

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA & BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCv 2011/0830

BETWEEN:

CHERYL THOMPSON

Claimant

v

THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Respondent

Appearances:

Mr. Steadroy Benjamin for the Claimant

Ms. Bridget Nelson for the Respondent

2014: November 21

JUDGMENT

[1] **HENRY, J.:** By Amended Fixed Date Claim Form filed December 20, 2011, the claimant claims against the defendant the following relief:

- a) A Declaration that the provisions of the Trafficking in Persons (Prevention) Act, 2010 hereinafter called "The Act" in whole or in part are void and of no effect in so far as they violate the claimant's right to protection of property, freedom of expression and liberty of the person assured to the claimant by sections 3, 4, 9, and 12 of the Constitution of Antigua and Barbuda.

- b) A Declaration that the penal provisions of section 13, 14, 15, 16, 17, 18, 21, 22, 23, 24(1), 25, 26, and 27(1) to 27(4) of the Act are so disproportionate to the conduct provided by the Act that they constitute an arbitrary, intimidatory and unreasonable fetter upon the claimant's protection of the Law guaranteed by section 3 and assured to the claimant by section 9 and 12 of the Constitution of Antigua and Barbuda.
- c) A Declaration that the jurisdiction vested in the Magistrate's Court under sections 15, 16, 17, 18, 21, 22, 23, 24(1), 25, 26 and 27(1) to 27(4) of the Act constitute an amendment of the jurisdiction of the Supreme Court effected in a manner inconsistent with the provisions of Section 47 of the Constitution and the vesting of the said jurisdiction in the Magistrate's Court is therefore void and of no effect.
- d) A Declaration that the section 37 of the Act sub-titled (Forfeiture of Property on Conviction) is in breach of sections 3 and 9 of the Constitution in that it provides the deprivation of property contrary to sections 3 and 8 of the Constitution.
- e) A Declaration that the deprivation of property after and in addition to the imposition/fixing of a sentence by the court of trial for an offence and as a consequence of the conviction (and sentence) amounts to and constitutes an additional penalty for the said offence.
- D A Declaration that the provision in the Act for the deprivation of property as a consequence of the conviction for an offence, separate and apart from the sentence fixed by the trial court, results in the convicted person being twice punished for the said offence and in accordingly in breach of section 15 of the Constitution.
- g) Costs

- [2] The claimant is a self-employed businesswoman. She owns and operates a clothing and accessories store in St. Johns. She admits that she also promotes shows and concerts in Antigua featuring well-known international reggae artists, international performers, entertainers, dancers and musicians. In addition, she avers that over several years of business operations she has travelled to several islands in the Caribbean, and in particular to Jamaica, to engage the services of artists. Working in conjunction and deliberating with business associates in Jamaica, male and female dancers were recruited to come to Antigua to perform at various functions. These performers stayed in Antigua for various periods of time.
- [3] On the 25th October 2010, Parliament enacted the Trafficking in Persons (Prevention) Act, No. 12 of 2010 (the Act). In November 2011, following a report made to the police, the claimant was invited to the Police Station where she was asked to explain several aspects of her business. She was subsequently arrested and charged with several offences under the Act. She is alleged to have breached sections 13, 15, 18 and 22 of the Act, which she denies.
- [4] The claimant asserts that she is entitled to the fundamental rights and freedom of expression, the protection of property, the protection of privacy and liberty of the person assured to her by the provisions of section 3, 4, 9, and 12 of the Constitution. Further, that the conception and communication of thoughts and ideas are the linchpin of the business activities in which she is engaged and from which she earns her livelihood and sustains her proprietary interest.

