of proof to the issue of whether the defendant committed the acts that had formed the basis of the criminal charge on which he was acquitted [para. 20].

However, the position was different in relation to proceedings that cast doubt on the validity of a prior acquittal, which *had* in some cases been found to offend Article 6(2), as had statements by public authorities suggesting that a person acquitted might none the less have been guilty. In respect of the former he observed that the *"common factor"* in those cases had been a procedural connection between the criminal trial and the subsequent proceedings; the proceedings were *"a consequence and the concomitant"* of the criminal proceedings [para. 21].

Lord Phillips stated that, on the face of the relevant cases, the effect of an acquittal in criminal proceedings was to "convert a presumption of innocence prior to conviction which is rebuttable, into an irrebuttable presumption of innocence after acquittal" [para. 25]. However, he was able to identify several features of the various cases which demonstrated that this was not, in fact, the case.

After analysing the authorities Lord Phillips indicated that this was an area that requires clarification from the Grand Chamber [para. 32]. However, he went on, at para. 34, to indicate that he was inclined to the view that:-

> *"…all that the cases establish is that article 6(2) prohibits a public authority from suggesting that an acquitted defendant should have been convicted on the application of the criminal standard of proof and that to infringe article 6(2) in this way entitles an applicant to compensation for damage to reputation or injury to feelings. I am inclined to this view, albeit that it involves a remarkable extension of a provision that on its face is concerned with the fairness of the criminal trial…"*

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Having come to the conclusion above, Lord Phillips clarified that the case law did not lend *credence* to the defence proposition to the effect that the application of Article 6(2) ought to have prevented the evidence from the Portuguese criminal proceedings from being admissible in the English civil proceedings against the appellants and, at para. 35, he noted that:-

> *"The link between the Portuguese criminal proceedings and the English civil proceedings, which Strasbourg would appear to consider so critical, is not there."*

If there were any residual doubt as to whether the critical feature that destroyed the "link" was the fact that the criminal proceedings took place in a different country, it is roundly disabused by Lord Dyson, para. 133:-

> *"I would hold that there is no sufficient link between civil recovery proceedings under Part 5 of SOCA and any criminal proceedings to justify the application of article 6(2) to the Part 5 proceedings. Indeed, there is no link at all. The Part 5 proceedings are not a "direct sequel" or "a consequence and the concomitant" of any criminal proceedings. They are free-standing proceedings instituted whether or not there have been criminal proceedings against the respondent or indeed anyone at all."*

Lord Dyson analysed the case law at paras. 134-143 and noted that the "link" could, however, be *created* where there was a suggestion in the proceedings that the individual in question was guilty of an offence notwithstanding an acquittal. Having analysed the wording used by the judge in the High Court, he found that had not been the case as far as the appellants were concerned [para. 142].

When considering the issue of the standard of proof Lord Phillips considered *R v Briggs-Price [2009] AC 1026* and *Geerings 46 EHRR 1222.* He recapped that the context in which *Geering* was decided was provided by the ECtHR in *Phillips v United Kingdom (2001) 11 BHRC 280* and in *van Offeren v The Netherlands (Application No 19581/04) (unreported) 5 July 2005*.

In each of those cases the Court held that confiscation proceedings in relation to the benefits of drug trafficking did not involve charging the defendant with a criminal offence so as to bring them within the scope of article 6(2) [para. 40].

The position in *Geering* was, however, different to that in *van Offeren* and *Phillips.* Mr. Geering's convictions for a number of offences had been *quashed.* However, the authorities decided to pursue confiscation proceedings in respect of the offences for which he had, effectively, been acquitted *in addition* to the offences for which his conviction was upheld.

Lord Phillips acknowledged, at para. 42, that "…there is something unattractive about a prosecuting authority, which has failed to procure a conviction, proceeding to seek a

confiscation order on the basis that the defendant committed the specific crimes of which he was acquitted."

The ECtHR had found, in *Geering* [at para, 47 and 48 of the judgment], that a combination of the lack of clear evidence that the appellant had *obtained* the assets in question, and the fact that the confiscation was based upon offences of which he had been acquitted, meant that the confiscation was effectively based upon a *presumption of guilt*. That was incompatible with Article 6(2).

