CITATION: *Smith v Hair & JLR* [2007] NTMC 086

PARTIES:	RODNEY SMITH
	v
	BRENDON ANDREW HAIR
	AND
	JLR
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Domestic Violence Act
FILE NO(s):	20412211
DELIVERED ON:	17 December 2007
DELIVERED AT:	Darwin
HEARING DATE(s):	10 October 2007
JUDGMENT OF:	Mr R J Wallace SM

CATCHWORDS:

PROCEDURE – Court of Summary Jurisdiction – Domestic Violence Act (NT) – application to revoke Domestic Violence Order – Parties to Application – Parties must be given an opportunity to be heard.

JURISDICTION – Court of Summary Jurisdiction – Application to have Domestic Violence Order declared null and void – no jurisdiction.

JURISDICTION – Court of Summary Jurisdiction – Application to have Court set aside Domestic Violence Order – party apparently consenting to Order alleging he did not consent – burden and standard of proof

REPRESENTATION:

Counsel:

Applicant:	P Elliot
Defendant:	J Truman

Solicitors:

Applicant:	Anthony Crane
Defendant:	Solicitor for the Northern Territory

Judgment category classification:	A
Judgment ID number:	[2007] NTMC 086
Number of paragraphs:	31

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20412211

[2007] NTMC 086

BETWEEN:

RODNEY SMITH

Applicant

AND:

BRENDON ANDREW HAIR

Defendant

AND

JLR

2nd Defendant

REASONS FOR DECISION

(Delivered 17 December 2007)

MR R J WALLACE SM:

1. This matter has been initiated by an Application ("the Application") purportedly pursuant to s 8 of the *Domestic Violence Act* ("the Act"). Section 8 provides a procedure whereby restraining orders made under the Act may be varied or revoked. The Regulations to the Act provide a form, Form 6, for applications pursuant to s 8, and the present Application is in that form. The Application is dated 12/06/07, and the body of the Application reads:

"DETAILS OF ORDERS TO BE VARIED OR REVOKED:

Orders of 26 May 2004 as attached hereto.

VARIATION/REVOCATION OF EXISTING ORDER:

The Applicant seeks an Order that

The Orders of 26 May 2004 under the Domestic Violence Act are void as a nullity or alternatively that the Orders be revoked or set aside.

REASONS FOR VARIATION OR REVOCATION:

The Orders were made without jurisdiction".

2. In at least three respects the Application is unusual: indeed as far as I can tell, unprecedented. These respects are: first, in that relief sought includes "an Order that the Orders of 26 May 2004…are void as a nullity…"; secondly, that the Orders spoken of had expired on 26 May 2005, slightly more that two years before the filing of the Application; and thirdly in that the Reasons pleaded (if that is the right verb) are that "The Orders were made without jurisdiction". As it turns out, that third item is of no moment, for reasons given below.

Background

3. Mr Rodney Smith ("Mr Smith") the Applicant in these proceedings was arrested on Tuesday 25 May 2004 and spent the rest of that day in police custody. The police were investigating allegations that he had committed serious offences against his stepdaughter JLR, named in the Application as the Second Defendant. JLR had made a statutory declaration on 25 May 2004 containing her allegations.

4. While Mr Smith was in police custody, Sgt Kate McMichael appeared in the Darwin Court of Summary Jurisdiction for Brendon Andrew Hair named in the Application as the Defendant. Constable Hair and Sgt McMichael were both police officers attached to the Domestic Violence Unit of the NT Police Force. An Application for Restraining Order pursuant to s 4 of the Act had

been filed by Constable Hair "On behalf of JLR". The Court heard the matter that day. A copy of JLR's statutory declaration seems to have been tendered (there is a copy on the court file) and the Court proceeded, in the absence of Mr Smith to make orders that Mr Smith be restrained in various ways. Such orders can be made ex parte by virtue of s 4(3) of the Act. The ex parte orders were expressed to be "until further order", and the matter was adjourned to the following day, 26 May 2004.

5. At 3.15pm on 25 May 2004 Sgt McMichael attended on Mr Smith (who was still in custody) in an interview room at the Darwin Police Station and served him with copies of the s 4 Application and the ex parte orders. Later on 25 May Mr Smith was charged with various offences. He was not granted bail.