- [5] Otis Archibald, a Corporal of Police filed an affidavit in response. He states that he conducted investigations into an initial complaint concerning the unlawful retention of a passport belonging to a citizen of Jamaica. In the course of his investigations, at the premises rented by the claimant and at the Jam Down Nightclub operated by the claimant, he discovered a number of exotic female adult and child dancers in the employ of the claimant. He says he is aware that the claimant's shows feature exotic dancers.
- [6] He states that all the women and children in the employ of the claimant were exotic dancers performing at the claimant's nightclub. They were recruited by the claimant via telephone either directly or through her agent in Jamaica. The exotic dancers remained for the periods stated in the claimant's affidavit as illegal immigrants.
- [7] He further states that he interviewed 18 exotic dancers who were housed at several apartments rented by the claimant. The dancers ranged in age from 17 years to 34 years. According to him, the claimant had no documentation consistent with the Labour Laws of Antigua and Barbuda, even though the females were employed by her to perform as dancers. The claimant did not apply for work permits for the dancers and there is no evidence that the standard procedure for recruiting artists was observed by the claimant.
- [8] Corporal Archibald states that he arrested the claimant for various offences against the Act; he charged her with 52 offences.
- [9] He asserts that the claimant has failed to particularize the specific provisions of sections 3, 4, 9, 12, 15 and 47 that have been, are being or are likely to be contravened in respect of the claimant. That without knowing the specific provisions, he denies that any of the provisions of the sections of the Constitution cited have been, are being or are likely to be contravened in respect of the claimant.

Background

- [10] Antigua and Barbuda became a signatory to The United Nations Convention against Transnational Organized Crime (the Convention) on 26th September 2001. The Convention is the main international instrument in the fight against transnational organized crime. It opened for signature by Member States in Palermo, Italy, on 12-15 December 2000.
- [11] The Convention is supplemented by three Protocols, which target specific areas and manifestations of organized crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. Countries must become parties to the Convention itself before they can become parties to any of the Protocols.
- [12] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the Protocol), was adopted by General Assembly resolution 55/25. It entered into force

on 25 December 2003. It is the first global legally binding instrument with an agreed definition on trafficking in persons. The expressed intention behind this definition is to facilitate convergence in national approaches with regard to the establishment of domestic criminal offences that would support efficient international cooperation in investigating and prosecuting trafficking in persons cases. An additional objective of the Protocol is to protect and assist the victims of trafficking in persons with full respect for their human rights.

[13] Article 3 of the Protocol defines Trafficking in persons as follows:

"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

[14] By Article 5 of the Protocol, each State Party agrees to adopt such legislative and other measures as may be necessary to establish, as criminal offences, the conduct set forth in Article 3 of this Protocol, when committed intentionally.

[15] Antigua and Barbuda became a party to the Protocol on 17th February 2010. Thereafter, The Trafficking in Persons (Prevention) Act 2010, was enacted.

[16] The claimant now contends that certain sections of the Act are void and of no effect in so far as they are in contravention of the fundamental rights provisions of the Constitution. The claimant also claims that the jurisdiction vested in the Magistrate's Court by the Act constitutes an amendment of the jurisdiction of the Supreme Court effected in a manner that is inconsistent with the provisions of section 47 of the Constitution, resulting in the jurisdiction in the Magistrate's Court being null and void. Further, the claimant seeks declarations that the "Forfeiture of Property" provisions in the Act violate sections 3, 9 and 15 of the Constitution.

Presumption of Constitutionality

[17] In questions of adjudication upon the validity of ordinary legislation, there is a presumption of constitutionality¹. Justice Hyatali in **Attorney General of Trinidad and Tobago v Mootoo**² stated as follows:

¹ The Attorney General and Anor v E. Ann Henry Goodwin et al Civil Appeal No 10 of 1997

² (1976) 28 W.I.R. 304

"Before considering the findings and conclusions of the learned Judge it would be useful, I think, to examine the function and responsibilities of a court and the canons by which it should be guided when it is called upon to consider and determine the constitutional validity of an enactment ... In *Fletcher v Peck* Marshall C.J. defined the function and responsibility in these terms:it is not on slight implication and vague conjecture that the legislation is to be pronounced to have transcended its powers and its acts to be considered as void. Hence the presumption is always in favour of the constitutionality of a statute not against it; and the courts will not adjudge it invalid unless its violation of the Constitution is, in their judgment, clear, complete and unmistakable."

The Applicable Burden of Proof

[18] It was stated succinctly in the case of **Nyambirai v. National Social Security Authority**³:

"From a procedural aspect the onus is on the challenger to establish that the enactment under attack goes further than is reasonably justifiable in a democratic society and not on the State to show that it does not."

[19] In **Frederick Smith v Commissioner of Police**⁴ the learned Chief Justice stated:

"The Constitution places the onus of establishing that such an action is not justifiable on those attacking it. In the absence of evidence, except in the plainest of cases, that onus is not discharged."