Whilst Lord Phillips acknowledged that Geering might be said to set down a principle to the effect that where a defendant has been tried and acquitted of an offence no claim can be based upon an assertion that he committed that offence, he rejected that interpretation as "contrary to principle". He went on to clarify his position, as follows, at para. 44:-

> *"I see no reason in principle why confiscation should not be based on evidence that satisfies the civil standard, notwithstanding that it has proved insufficiently compelling to found a conviction on application of the criminal standard…"*

Lord Bridge further justified this position, at para. 115, *by observing that "contrary to widespread popular misconception, acquittal does not prove the defendant innocent".*

Lord Phillips noted that *Geering* provided clear support for the proposition that *where it is not proved by independent evidence that the defendant possesses or possessed property for which there is no innocent explanation, but asserted that this is to be inferred from the fact that he committed a crime or crimes, the latter fact must be proved according to the criminal standard of proof* [para. 45].

However, he stated that this had not been the position in the appellants' case as there was clear evidence of property in their hands *whose provenance had not been sufficiently explained.*

Having so found he moved onto consider the proposition that *in no case can confiscation be ordered unless it is proved to the criminal standard that the defendant committed the offences from which the property is alleged to have been derived.*

He conducted a detailed review of the judgment in *Briggs-Price*, in which that question was addressed in respect of post conviction confiscation orders in which the Crown sought to rely upon additional offending that had not been charged. His conclusion, at paras. 54-55, was this:-

> *"54…The commission by the appellants in the present case of criminal conduct from which the property that they held was derived had to be established according to the civil and not the criminal standard of proof...*

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> *55. The starting point in this case is the possession of property by the appellants for whose provenance they were unable to provide a legitimate explanation. There was an abundance of evidence, set out at length by the judge with great care, which implicated them in criminal activity that provided the explanation for the property that they owned. The judge rightly applied the civil standard of proof, but on my reading of his judgment he would have been satisfied to the criminal standard of the appellants' wrongdoing. For the reasons that I have given I would dismiss the appeal in relation to the first issue."*

Lord Clarke, with whom Lord Mance, Lord Judge and Lord Reed agreed, concurred in his judgment at para. 59; Lord Brown did so at para. 110; and Lord Dyson also did so at para. 119.

## Issue 2: Costs of the Receiver appointed by SOCA

SOCA had obtained an Interim Receiving Order pursuant to section 246 POCA, and it was upon the basis of that report that they had commenced civil recovery proceedings [para. 6].

At the conclusion of the civil recovery proceedings Griffith Williams J ordered costs against the appellants but refused to allow an order that these costs include the costs incurred by the receiver during his investigation [para. 61]. This decision was overturned by the Court of Appeal.

The Supreme Court, which concurred unanimously with Lord Clarke's judgment, found that costs could be awarded, pursuant to section 51 SCA, if they are either *costs of or incidental to the relevant proceedings* at the discretion of the Court [para. 75]. The question in this case was, therefore, *were the Receiver's costs, costs of or incidental to the civil recovery proceedings* [para. 76]?

The answer was, according to the Court, *firmly in the affirmative* [para. 79], and there was no statutory rule or provision, that would lead to a contrary conclusion [para. 81], notwithstanding the fact that there was provision in section 280(3) POCA for the Receiver's expenses to be paid by SOCA from the monies realised under the recovery order. That, it was found, was a matter for SOCA's discretion [para. 83].

Whilst the case of *SOCA v Wilson [2009] NICA 20; [2009] NI 28* suggested the contrary, the Court found that the Receiver's costs *were* allowable, thereby finding that *Wilson was* decided wrongly [para. 109], and the appeal was duly dismissed on this issue.

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## Analysis

This judgment is significant because it preserves the ability of law enforcement agencies to continue their drive to neuter criminal enterprises by depriving them of their capital, even in circumstances in which insufficient evidence is available to sustain a criminal prosecution. Whilst *unattractive*, civil recovery proceedings can even, it seems, be brought in the face of an *acquittal* for an offence based upon the same conduct and the same evidence relied upon in those proceedings.

However, it would appear that the way in which such cases are *presented* by the authorities, and the way in which judgments are *phrased*, is currently of critical importance if these proceedings are to avoid engaging Article 6(2). A clumsy sentence in an application suggesting that there has been a wrongful acquittal may, on the analysis of the Supreme Court, lead to an application for damages.

It is to be hoped that the Supreme Court's appeal to Strasbourg for further clarification as to exactly what part Article 6(2) has to play in civil proceedings that involve evidence and assertions of criminal activity will be met with clear guidance in due course.

It should be noted that *Angus v UKBA [2011] EWHC 461 (Admin)* appears to have eroded the last interpretative disparity between cash forfeiture and asset recovery; this is an authority that will, in our opinion, be of equal application to cash forfeiture proceedings.

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