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| crestIN THE HIGH COURT OF JUSTICEQUEEN'S BENCH DIVISIONADMINISTRATIVE COURT**[2021] EWHC 1182 (Admin)** | No. CO/3532/2020 |

Royal Courts of Justice

Tuesday, 20 April 2021

Before:

LORD JUSTICE BEAN

MR JUSTICE CAVANAGH

B E T W E E N :

 COMMISSIONERS FOR

 HER MAJESTY'S REVENUE & CUSTOMS Appellants

- and -

 JASVINDER MANN Respondent

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MR T. RAINSBURY appeared on behalf of the Applicant.

THE RESPONDENT was not present and was not represented.

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**J U D G M E N T**

LORD JUSTICE BEAN:

1. On 1 October 2019, HMRC officers attended premises where they found boxes containing vodka worth some £220,000 in evaded duty and VAT, together with two plastic carrier bags each containing bundles of sterling notes totalling £35,000. The respondent, Jasvinder Mann, was arrested on suspicion of fraudulent evasion of excise duty. The £35,000 in cash was seized.
2. On 3 October 2019, the Commissioners made applications for a first detention of cash under s.295(2)(a) of the Proceeds of Crime Act 2002, to the Westminster Magistrates' Court. The court authorised the continued detention of the cash for six months.
3. On 24 March 2020, Mr Mann's representatives consented in writing to an application for the continued detention of cash for a further six months. On 26 March 2020, HMRC filed the information and applications with the appropriate forms for an order for further detention under s.295(2)(b). The evidence in support stated the suspicion of the Commissioners that the cash derived from the proceeds of crime, namely the fraudulent evasion of excise duty.
4. It will be observed that March 2020 marked the beginning of the lockdowns which have occurred to cope with the coronavirus pandemic. Indeed, the Coronavirus Act 2020 was given Royal Assent on 25 March, and many of its provisions came into force on 26 March. Between 26 March and 2 April 2020, HMRC made numerous requests by telephone and email to arrange for their applications for further detention of the cash to be listed prior to the expiration of the six month period, which had begun on 3 October, but the court failed to arrange for these to be listed or even for the matter to have been dealt with administratively assuming for the moment that that would have been a lawful course to follow.
5. On 3 April the six month period expired and, accordingly, the orders authorising the continued detention of the cash expired on that date. Three weeks later, on 24 April, the Westminster Magistrates' Court confirmed to the Commissioners that the applications would be listed for a remote telephone hearing on 28 April 2020. When that date came, the case was adjourned for the respondent, Mr Mann, to be given notice of the applications and for skeleton arguments to be served on the issue of jurisdiction. On 22 June 2020, District Judge Susan Green heard legal argument advanced by the Commissioners. Mr Mann's legal representative was present, but apparently made no submissions on behalf of the respondent.
6. On 1 July 2020, District Judge Green delivered an oral judgment holding that the court had no jurisdiction to order the continued detention of the cash beyond the expiration of the first period of detention, namely, 3 April 2020. She was asked to, and did, state a case for the opinion of this court, which Mr Tom Rainsbury, for the Commissioners, has rightly described as thorough and helpful. She held that the court was bound by *dicta* in two cases to which I shall refer later in this judgment, namely, *R v Uxbridge Magistrates Court ex parte Henry,* The Times, 24 February 1994, and *Walsh & Etherington v HM Customs & Excise* [2001] EWHC (Admin) 426. She recorded and rejected the submissions made on behalf of the Commissioners: I shall not set them out at this stage because Mr Rainsbury made essentially the same submissions to us, and I shall come to them shortly. The District Judge's conclusion was that once the orders of 3 October had expired on 3 April 2020, the court had no jurisdiction to order continued detention of the seized cash. The case stated ends by posing this question for the High Court:

"Was the judge correct to conclude that on a correct construction of s.295(2)(b) of the Proceeds of Crime Act 2002 there was no jurisdiction to extend the periods of detention of two sums of seized cash in circumstances where HM Revenue & Customs had filed applications to extend the periods before the expiration of the previous orders under section 295(2)(a) of the Act, but those orders had expired before the applications were determined?"

1. It is convenient to set out the relevant sections of the Proceeds of Crime Act 2002. Section 294(1) provides that:

"An officer of Revenue and Customs . . . may seize any cash if he has reasonable grounds for suspecting that it is –

(a) recoverable property, or

(b) intended by any person for use in unlawful conduct."

Section 295, headed: "Detention of Seized Cash" includes the following subsections which are material:

"(1) While the officer of Revenue and Customs . . . continues to have reasonable grounds for his suspicion, cash seized under section 294 may be detained initially for a period of 48 hours."