Whether the Act, in whole or part, violates the claimant's right to protection of property, freedom of expression and liberty of the person

[20] The claimant seeks a declaration that the provisions of the Act in whole or in part are void and of no effect in so far as they violate her right to protection of property, freedom of expression and liberty of the person assured to her by sections 3, 4, 9 and 12 of the Constitution.

[21] Section 3 is the general declaration of the entitlement of every person in Antigua and Barbuda to the fundamental rights and freedoms enumerated therein, but subject to respect for the rights and freedoms of others and for the public interest. These rights and freedoms are:

- (a) Life, liberty, security of the person, the enjoyment of property and the protection of the law;
- (b) Freedom of conscience, of expression (including freedom of the press) and of peaceful assembly and association; and
- (c) Protection for his family life, his personal privacy, the privacy of his home and other property and from deprivation of property without fair compensation.

³ [1996] ILRC 64 AT PAGE 75

⁴ [1984] 50 W.I.R. 1

[22] The entitlement is subject to certain limitations designed to ensure that the enjoyment of the rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

[23] Since the claimant also alleges violation of her right to protection of property, freedom of expression and liberty of the person assured her specifically by sections 5, 9 and 12 of the Constitution. The correct approach therefore is to read section 3 together with the relevant section which specifically assures the right or freedom alleged to be violated, the language of each section influencing the interpretation of the other⁵⁵.

[24] Section 9 of the Constitution deals with the protection from deprivation of property. Subsection 4 which sets out certain limitations provide that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of the section - to the extent that the law in question makes provision for taking of possession or acquisition of any property, interest or right -

(i)

(ii) By way of penalty for breach of the law or forfeiture in consequence of breach of the law;

[25] Section 5 of the constitution, which deals with protection of the right to personal privacy provides:

"(1) No person shall be deprived of his personal property save as may be authorized by law in any of the following cases, that is to say-

(a)

(b) In execution of the sentence or order of a court, whether established for Antigua and Barbuda or some other country, in respect of a criminal offence of which he has been convicted;

(D) upon reasonable suspicion of his having committed or of being about to commit a criminal offence under any law;

[26] Section 12 provides:

"(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression.

[27] Subsection 4 provides that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question **makes** provision that is reasonably required-

⁵⁵ Per Lord Woolf in *La Compagnie Sucriere de Bel Ombre Ltee and Others v Government of Mauritius* (1995) 3 LRC 494 at 501

- (i) In the interest of defence, public safety, public order, public morality or public health; or
- (ii) For the purpose of protecting the reputations, rights and freedoms of other persons, ...

- [28] Having admitted in paragraph 3 of her affidavit that she owns and operates a clothing and accessories store and that in addition she is a promoter of shows and concerts featuring reggae artists and famous international performers, dancers and musicians, the claimant states: "I am advised and do verily believe that I am entitled to the fundamental rights and freedom of expression, the protection of property, the protection of privacy and liberty of the person assured to me by the Constitution". She further states in paragraph 5 that the conception and communication of thoughts and ideas are the linchpin of the business activities in which she is engaged and involved and from which pursuits she earns her livelihood and sustains her proprietary interest. In paragraph 6, she repeats that as part of her business operations she travels to several islands in the Caribbean and in particular Jamaica to engage the services of the artistes mentioned in paragraph 3. She admits that working in conjunction with local business associates in Jamaica, male and female dancers were recruited to come to Antigua to perform at various functions and facilities. These performers have stayed for various periods of time. According to her for approximately 15 years prior to 2010, she and other competing entrepreneurs and promoters operated their recruitment of dancers and entertainers in the terms mentioned above. She then admits to being arrested and charged with several offences under the provisions of the Act. She then states her belief that her constitutional rights have been, are being and are likely to be contravened.
- [29] No particulars have been given as to how the Act violates the claimant's right to protection of property, freedom of expression and liberty of the person, or even what provisions of the Act she is asserting are void.
- [30] Given the presumption of constitutionality and the burden of proof the claimant must discharge, it is not sufficient to merely allege that one's fundamental rights have been or are likely to be violated. The factual basis has to be set out. This aspect of the claim therefore fails.

Whether the Penal Provisions of the Act constitute an arbitrary, intimidatory and unreasonable fetter on the Claimant's protections of the Law guaranteed by the Constitution

- [31] The claimant complains that section 13 to 18 and 21 to 27, the penal provisions of the Act, violate sections 3, 9 and 12 of the Constitution. The impugned sections provide the penalties for the various trafficking offences.

