Neutral Citation Number: [2022] EWCA Crim 1243

Case No: 202103477 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT INNER LONDON
HIS HONOUR JUDGE KELLEHER
T20217055

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 September 2022

Before:

LORD JUSTICE STUART-SMITH
MRS JUSTICE MAY DBE
THE RECORDER OF LONDON
(His Honour Judge Lucraft QC)
(Sitting as a Judge of the Court of Appeal Criminal Division)

- -

Between:

REGINA

Respondent

- and -

NIKI WOOD

Appellant

- -
- -

James Waddington QC and **Ben Edwards** (instructed by **TV Edwards Solicitors**) for the **Appellant**

Martin Evans QC and **Thomas Hoskins** (instructed by **CPS Proceeds of Crime Confiscation Team**) for the **Respondent**

Hearing date: 20 July 2022

- -

Remote hand-down:
This judgment was handed down remotely at 10.30am on 20 September 2022 by circulation to the parties or their representatives by email and by release to the National Archives.

- -

Approved Judgment

Stuart-Smith LJ:

Introduction

1. Mr Wood applies for permission to appeal an order of HHJ Kelleher made on 20 October 2021, his application having been referred to the full court by Ellenbogen J. We shall refer to Mr Wood as the Appellant throughout. At the end of the hearing of the application, we announced that leave to appeal would be granted but the appeal dismissed for reasons to be provided in writing at a later date. This judgment sets out our reasons.

2. The appeal raises an issue about the application of section 22 of the Proceeds of Crime Act 2002 ["the Act" or "POCA"]. Put simply, the question is whether the section applies in circumstances where (a) either new assets have been identified or an asset that was included in the original calculation of the available amount has become more valuable, but (b) the value attributable to the newly identified or revalued assets (determined by performing a "new calculation" pursuant to section 22(3)) does not exceed the "relevant amount" determined in accordance with section 22(8) of the Act i.e. the amount found as the available amount for the purposes of the original confiscation order.

3. In a ruling given on 21 October 2021, to which we shall refer in greater detail below, HHJ Kelleher ruled that the section applied. The Appellant now seeks permission to appeal against that ruling and the order that was made in consequence by the Judge. In our judgment, HHJ Kelleher reached the right conclusion. As we shall explain, resolution of the issue depends upon what is meant by the words "new calculation" in section 22. As will be clear from our initial formulation of the issue at [2] above, it is the Appellant's case that when performing a "new calculation" under section 22 only the current value of the defendant's retained assets that have been revalued and those that are newly acquired or identified are to be taken into account. In our judgment, that is where the flaw in the Appellant's case lies, and it is fundamental.

4. A modified version of the Appellant's submission would include in the "new calculation" the assets included in the calculation of the available amount for the purposes of the original confiscation order that are still retained by the defendant, whether or not they are subject to revaluation. In our judgment, the same principles, logic and result obtain in relation to the modified submission as they do to the basic formulation we have set out above.

The background facts

5. In April 2013, having been convicted by the Crown Court at Blackfriars of three offences of obtaining a money transfer by deception and an offence of fraud, the Appellant was sentenced to a total of 2 years' imprisonment. The gist of his offending had been the obtaining of mortgages by giving untrue and inflated information about his means and income. On 22 January 2014 the court made a confiscation order ["the Original Confiscation Order"] pursuant to section 6 of the Act. It found that the value of the benefit was £978,011.99 and that the available amount was £610,564.94: a shortfall of £367,447.05. The Original Confiscation Order was accordingly made in the sum of £610,564.94 with the

Appellant being given 12 months to pay and a period of imprisonment in default of 4 years.

6. The schedule of available or realisable assets which went to make up the available amount of £610,564.94 included equity available in 15 New Road, Leigh on Sea, Essex ["the House"], which was included in the schedule valued at £127,539.88. We are told that the House has been and is the family home for the Appellant, his wife and his two sons, who are now aged 16 and 22. It also included the Appellant's interest in a piece of land valued at £7,500 and his interest in a Nissan van valued at £4,798.80. It is not necessary to mention the other scheduled assets specifically save that they included a flat at 29A Mill Lane in Woodford Green, which was included in the schedule valued at just over £60,000 but was later sold for more than three times that amount, the proceeds being used to pay off part of the monies owing under the Original Confiscation Order.

7. The Original Confiscation Order was not paid in time and therefore accumulated interest. The sum originally ordered to be paid (£610,564.94) was paid in full by 14 January 2018, without the Appellant having to sell the House. It appears that the Appellant managed to pay off the sum without having to sell the House by a combination of selling some assets for more than the amount that had been included in the schedule of available or realisable assets (e.g. the flat at 29A Mill Lane) or with the assistance of third parties. No steps have been taken to enforce the sanction of imprisonment in default.