6. On Wednesday 26 May he was taken in custody to the Darwin Court of Summary Jurisdiction to appear in answer to those charges and also to appear in the adjourned proceedings pursuant to the Act. At court, he made the acquaintance of Mr Strachan, a legal practitioner from the NT Legal Aid Commission. Mr Strachan appears to have been the, or one of the, "duty solicitors" that day. There were two proceedings on foot in the Court: the criminal charges, in which a prosecutor appeared, I assume – that person's identity is not known to me – and the proceeding under the Act, in which Sgt McMichael again appeared for the applicant, Mr Hair. Mr Strachan obtained instructions from Mr Smith to make a bail application on his behalf. At some stage during that day that bail application was made and the Court granted bail to Mr Smith. At what seems to have been another stage [I take this from a statement from the bar table by Mr Elliott, counsel for Mr Smith in this matter – see p 3 of the transcript] Mr Smith apparently consented to the ex parte Orders being confirmed for the period of 12 months. [I write "apparently", because Mr Smith now asserts that he did not consent.] If the two matters – bail and the Orders – were dealt with separately, there is reason to support the Orders may have been dealt with

first, in that Mr Smith was still in the cells when Ms Docker saw him – see her affidavit in paragraph 10 of these Reasons.

7. These 12 months passed and the Orders expired. Mr Smith was, I assume, committed for trial. Upon his trial he pleaded not guilty and was found by his jury to be not guilty of eight of the eleven charges on the indictment. The jury was unable to agree on verdicts on the other three charges. I am not informed as to the date of the trial and verdict, but it must have been some time – a month or two perhaps – before 21 October 2005. On that date, I am told, a *nolle prosequi* in relation to the remaining charges was entered.

8. I have derived this outline of events mainly from the Affidavit sworn by Mr Smith on 31 May 2007 and tendered in these proceedings: I have also had reference to the Affirmation of Kate Alison McMichael affirmed 8 October 2007, and to documents I have found on the court file, notably the statutory declaration of JLR.

Mr Smith's Affidavit

9. I mentioned above the Mr Smith now asserts that he did not consent to the Orders' being confirmed. In his affidavit on 31 May 2007 he says (relevantly):

> 7. At all relevant times I was married to the mother of the Second Respondent. The second respondent was therefore my step-daughter.
>
> 8. The events described in paragraphs 7 – 21 hereof occurred over the period 24 to 26 May 2004 at which time:-
>
> a. I had been in full employment for most of my life, culminating in the senior and responsible position I held as at 24 May 2004.
>
> b. I had never been in trouble with police. My only contact with police had been queries from police now and again

over years related to whether I was a particular “Smith” police wanted to speak with.

c. I was 40 years of age.

d. I was on night shift and at the time of my original call to police on 24 May 2004 as described herein I had had about 2 hours sleep in the previous 24 hours.

e. I was recovering from an attach of Ross River virus and glandular fever, which attacks still come on me from time to time but then and now I usually work through them and just wait for them to go away.

f. I had been on blood pressure tablets since the age of 15. I lost a kidney playing football at that age and have been on permanent blood pressure medication ever since. I did have and still have some hearing loss.

g. I had held a firearms licence since the age of 16. From well before that age to the time of these events I regularly used firearms in recreational and sometimes commercial activities.

h. My wife was overseas and I was the sole carer for my stepdaughter.

9. On the night of 24 May 2004 I had an argument with my step-daughter about her school wagging in the absence of her mother.

10. The next morning, 25 May 2004 I woke at about 7.30am after a couple of hours sleep after night shift and noticed that my step daughter was not at home.

11. I called the police to report her missing. I did that because I was concerned with where my step-daughter was, and because apart from our argument a few hours earlier, I had become concerned at other I thought inappropriate behaviour patterns she had started to exhibit.

12. About half an hour later police attended at my house. Instead of the police telling me, as I expected, that they had come in answer to my call, they arrested me for, as police informed me, sexual intercourse with my step daughter without consent. I was similarly informed and verily believed that the official

police tactical response group had also arrived and was deployed near my home. I was handcuffed and placed in the rear of a police vehicle.

13. The events described in paragraph 8 were utterly unexpected, shocking, confusing and stunning to me. From my lifetime of being a fully employed, minding his own business good citizen, concerned that morning about the welfare of a step daughter, I was suddenly transformed into a handcuffed prisoner accused of rape of that step daughter, and justifying the police tactical response group arriving at my place presumable to protect someone or something from me.