Section 13 provides:

"13. Offence of trafficking in persons

A person who engages in trafficking in persons commits an offence and, subject to sections 15 and 16, is liable on summary conviction to a fine not exceeding four hundred thousand dollars or to imprisonment for a term not exceeding twenty years or to both.

Section 14: Directing, conspiring, inciting etc., the commission of trafficking in person

A person who-

- (a) performs an act which is aimed at committing the offence of trafficking in persons;
- (b) incites, instigates, commands, directs, aids, advises, recruits, encourages or procures another person to commit the offence of trafficking in persons; or
- (c) conspires with another person to commit the offence of trafficking in persons or to aid in the commission thereof;

commits an offence and, subject to sections 15 and 16, is liable on summary conviction to a fine not exceeding four hundred thousand dollars or to imprisonment for a term not exceeding twenty years or to both.

Section 15: Special penalty where trafficked person is a child

(1) Where an offence under section 13 or 14 is committed in relation to a child, subject to subsections (2) and (3) and section 16, the person convicted for that offence is liable on summary conviction to a fine not exceeding six hundred thousand dollars or to imprisonment for a term not exceeding twenty-five years or to both.

(2) Where an offence under section 13 or 14 is committed for the sexual exploitation of a child, subject to section 16, the person convicted for that offence is liable on summary conviction to a fine not exceeding one million dollars or to imprisonment for a term not exceeding twenty-five years or to both.

(3) A person who-

- (a) sexually exploits a child which he knows or ought reasonably to know is a trafficked child;
- (b) takes, detains or restricts the personal liberty of a child for the purpose of sexual exploitation;

commits an offence and is liable on summary conviction to a fine not exceeding one million dollars or to imprisonment for a term not exceeding twenty-five years or to both.

Section 16: Aggravating circumstances

A person convicted of an offence under section 13 or 14 is liable on summary conviction to a fine not exceeding one million dollars or to imprisonment for thirty years or to both if certain circumstances are present.

Section 17. Debt bondage

A person who intentionally engages in conduct that causes another person to enter into debt bondage commits an offence and is liable on summary conviction to a fine not exceeding four hundred thousand dollars or to imprisonment for a term not exceeding twenty years or to both.

Section **18. Using services of trafficked person**

- (1) A person commits an offence if he intentionally-
 - (a) benefits, financially or otherwise, from the services of a trafficked person or of a person he knows or ought reasonably to have known to be a trafficked person;
or
 - (b) uses or enables another person to use the services of a trafficked person or of a person he knows or ought reasonably to have known to be a trafficked person.
- (2) A person who commits an offence under subsection (1) is liable on summary conviction to a fine not exceeding four hundred thousand dollars or to imprisonment for a term not exceeding twenty years or to both."

[32] The objects of the Act as set out in section 3 are:

- "(a) to give effect to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons;
- (b) to provide for the prosecution of persons involved in trafficking in persons and related offences and for appropriate penalties;
- (c) to provide for the prevention of trafficking in persons and for the protection of and assistance to trafficked persons;
- (d) to provide for effective enforcement measures; and
- (e) generally to combat trafficking in persons."

[33] The Convention and Protocol have given voice to the belief as expressed by the UN Secretary General that trafficking of persons, particularly women and children for forced and exploitative labour, including for sexual exploitation is one of the most egregious violations of human rights that the United Nations has found⁶. Consequently, one would expect to see penalties which reflect the abhorrence of the offence.

[34] To give sensible effect to these objectives requires not only the creation of offenses, but also severe penalties for violation which would have the desired effect to prevent, suppress and punish trafficking in persons.

⁶ Per Remarks by Kofi Annan, former Secretary General of the United Nations.

- [35] Again the claimant has set out no specific details of the way in which the legislation is arbitrary, intimidatory, or unreasonable and how it fetters or violates her constitutional rights.
- [36] Having considered the provisions of the Constitution, the Act and its expressed objectives, the court is of the view that the penalty provisions are not arbitrary, intimidatory or unreasonably. The penalties set out in these sections are expressed in terms of the maximum sentence, the trial Judge would have the discretion to tailor the sentence to meet the Justice of each case. The provisions provide penalties designed to deter those who may be inclined to commit such offenses.