The application under section 22 of the Act

8. In mid-2020 an application under section 22 of the Act was brought at a time when accrued interest remained outstanding. It was supported by evidence from a financial investigator, Mr Larner. His evidence, in a statement made on 16 June 2020, identified four assets that the Prosecution considered to be available for reconsideration pursuant to section 22 of the Act:

    i) The equity in 15 New Road, now valued at £332,901 (originally £127,539.88);

    ii) The defendant's interest in a piece of land, now valued at £12,125 (originally £7,500);

    iii) A Nissan van, now valued at £2,500 (originally £4,798);

    iv) A pension, not previously discovered by the prosecution, with a net value of £1,863.

    Of the four, overwhelmingly the largest in terms of money and significance is the House, not least because it provides the Appellant and his family with their home.

The hearing below

9. At the hearing on 21 October 2021, the defence accepted that the Appellant had the identified assets and accepted Mr Larner's valuations. The defence objected to an order being made on two grounds:

   i) First, it was submitted that the Court has no power to vary the order, given the wording of sections 22(3) and (4) and section 9 of POCA and the fact that the value of the assets that are the subject of the proposed variation (£349,389) is lower than the amount that was the subject of the original confiscation order (£610,564.94).

   ii) Second, it was submitted that it would be unjust to vary the Original Compensation Order.

10. The Judge rejected these submissions in a ruling that was clear and concise. Dealing with the first submission, he held that section 22(3) of the Act required the Court to re-assess the available amount to take account of any assets that had since been discovered or acquired or had increased in value since the Original Confiscation Order. That process of re-assessment was what was meant by the "new calculation".

11. Turning to the second submission, he noted that the Appellant had chosen not to attend the proceedings and that no objection had been taken to the Court proceeding in his absence. In addition, he had submitted no evidence to support the second submission despite ample opportunity to do so. The Judge accepted that the Appellant was living at the House with his wife and two sons, and that the younger son attended a local school. Although he held that there was no evidence to support a defence submission that he would be forced to sell the House if the Original Confiscation Order was varied, he accepted that it was at least a possibility given that the Prosecution had not identified any other assets that might be used to discharge an increased liability. Noting defence submissions (a) that he should be slow to deprive the Appellant of his last remaining asset, and (b) relying on Protocol 1 of Article 1 of the European Convention on Human Rights ["A1P1"] and Article 8 of the Convention in support of a submission that the proposed order would infringe the Appellant's right to a family life, he agreed that he had to consider "very carefully" whether it was unjust for the Appellant and his family to be put in a position in which they may be deprived of their family home; and he said that he had done so.

12. The core of his reasoning is set out at [32]-[40] of his ruling as follows:

> "32. I take note of the fact that the prosecution could have sought a variation under section 22 to take account of the remaining equity in the home at any time from early 2015. It is stated by Mr Larner … that the potential amount of equity in the property had not been known until recent valuations were obtained. Those valuations suggest it is now worth between £425,000 and £475,000. In the original proceedings in 2013, it was valued at £235,000. The increase is undoubtedly substantial but there is no evidence to suggest that the rate of increase is significantly

different from the general increase in property values, of which any financial investigator will be aware. I do not therefore accept that the prosecution have been taken by surprise by the increase in value. It seems far more likely that the matter was simply not considered until later.

33. Of course that is not, in itself, a reason why the application should not be granted. There is no time limit in which an application under section 22 can be made, unlike the six year limit for applications to begin proceedings from scratch under section 19 or to increase the benefit figure, under section 21.

34. Various cases have been cited before me on this issue, including *R v. Mundy* [2018] EWCA 105 (Crim) in which the Court of Appeal considered section 22(4) in respect of the word 'just' and found as follows:

> 26. (Third), the passage of time may be relevant to the exercise of the discretion to reconsider the available amount but there is no express time limit as there is for example in the reconsideration of a benefit (see section 21(1)(d), six years from the date of the order). In *R v Padda* ([2013] EWCA Crim 2330) the order under section 22(4) was made six years later and in the case of *In Re Peacock (Secretary of State for the Home Department)* [2012] UKSC 5 it was ten years later.
>
> 29. (Fourth), an assessment of an amount which is "just", extends beyond what is just to a defendant. In *Leon John* [2014] 2 Cr App R(S) 73, it was held that an award of general damages for personal injuries, made after the initial hearing, was an amount available for the purposes of section 22. Equally, the fact that the available amounts may have been acquired by hard work in a legitimate enterprise does not preclude an order, although that fact is a matter to be taken into account. The word "just" means just in all the circumstances, bearing in mind that the purpose of such orders is the advancement of the public interest in confiscating the proceeds of crime.
>
> 30. (Fifth), in *Leon John* at 24, the court said this:
>
> > "We do wish to stress that it is important for judges when determining applications under section 22 of POCA to assess carefully in each case the competing considerations in order to decide what course is truly just. In cases such as the present, not involving a 'windfall' gain the consideration should be particularly anxious."