14. Police took me to Mitchell Street police station and put me in a cell.

15. After a while police took swabs from me, they said and I verily believed for DNA samples. From time to time I said words to the effect of "What is this? What am I supposed to have done?" I remember being told in the confusion words to the effect of "There has been an allegation that you raped your step daughter." I had done no such thing and continued to be shocked, horrified and disbelieving of what was going on. I had called police to report the absence of my step daughter and within a couple of hours had found myself arrested complete with the tactical response group handcuffed, taken to jail, swabbed and accused of something quite wrong and horrible.

16. Police took my clothes away from me, gave a pair of shorts and blanket and left me in a cell. After a while they took me to Royal Darwin Hospital where, in my words, I was poked and prodded, I was told by other persons present and verily believed, for further samples and then police took me back to the Mitchell Street cell.

17. At some point the police sought to interview me about what they said were the allegations against me. As part of that, I remember one police officer saying to me words or words to the effect of "Are you OK?" and I said words or words to the effect of "No I feel bad, I can't have my blood pressure tablets and you won't even let me have a drink of water". Everything was a confused blur and I cannot estimate what time this occurred. Similarly, police asked me for the keys to my home and my gun safe. They told me and I verily believed words or words to the effect of "It is standard procedure to take possession of your firearms in a case like this". When I

returned home after the court gave me bail I found all the firearms absent from my gun safe.

18. At some time in the evening of 25th May, I was told that I had been charged with multiple offences of sexual intercourse without consent, indecent assault, and other offences of a sexual nature. I could not believe what had happened to me, and was in a state of total shock. The police told me that I would not get bail that night, and that I would have to spend the night in the cells. From time to time I asked about my blood pressure tablets and said to police officers words to the effect of "I'm not well, I haven't had any sleep and I have to have my blood pressure tablets," but I was ignored.

19. I stayed in jail on the night of 25 May 2004 and did not sleep at all. I couldn't. The cell had no water, I had not showered or cleaned myself since the morning of 24 May, I had had hardly any sleep I was still getting over the Ross River Virus and glandular fever problem. I had not been given access to my blood pressure tablets, and I was in a state of disbelieving shock. I was not even allowed to have a drink of water. On the morning of 26 May, I was allowed to have a shower before going to court. Although I was offered food while in police custody, I ate nothing over that period. To the best of my memory the police gave me no papers of any kind during my entire stay in the police station.

20. Police took me to court on 26 May 2006. For a few minutes I saw a solicitor whom recent enquiries disclose was a Mr Strachan from the Northern Territory Legal Aid Commission. I had had no sleep, nothing to eat, none of my blood pressure medication and I had a continuing bad headache and I was having my usual difficulty hearing clearly. I'd been put in handcuffs and jail by surprise, accused of the most horrible things I had not done, the rug had been pulled from under my work and my whole way of life I cold not think straight. I continued to be confused and shocked. Mr Strachan asked if I wanted bail and I instructed him that I most certainly did.

21. Mr Strachan did whatever he did and I remember that I signed papers, I just signed whatever I was given. Annexed hereto and marked "D" is a true copy of that bail undertaking. I have been told that I consented to a Domestic Violence Order being made, and it is my signature on Annexure "C". I did not know what a Domestic Violence Order was, how it worked, or what it meant. I thought that all of the proceedings of 26 May 2004

were part of Mr Starchan's bail efforts. I remember nothing about the "DVO" being explained to me, and if any explanation was given to me by I had no understanding of it other than as part of what was necessary for me to obtain bail. I thought I had to sign it to get out of there.

22. When I signed the order on 26 May 2004, I had no idea that I was signing anything other that that which was necessary for me to receive bail. Had I been fully and properly aware of the nature and extent of the "DVO" I would not have agreed to sign it, or agree to it in any way because I had not done what I was accused of having done and at any event I had bail conditions. I was focussed on getting out of jail on bail. After I was given bail my life focussed on fighting the charges which had been made against me.

And

24. I did not consent to a Domestic Violence Order against me. I did not realise the full fact or full effect of a DVO or even the fact that I was said to have consented to such an Order until after my criminal trial, when I sought the return of my firearms. My whole focus had been on fighting the criminal charges against me.

25. I have not been able to afford to bring this application prior to my now bringing it.

10. As against that, there are three countervailing matters of fact. First, in her affirmation of 8 October 2007, Sgt McMichael states:

2. In May 2004 I was stationed at the Domestic Violence Unit at Nightcliff Police Station. On 25 May 2004 at 3.15 pm I served the following documents ("the Documents") on Rodney Smith (hereinafter referred to as "the Applicant") in the Darwin Police Station Interview Room number one:

- An Application for Restraining Order dated 25 May 2004; and
- an Order dated 25 May 2004.