The jurisdiction of the Magistrate Court under the Act

- [37] The claimant asserts that the jurisdiction vested in the Magistrate's Court under sections 15 - 18 and 21 - 27(4) constitutes an amendment of the jurisdiction of the Supreme Court effected in a manner inconsistent with the provisions of section 47 of the Constitution and is therefore void.
- [38] Counsel for the defendant acknowledges that the maximum periods of imprisonment that can be imposed under the Act are very much in excess of the maximum period of imprisonment that the Magistrate can impose under the Misuse of Drugs Act or any other Act. Indeed the sentencing powers conferred on the Magistrate's Court by the Act are without precedent in any other democratic common law jurisdiction.
- [39] The Supreme Court Order⁷ provides for the establishment of a Supreme Court which shall be a superior court of record; and for the appointment of tenured judges of the court. Parliament may only alter the provisions of the Supreme Court Order in the manner specified in section 47 of the Constitution.
- [40] Counsel for the defendant states that it is evident that the jurisdiction that the Supreme Court has traditionally exercised in imposing severe sentences of imprisonment has been altered; that the International Criminal Court considers imprisonment for periods of 25 years and more as life sentences and that it appears evident from section 47 that ordinary laws, such as the Act, cannot vest in the summary court a jurisdiction to impose severe periods of imprisonment that traditionally formed part of the jurisdiction of the Supreme Court.
- [41] The court is of the view that the offences enumerated above are in the nature of serious offenses. Even though trafficking in persons and related offences may be relatively new to the statute books of Antigua and Barbuda, Parliament considered the offences so serious as to provide penalties for their violation that are comparable to life sentences. No one can doubt that the trial of serious criminal offences forms a significant part of the jurisdiction that has historically characterized the High Court.
- [42] Counsel for the defendant refers to section 6 of the Act which provides that in the event of any conflict or inconsistency between the provisions of the Act and those of any other written law the

⁷ Cap 422A of the Laws of Antigua and Barbuda

provisions of the Act shall prevail and the other written law shall be deemed to be superseded to the extent of the inconsistency or conflict. This prevailing law clause, she submits has the express effect of amending any conflicting law.

[43] Section 6 of the Act reads:

- (1) The provisions of this Act are in addition to, and not in derogation of, the provisions of any other written law relating to trafficking in persons.
- (2) In the event of any conflict or inconsistency between the provisions of this Act and those of any other written law, the provisions of this Act shall prevail and the conflicting or inconsistent provisions of such other written law shall, to the extent of the conflict or inconsistency, be deemed to be superseded.

[44] If the provisions of the Act were in conflict with the provisions in another ordinary legislation, then this prevailing law clause would be effective. However, the provisions of the Act are in conflict with section 47 of the Constitution and in light of section 2 of the Constitution, where any law that is inconsistent with the Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

[45] Having admitted that the jurisdiction that the Supreme Court has traditionally exercised in imposing severe sentences of imprisonment has been altered, and that such alteration or amendment was not in accordance with section 47, Counsel for the defendant proposes that the invalid penalty sections be severed from the Act which would result in those sections being replaced by section 36 (b) of the Small Charges Act Cap 405 until such time as the Legislature amends the Act. That section provides that any person who contravenes any statutory instrument, the infringement of which no specific punishment is prescribed, shall be liable to a fine not exceeding two hundred and fifty dollars.

[46] However, as was stated in **Hinds and Others V The Queen**⁸ if the jurisdiction to try these offenses were to remain with the Magistrate Court, the individual citizen could be deprived of the safeguard, which the makers of the Constitution regarded as necessary, of having important questions affecting his civil or criminal responsibilities determined by a court, composed of judges whose independence from all local pressure by Parliament or by the executive was guaranteed by a security of tenure more absolute than that provided by the Constitution for judges of inferior courts.

[47] Accordingly, the court finds that sections 15 to 18, 21 through 24 (1) and sections 25, 26, 27(1) to 27 (4) are unconstitutional and therefore null and void.

The Forfeiture Provisions of the Act

[48] Section 37 of the Act provides:-

⁸ [1977] A.C. 195

- (1) The property of a person convicted of the offence of trafficking in persons that was used or obtained in the course of the offence and any benefit gained from the proceeds of the offence is liable to be forfeited to the Crown.
- (2) A conveyance, personal property, book, record, report or document seized in the exercise of any power conferred under this Act is liable to be forfeited to the Crown.
- (3) Any human organ seized in the exercise of any power conferred under this Act is liable to be forfeited to the Crown and destroyed in the manner prescribed.
- (4) Where a person is convicted of the offence of trafficking in persons, the court may, on application by the Director of Public Prosecutions, order that anything liable to forfeiture under subsection (1) or (2) be forfeited to the Crown.
- (5) The court shall not make a forfeiture order in relation to subsection (2) unless it is satisfied that-
 - (a) The person convicted owns the property seized; or
 - (b) The owner permitted the property to be used in the commission of the offence or trafficking in persons.