(There are then provisions for how the 48 hours is to be calculated omitting weekends and bank holidays, but these do not affect the outcome of the present case.) Subsection (2) is the crucial one in the present case, and provides:

"(2) The period for which the cash or any part of it may be detained may be extended by an order made by a magistrates' court . . . but the order may not authorise the detention of any of the cash–

(a) beyond the end of the period of six months beginning with the date of the order,

(b) in the case of any further order under this section, beyond the end of the period of two years beginning with the date of the first order."

Subsection (3) provides:

"(3) A justice of the peace may also exercise the power of a magistrates' court to make the first order under subsection (2) extending the period."

The remaining subsections provide that the court may make the order if satisfied that one of two alternative conditions is met. It is not necessary to recite these since there is no doubt in the present case that there were reasonable grounds for suspecting that the cash was recoverable property whose continued detention was justified.

1. The Magistrates' Court (Detention and Forfeiture of Cash) Rules 2002 make provision in r.5 for "Further applications for the continued detention of seized cash". Rule 5(1) provides for the form in which the application must be made. Rule 5(3) states:

"The court shall fix a date for the hearing of the application, which, unless directed otherwise, shall not be earlier than seven days from the date on which it is fixed, and the court shall notify that date to the applicant and every person to whom notice of the previous orders has been given."

1. It is to be noted that no procedural requirements are imposed for the initial application under s.295(3) of the Act, which allows a single Justice of the Peace to make the first order for a six month extension beyond the 48 hour period provided for by s.295(1), but does not apply to any further extension after that. Section 297 deals with the release of detained cash: subsection (2) states that:

"A magistrates' court may direct the release of the whole or any part of the cash if the following condition is met."

Subsection (3) states that:

"(3) The condition is that the court or sheriff is satisfied, on an application by the person from whom the cash was seized, that the conditions in section 295 for the detention of the cash are no longer met in relation to the cash to be released."

1. The 2002 Act, as originally enacted, provided for forfeiture of cash to be the subject of an application to the court for an order for forfeiture. An alternative of forfeiture by notice is now available, governed by sections 297A to G, which were inserted by the Police and Crime Act 2009 (although, as I understand it, they did not come into effect until 2015). I will start with s.298. This provides that while cash is detained under, among other powers, s.295, an application for the forfeiture for the whole or any part of it may be made to a magistrates' court. The court may order forfeiture of the cash, or any part of it, if satisfied that it is recoverable property or is intended by any person for use in unlawful conduct. Section 298(4) reads:

"(4) Where an application for the forfeiture of any cash is made under this section, the cash is to be detained (and may not be released under any power conferred by this Chapter) until any proceedings in pursuance of the application (including any proceedings on appeal) are concluded."

1. Turning to the alternative procedure of forfeiture by notice, s.297A(1) states that:

"Subsection (2) applies while any cash is detained in pursuance of an order under section 295(2) made by a magistrates' court in England and Wales or Northern Ireland."

Section 297A(2) allows a senior officer to give a notice for the purpose of forfeiting the cash. Section 297C states:

"(1) This section applies if a forfeiture notice is given in respect of any cash.

(2) The cash is to be detained until–

(a) the cash is forfeited under this section,

(b) the notice lapses under this section, or

(c) the cash is released under a power conferred by this Chapter.

(3) If no objection is made within the period for objecting, and the notice has not lapsed, the cash is forfeited (subject to section 297E).

(4) If an objection is made within the period for objecting, the notice lapses.

(5) If an application is made for the forfeiture of the whole or any part of the cash under section 298, the notice lapses.

(6) If the cash or any part of it is released under a power conferred by this Chapter, the notice lapses or (as the case may be) lapses in relation to that part.

(7) An objection may be made by anyone, whether a recipient of the notice or not.

(8) An objection means a written objection sent to the address specified in the notice; and an objection is made when it is received at the address.

(9) An objection does not prevent forfeiture of the cash under section 298.

(10) Nothing in this section affects the validity of an order under section 295(2)."

1. Finally, s.297D governs detention following the lapse of a forfeiture notice. Sections (1), (2) and (5) provide as follows:

"(1) This section applies if—

(a) a forfeiture notice is given in respect of any cash,

(b) the notice lapses under section 297C(4), and

(c) the period for which detention of the cash was authorised under section 295(2) has expired.

(2) The cash may be detained for a further period of up to 48 hours (calculated in accordance with section 295(1B)).

………..

(5) If within that period an application is made for a further order under section 295(2) the cash may be detained until the application is determined or otherwise disposed of."