A true copy of the Documents I served are annexed hereto and marked "A".

3. Although I do not specifically recall the Applicant, whenever serving a person with a Domestic Violence Order, I always follow a certain procedure. Firstly I will hand the person a copy of the Order, and then read the Order aloud to that person. I will then, if necessary, inform the person of the time and date that they are required to appear in court and confirm that persons name for the purpose of service. It is also my practice to advise the person on whom the Order is being served to seek legal advice about the Order.

4. I do not recall a situation where a person has appeared not to understand the Order, or exhibited any confusion or inability to understand what was being said. However, if this were the case I would again advise them to seek legal advice about the Order. If English was not the first language of the person being served with the Order, I would also consider making arrangements for an interpreter to speak with them for the purposes of explaining the Order to them.

Secondly, in an affidavit sworn 27 September 2007, Patricia Docker states:

1. I am currently employed as a Senior Criminal Officer at the Criminal Registry of the Darwin Magistrates Court of the Northern Territory.

2. In the course of my duties as a Senior Criminal Officer I routinely serve Domestic Violence Orders made by the Court on persons detained in the Court Cells of the Darwin Magistrates Court.

3. In May 2004 I was employed as a Senior Criminal Officer at the Darwin Magistrates Court. On 26 May 2004 at the Court Cells of the Darwin Magistrates Court, I did personally serve on Rodney Smith (hereinafter referred to as "the Applicant") a copy of the Domestic Violence Order dated 26 May 2004, a true copy of which is annexed hereto and marked "A".

4. Although I do not specifically recall the Applicant, whenever serving a person with a Domestic Violence Order, I always follow a certain procedure to ensure that the person understands the Order that they are being asked to sign. Firstly, I will say "this is the Domestic Violence Order that was made today" or words to that effect. I then read the Order aloud and ask the person "are you happy to sign the bottom of the Order?" Once the person indicated that they are happy to

sign the Order I pass two copies of the Order to the person for their signature.

5. On some occasions Caucasian persons will clearly state that they do not want to read the Order or have it read to them. On such occasions I will ask the person if they understand the terms of the Order, and will ensure that they have indicated that they understand the terms of the Order before obtaining their signature.

6. If a person ever advised me that they do not understand the order, or says nothing at all after I have read the Order aloud to them, I will ask the person if they would like me to read the Order to them again. If, after reading the Order aloud a second time, they still indicate that they do not understand, I ask them if they would like me to arrange for their solicitor to meet with them and explain the Order.

Thirdly, and presuming regularity as I must, I presume that the Court complied with its obligation pursuant to s 5(5) of the Act: that is, that the magistrate explained the matters listed in that subsection to Mr Smith in open court before Mr Smith had his encounter with Ms Docker.

11. In my opinion, as a matter of law, if Mr Smith did effectually consent to the confirmation of the order, that consent must have happened at the time the magistrate made the order in open court. The relevance of Sgt McMichael's affidavit would be that her conversation with Mr Smith on 25 May 2004 ought to have put him on notice that he was within the embrace of the Act. The relevance of Ms Docker's affidavit would be that one would expect Mr Smith to have protested in some fashion if he (a) understood what Ms Docker was telling him and (b) had not understood that that was what the magistrate had ordered with his apparent consent.

"Jurisdiction"

12. It will be recalled that the Application cites as the reason for the revocation sought that "The Orders were made without jurisdiction". In my opinion this is a particularly unapt pleading. If the issues in the case involved any

question of the Court's jurisdiction, in the normal sense of the word "jurisdiction", then the appropriate remedy would lie through proceedings in the nature of a prerogative writ, and not in this Court. But, as the affidavit material shows, the issues do not involve jurisdictional questions. Rather, Mr Smith should have pleaded that, in respect of his consent to the Orders' being confirmed, *non est factum*.

13. However, the Court of Summary Jurisdiction is not, by and large, a court of pleadings, and is has never been the practice of the Court in its jurisdiction created by the Act to restrict applicants to the matters listed in the various sorts of applications. In the present matter Ms Truman, counsel for Mr Hair (i.e. the NT Police) makes no complaint of being ambushed. From what I can remember of the mentions of the matter before me on 27/6/07 and 16/7/07 (before the hearing on 10/10/07) I am confident that Mr Hair has had fair notice for some months of what the case is really about.

Parties to the Application

14. The same cannot be said of JLR, who is unquestionably a party, by virtue of s 8(4) of the Act:

> (4) The person on whose behalf an application is made under section 4 or 6(1) is, in addition to the member of the Police Force or the person who made the application, a party to a proceeding in respect of the application.