[49] In regard to section 9 of the Constitution, the claimant avers that this section forbids the taking of property from an individual without offering compensation for the said property. Additionally, section 9(4)(a)(ii) of the Constitution permits for the taking possession or acquisition of any property, interest or right by way of penalty for breach of the law or forfeiture in consequence of breach of the law. However, for the forfeiture to come within the provisions of section 9(4)(a)(ii) of the Constitution, the forfeiture order would have to form part of the sentence meted out to an accused at the time of trial. That the word "convicted" in section 37 (1) of the Act means verdict and therefore the application to forfeit property under the said section must be made as a part of the sentencing process.

[50] In addition, the provision in the Act for the deprivation of property as a consequence of the conviction for an offence, separate and apart from the sentence fixed by the trial court, results in the convicted person being twice punished for the said offence and is accordingly in breach of section 15 of the Constitution

[51] Section 9 of the Constitution clearly contemplates the existence of statutes dealing with the taking of possession of property, interest or right by way of forfeiture in consequence of breach of the law. Such provisions are not inconsistent with or in contravention of section 9 (1) as long as the provision is reasonably justifiable in a democratic society. No allegation has been made that the provision is not reasonably justifiable in Antigua and Barbuda.

[52] Furthermore, the forfeiture provisions under the Act are civil proceedings. There are several factors that point to this. As was noted in **Walsh v Director of the Assets Recovery Agency!**,⁹ in an asset recovery proceeding no charge is preferred against the person. He does not acquire a

⁹ [2005] NICA 6

criminal conviction if it is found that the property is liable to forfeiture. He is not required to plead to a charge. The provisions in sections 38 and 39 of the Act dealing with the procedures for application are those associated with a civil claim. They make it clear that the forfeiture proceedings are civil in nature.

[53] Lord Chief Justice Kerr, speaking for the court of Appeal in **Walsh**¹⁰ on the nature of proceedings for the recovery of assets noted that the trial judge had stated the purpose and function of civil recovery procedure. It is "to recover property obtained through unlawful conduct but not to penalize or punish any person who is proved to have engaged in such conduct". Kerr, LCJ drew a distinction between confiscation orders and recovery proceedings, having accepted that Lord Steyn in **R v Rezvi**¹¹ had stated that one of the purposes of confiscation proceedings was to punish convicted offenders. However, LCJ Kerr concluded that even if the proceeding in that case was to be regarded as imposing a penalty, that was not sufficient to classify the proceeding as criminal for purposes of Article 6 of the European Convention on Human Rights and Fundamental Freedoms.

[54] The court adopts the reasoning of Kerr, LCJ and find that the forfeiture proceedings in the Act are akin to the asset recovery proceeding and are civil in nature. Its primary purpose is to recover proceeds of crime; it is not to punish in the sense normally entailed in a criminal sanction. Furthermore, even if the proceedings are to be regarded as imposing a penalty, this is not sufficient to classify the proceedings as criminal for purposes of section 15 of the Constitution, which section provides certain protection for a person "charged with a criminal offence." Accordingly the court finds that the forfeiture provisions of the Act do not violate sections 9 or 15 of the Constitution, and the declarations sought by the claimant in respect of the forfeiture provisions are refused.

[55] Accordingly the court makes the following declarations and orders:

1. A declaration that the jurisdiction vested in the Magistrate's Court under sections 15 through 18, 21 through 24(1) and sections 25, 26, 27(1) to 27(4) of the Act constitute an amendment of the jurisdiction of the Supreme Court effected in a manner inconsistent with the provisions of section 47 of the Constitution and the vesting of the said jurisdiction in the Magistrate's Court is therefore void and of no effect.
2. Parties are to file submissions on cost within 14 days


CLARE HENRY
High Court Judge
Antigua & Barbuda

¹⁰ Supra, at paragraph 37

¹¹ [2002] UKHL 1