1. I turn now to the two previous cases which the District Judge held were binding or effectively binding on her. Mr Rainsbury rightly points out that each of them was concerned with a first court order, not a court order for an extension following a previous court hearing, and also that the provisions under which they were determined were predecessor statutes to the 2002 Act and not identically worded. In *R v Uxbridge Magistrates Court ex parte Henry* the statute in question was s.25 of the Criminal Justice (International Co-operation) Act 1990. Section 25(1) allowed customs officers or constables to seize cash being imported into or exported from the UK if it was reasonably suspected to represent the proceeds of drug trafficking. Section 25(2) provided:

"(2) Cash seized by virtue of this section shall not be detained for more than forty-eight hours unless its continued detention is authorised by an order made by a justice of the peace."

1. In the *Henry* case the cash had been detained at 09.44 a.m. on day 1, but the order of the Magistrates' Court was made at or shortly before 12.30 p.m. on day 3. It was held, although the point of law does not seem to have been argued, that by the time the court order was made, the initial period of 48 hours had expired. Scott Baker J said at p.8 of the transcript:

"Parliament, in my judgment, has prescribed a specifically limited period, a period to be measured in hours. This is, as the learned editors of *Archbold* have pointed out, draconian legislation. In these circumstances it is particularly important that its provisions should be strictly complied with. 48 hours is the period given to the Customs & Excise to make their further enquiries, and if they require more time then they have to go to a magistrate to seek an appropriate order. It does not seem to me that that places any undue burden upon them."

1. The same view was taken in *Walsh and Etherington v Her Majesty's Customs & Excise* in 2001. The statute relevant to that case was s.42 of the Drug Trafficking Act 1994, subsection (2) of which provided that:

"Cash seized by virtue of this section shall not be detained for more than 48 hours unless its continued detention is authorised by an order made by a justice of the peace."

This is identical wording to that contained in the 1990 Act, and considered in the case of *Henry*. Latham LJ said at para.21:

"Although the matter had not been the subject of argument before the court in *Henry,* it has been the subject of argument before us. As I have already indicated, I have no doubt that the wording of subsection (2) is such as to preclude any Justice from making any order authorising the continued detention of any cash under that section after the end of 48 hours from seizure. The statutory provision is one which, in my judgment, has to be construed strictly as explained by Scott Baker J and Kennedy LJ in *Henry.* I acknowledge the consequence that there are practical difficulties which will confront Customs & Excise and, indeed, there may be some uncomfortable decisions that have to be made by Justices under constraints of time as a result, but I can see no escape from the conclusion that the section only authorises the detention of the property up to the end of 48 hours from seizure. The moment that 48 hours has elapsed, if there has been no extension, then there is no authority for the continued detention of the money. In other words, there is no existing authorisation to retain the money which can be extended under s.42. The problem, it seems to me arises from the fact that Parliament has decided that in this procedure, unlike in some others, the cut-off period should be as draconian as appears on its face."

1. Mr Rainsbury drew our attention to criticism of the decision in *Walsh* by the editors of *Mitchell, Taylor & Talbot on Confiscation and the Proceeds of Crime*. They write at para.X009:

"It is not thought that *Walsh* was properly decided. It is important to note that s.295 does not say that the court has no power to order the detention of cash more than 48 hours after it was seized but instead that the officer may not detain the cash for more than 48 hours without an order from the court. In this sort of case it is crucial for the court to achieve a result which is just and in accordance with the intention of Parliament. There are numerous cases from related jurisprudence which emphasise that the fact that an apparent mandatory procedural requirement has not been met does not deprive the court of jurisdiction to proceed. None of this line of jurisprudence appears to have been cited in *Walsh.* The clear intention of s.295 was to limit the power of the officer to detain to no more than 48 hours, after that if further detention is sought it must be subject to court approval. It follows that once an application is before the court Parliamentary intention should not be thwarted if the practicalities mean that the court does not, in fact, make its order strictly within the 48 hour period."

1. With respect, I entirely disagree. It is not necessary to consider the circumstances in which a Divisional Court can depart from a previous decision of another Divisional Court if the previous case was wrongly decided. Mr Rainsbury did not, in fact, submit in oral argument that *Walsh* was wrongly decided but, for my part, I have no doubt that it was correctly decided. Moreover, even if the matter were free from authority, it seems to me that the construction for which HMRC argue in the present case is contrary to the natural meaning of the statute. Section 295(2) uses the word "extended". I do not accept that Parliament was using the word in anything other than its natural meaning, which is that the decision must be made before the original period expires. Otherwise the so-called extension is retrospective.
2. The wording of the statutes considered in the case of *Henry* and *Walsh* was, as already pointed out, not identical, but there the critical word was "continued". Latham LJ, as already indicated, said that the wording of s.42(2) of the Drug Trafficking Act 1994 precluded any Justice from making any order authorising the continued detention of any cash after the end of the 48 hour period. As he said:

"The moment that 48 hours has elapsed if there has been no extension then there is no authority for the continued detention of that money."