Section 8(1) and (2) read:

> (1) A party to a proceeding in which a restraining order has been made may, at any time, apply to the Court for a variation or revocation of the order.
>
> (2) The Court may, on receiving an application under subsection (1) or of its own motion, after all parties and other persons who, in the opinion of the Court, have a direct interest in the outcome have had an opportunity to be heard on the matter, vary or revoke, or refuse to vary or revoke, a restraining order.

15. As far as I can tell from the file and from enquiries I made of counsel during the hearing, JLR has been given no notice at all of Mr Smith's Application. It seems clear to me that the obligation to comply with s 8(2) falls upon the Applicant and it also seems clear to me that compliance with s 8(2) is mandatory, at least in the absence of any insuperable obstacle to compliance. As far as I can tell in this case the Applicant simply overlooked s 8(2). It seems to me in these circumstances that, so far as the relief that Mr Smith is seeking depends upon the provisions of s 8, I ought not to proceed any further with the matter until JLR has been afforded an opportunity to be heard.

16. This conclusion is, in a way, a shame, because I have come to a fairly firm view (from which it is, I think, unlikely that JLR would want to dissuade me) that I would as a result of matters of law dismiss that part of the Application i.e."…alternatively, that the Orders be revoked…."I am presently of the view that the word "revocation" in s 8 has application only to orders currently in effect, and I am further of the view that the power of the Court created by s 8(2) is not so much a power to "vary" or "revoke"; but rather a power to "vary or revoke" and that if it is nonsensical to think of varying an order that has expired – and in my judgment it is nonsensical – then, *noscitur a sociis*, so it is to think of revoking such an order. But I will not develop these thoughts at this time.

Other Forms of Relief Sought

17. It will be recalled that the Application recited that:

> "The Applicant seeks an order that
>
> The Orders of 26 May 2004 under the *Domestic Violence Act* are void as a nullity or alternatively that the Orders be revoked or set aside".

18. Of the three bases for relief there touched upon (voidness, revocation, setting aside) only revocation is relief pursuant to s 8 of the Act. Section

8(4) nevertheless has it that JLR is a party in the matter – see *Turnbull v Di Nale* (unreported judgment of Angel J on 24/3/00, SC No JA 7 of 2000). However, s 8(2) would have no application, and the question arises whether it is proper to proceed to consider the outstanding issues in the matter, she not having been heard. As it happens Angel J was in a not dissimilar situation in *Turnbull v Di Nale* and decided that in the circumstances of that case he could proceed – see paragraph 10 of His Honours Reasons for Judgment on p 5.

19. After some hesitation I have decided that I may properly proceed to consider this relief. My decision to proceed has been made easier by my opinion that the application for this relief is ill-founded. There having been no authority cited by Mr Elliot to demonstrate a power in this court to make the sort of declaration sought, and having been unable myself to locate any authority suggesting that there is such a power, I dismiss this part of the application.

20. That leaves the last relief sought, namely, that Orders of 26 May 2004 be set aside. This is a form of relief that is in my judgment not necessarily beyond the powers conferred on this Court. As Mildren J wrote in *Suter v Commissioner of Police in the Northern Territory* (unreported SCC No 135 of 1998, judgment of 11 September 1998) at p 8 - 9:

> "It is well established that all courts, even inferior statutory courts, have an inherent power to set aside orders improperly made in the absence of a defendant who was not actually served with the relevant process: see *Taylor v Taylor* (1979) 143 CLR 1, at 8, 16; *Hoskins v Van Den-Braak* (1998) 43 NSWLR 290, and this is so irrespective of whether or not there is a right of appeal. Further, provisions such as s 8 of the *Domestic Violence Act* have been treated as conferring express jurisdiction to set orders aside: see for example, *Posner*, *supra*, at 471 per Latham CJ".
>
> [*Posner* is *Posner v Collector For Inter-State Destitute Persons (Victoria)* (1946) 74 CLR 461.]

21. I have no trouble imagining cases where the Court would desire to have the power to set aside an order made pursuant to the Act apparently with the

consent of the defendant. For example, if the person who appeared at court and consented to the Order were an impostor – the defendant having a cast-iron alibi, such as being in gaol somewhere, or on military service overseas – then I think the Court should have and would find that it did have power to set aside the Orders. (Whether that setting aside would render the orders void *ab initio* is a different question.)