In my judgment, the same applied at midnight or close of business on 3 April 2020 when the six month period expired. The scheme of the 2002 Act and the rules made under it are that initially cash may be seized without any court process at all. Within 48 hours authority must be obtained from a justice of the peace, without notice having to be given to the respondent, for the cash to be held for a further six months, but that if further extensions are sought after that, there must be a hearing arranged on at least seven days' notice to the respondent to justify any extension beyond the six month date.

1. The editors of *Mitchell, Taylor & Talbot* refer, in footnotes to the passage which I have cited, to a variety of other cases in which, under different statutes, time limits have been held not to be binding. There are many cases going each way in both criminal and civil jurisdictions Mr Rainsbury referred us to *R v* *Sheerin* (1977) 64 Cr.App.R 68*,* involving a construction of a provision which provides that material must be served within 28 days of an indictment being deferred, or such further period as a judge may allow. The Court of Appeal held, unsurprisingly, that this wording permitted a judge to allow a further period, even if the judge's decision comes after the 28 day period has elapsed. An example the other way, to which *Mitchell, Taylor and Talbot* do not refer, is the decision of the House of Lords in *R v Weir* [2001] 2 All ER 216. The Court of Appeal, Criminal Division, had allowed Mr Weir's appeal against his conviction for murder on grounds which were subsequently held by the House of Lords to be erroneous. The Director of Public Prosecutions petitioned the House of Lords for permission to appeal but lodged his petition one day late. Their Lordships held that they simply had no power to grant an extension of time beyond the 14 day period which Parliament had provided was the period within which an application for leave to appeal had to be made. That is not binding on us in the present case; it simply goes to show that authority for or against the mandatory nature of a time limit is not generally helpful when directed to an entirely different statute.
2. Mr Rainsbury submits that the provisions in s.297D(5) and s.298(2) of the 2002 Act support his case. But, with respect, I consider that they are clearly against him. In s.298(2) Parliament provided that when an application for forfeiture has been made to a Magistrates' Court the cash is to be detained until court proceedings are concluded. When the forfeiture by notice procedure was introduced by the 2009 Act a similar provision was made in s.297D(5). But neither in 2002, nor in 2009, did Parliament make any amendment to s.295 to ensure that when an application is made for an order under s.295(2), extending the period for which cash may be detained, the same kind of holding provision should apply. Parliament must, in my view, therefore, be taken to have been content with the strict approach which this court had taken in the cases of *Henry* and *Walsh* to statutory powers which, though not identically worded, are not materially different.
3. Mr Rainsbury, whose presentation of the case has been exemplary, and has taken into account the fact that the respondent has not been represented before us, drew to our attention two further cases: *Chief Constable of Merseyside Police v Hickman and Preston* [2006] EWHC 451 (Admin), a decision of Mitting J, and *Iqbal v South Bedfordshire Magistrates' Court* [2011] EWHC 705 (Admin), a decision of a Divisional Court comprising Pill LJ and Supperstone J. Each of these cases is authority for the proposition that where cash has been seized by the police under the Police and Criminal Evidence Act 1984, but subsequently the authority to detain it under the 1984 Act has lapsed, it is lawful for it to be re-seized under the provisions of the Proceeds of Crime Act 2002.
4. In the present case, HMRC, we are told, took the view that if, following the decision of District Judge Green, they had simply re-seized the cash, that might be perceived as an abuse of process or, at any rate, somewhat disrespectful to the court. Mr Rainsbury, wearing his hat of presenting arguments which might have been advanced on behalf of the respondent, says that it might have been argued that if the decisions in the *Hickman* and *Iqbal* cases apply by analogy, it could be said that a re-seizure power is available to the Commissioners in the present case, in which case the public policy arguments which he says justify the prosecution's construction of s.295(2), may not involve such drastic consequences after all.
5. We are in no position to say whether it would be an abuse of process for the Commissioners to re-seize cash in a case such as the present, where (i) an application has been lodged with the court for continued detention; (ii) through no fault of the Commissioners, the application is not listed until the authorised period of detention expires; and then (iii) as the District Judge has held, and I would also hold, it is too late for an order for an extension to be made. If the Commissioners were to re-seize the cash and Mr Mann, or his representatives, were to object that this constituted an abuse of process, that issue would be a decision for another court to make on another day. Particularly in the absence of any advocate representing the respondent, it is not a matter on which we should express an opinion.
6. I have a good deal of sympathy with HMRC on the facts of the present case. Their application was lodged with the court, as I have pointed out, just as the first national lockdown was beginning. They had no reason to believe that a hearing would be so difficult to arrange. If an extension were a matter of discretion, it might well have been exercised in their favour, but, like District Judge Green, I conclude that this is not a matter of discretion at all. I would therefore dismiss this appeal.

MR JUSTICE CAVANAGH: I agree.

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This transcript has been approved by the Judge.