22. The present case is a different one: there is no suggestion of fraud on the jurisdiction. Nevertheless a power to set aside may exist and I proceed on the basis that it does.

23. It seems to me that before this relief can be granted Mr Smith must satisfy me that, as a matter of fact, he did not consent to the Orders. Mr Smith's affidavit, previously quoted at length sets out circumstances which render it credible that the whole business of the Domestic Violence Order might have "gone straight over his head". I should say that in the absence of some medical or pharmacological expertise I probably ought not to allow that the effects of Ross River Fever, glandular fever or the lack of blood pressure tablets would have any particular effect upon Mr Smith's attention or comprehension, but with or without such effects, Mr Smith's tiredness, bewilderment, shock, anger, disbelief etc in the completely unfamiliar and fearsome surroundings of police custody would, I think, certainly have him functioning at a different mental level than normal, and probably a level where he would be more likely to miss some things and misinterpret others, than he normally would.

24. Granting all that, it nevertheless seems to me that the material in his affidavit falls far short of satisfying me that he did not consent to the orders. Broadly speaking, that material leaves open three possibilities:

    (i) That Mr Smith is not telling the truth about not knowing what he was doing when he consented to the order. I am not giving this possibility any weight in what follows.

(ii) That Mr Smith is sincere in what he says in his affidavit, but mistaken. That is, that he did grasp what was going on in the police interview room with Sgt McMichael, in the Court, and in the court cells with Ms Docker, but, the Orders forming so slight and inconsiderable part of the troubles that had fallen upon him (by comparison with the criminal charges, and all that flowed from them in terms of legal business, family disruption and community repute, he more or less forgot the Orders' separate existence and has subsequently persuaded himself that he never knew of them.

(iii) All the processes to do with the Orders did really go "over the top of his head" at the time.

25. In the light of the affidavits of Sgt McMichael and Ms Docker, it seems to me far more likely that the true history of Mr Smith's understanding lies in a sequence of events something like that outlined in possibility (ii) rather than possibility (iii). It seems to me almost certain that Mr Smith, bewildered and tired etc as he was, would have hung on Sgt McMichael's every word when she read out the ex parte Orders to him on 25 May 2004. He was, after all, desperate to know what was going on. Having heard, and in my opinion almost certainly understood the purport of what Sgt McMichael read to him, he may well have decided that that was of no great interest to him in his then situation.

26. Whether that was so or not, when the magistrate recorded the "consent" orders on the following day, and gave the s 5(5) explanations, it seems to me unlikely that the magistrate would have missed any overt sign of lack of comprehension by Mr Smith. Notably, Sgt McMichael (who has a fairly imposing presence) was present then also. Much the more likely event, in my judgment, was that the magistrate's words and Sgt McMichael's presence would have refreshed Mr Smith's memory of the reading of the ex parte orders.

27. I am similarly persuaded by Ms Docker's affidavit. Ms Docker is, as it happens, a very experienced, serious, and conscientious servant of the Court. Had there been any overt want of comprehension in Mr Smith, I have no doubt she would not have been satisfied simply to go through the motions of reading the order to him. Her acceptance of his signature as indicating an understanding carries weight that, in my opinion, Mr Smith's memory, of confusion and incomprehension, years later, cannot come close to shifting.

28. Another way of illustrating the difficulty of Mr Smith's position is this: He says in effect

> "a) I seem to have signed these orders.
>
> b) I have no memory at all of anything to do with these orders.
>
> c) Therefore I think I must never have comprehended these orders.
>
> d) In particular I have no memory of consenting to these orders.
>
> e) Therefore I think I never did consent.
>
> f) I say now – in 2007 - that I would not have consented to the orders, had I understood."

29. As for item (f), the 2007 assertion, it carries little or no weight in my view. Suppose that, on 26 May 2004, Mr Strachan had advised him that it would make a grant of bail much more likely if he consented to the orders' being confirmed. (That would have been sound advice). Would Mr Smith have consented for that reason? I don't know and I doubt whether he does either.

30. The best that can be said for the two "therefores" above is, "perhaps". The workings of a person's memory are as complex as the workings of the mind that lays down the memory. I cannot accept that it is more likely than not that Mr Smith's understanding failed him on 26 May 2004 as he says he believes it did. The Application is dismissed sofar as it seeks relief by way of having the Orders on that day set aside.

31. I would prefer not to hear from the parties as to costs until the outstanding question of relief pursuant to s 8(2) or the Act is resolved.

Dated this 17th day of December 2007

_____

R J Wallace
STIPENDIARY MAGISTRATE