35. The increase in the value of the defendant's interest in 15 New Road, if not quite a windfall, cannot be said to be the result of hard work or legitimate enterprise on his part. The fact that he

> has it at all is the result of the increase in value of his other property assets after 2014 and the willingness of a third party to make payments to meet part of the original order.
>
> 36. I take account of the fact that residential property in the area was probably less expensive in 2015 than now, and if that is right then the defendant would need to obtain greater funds now to purchase a new home (if he is able to at all) than he would have needed in 2015. As against that, he and his family have had the benefit of remaining in 15 New Road for the past six years whereas, had the Crown made a successful application under s22 in 2015, they might at that point have been forced to reside in less comfortable accommodation.
>
> 37. There is no evidence before me as to whether the defendant was led to believe that his equity in the house could not be the subject of an application such as the present one. Also, although it has been said on the defendant's behalf by his counsel that he would be forced to sell the home if the variation were granted, there is no evidence before me that that is so nor of what would actually happen to him and his family in those circumstances. At one extreme, it may be that friends or family members could accommodate them in comfort or even assist with a new purchase. At the other, they may be rendered effectively homeless and dependent on their local authority for housing.
>
> 38. I bear in my mind that this is an application only under s22 of the Act and there has at no stage been any application to vary the assessment of the defendant's benefit from his criminal conduct.
>
> 39. In the absence of any evidence from the defence as to the actual hardship that would be caused, I am satisfied that the general principle that it is in the public interest for the defendant to be deprived in full of his benefit from criminal conduct significantly outweighs all of the considerations I have set out. I am therefore satisfied that it would be just for the confiscation order to be varied to take account of his interest in 15 New Road.
>
> 40. I am also satisfied that his interest in the other real property and the value of his other assets should be encompassed by the variation."

13. In the result, he held that the confiscation order was to be varied by the amount of the increase indicated by the valuation of the four assets to which we have referred, namely £311,891.26, so that the order as revised required him to pay £924,456.20. This figure still leaves a shortfall when compared with the Appellant's benefit of £978,011.99. As is usual, the revised order recorded that the Appellant's assets were those described in the "Schedule of available or realisable assets" totalling £924,456.20. We have not seen that schedule, but it

is plain that the result of the new calculation carried out by the judge was to assess the Appellant's available assets as being £924,456.20.

The Grounds of Appeal

14. The Appellant advances three grounds of appeal, as follows:

    i) Ground 1: the Judge erred in law in considering the application made by the Prosecutor pursuant to section 22 of POCA in that the "new calculation" did not exceed the "relevant amount" as set out in section 22(4).

    ii) Ground 2: the Judge did not properly consider whether it would be unjust to vary the order and was therefore wrong to exercise the court's discretion in making the order. The Judge failed to adequately consider the effect of granting such an order would have on the defendant and his family, thus not considering A1P1 of the European Convention on Human Rights or Article 8 of the Convention.

    iii) Ground 3: in particular, the Judge failed to afford sufficient weight to the fact that in contrast to the more usual section 22 applications, this case invited the judge to recalculate assets already considered in full at the original confiscation hearing. In this case, as opposed to others where the application of section 22 may be more readily understood to be just, there was no element of previously concealed or newly obtained assets.

The legal framework

15. The many challenges to the operation of the POCA regime have given ample opportunity for statements of principle of the highest authority, of which the most important for present purposes are those that deal with the purpose of the Act and the proper approach to the interpretation of its provisions. It is, however, convenient to set out or summarise again some of the key provisions of the Act.

The most relevant statutory provisions

16. Section 6(1) makes it mandatory for the Court to proceed with the POCA process if the pre-conditions set out in section 6(2) and (3) are satisfied. If it does so, it must decide whether the defendant has benefited from his criminal conduct: see section 6(4). If he has, then section 6(5) requires the Court to decide "the recoverable amount" and to make an order requiring the Defendant to pay that amount.

17. Section 7(1) and (2) provide:

> (1) The recoverable amount for the purposes of section 6 is an amount equal to the defendant's benefit from the conduct concerned.
>
> (2) But if the defendant shows that the available amount is less than that benefit the recoverable amount is—

(a) the available amount, or

(b) a nominal amount, if the available amount is nil.

18. Section 8 makes provision governing the calculation of the Defendant's benefit. Section 9(1) defines the available amount as follows:

> (1) For the purposes of deciding the recoverable amount, the available amount is the aggregate of—
>
> (a) the total of the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority, and
>
> (b) the total of the values (at that time) of all tainted gifts.
>
> …

19. Section 10 specifies assumptions that are to be made in case of a finding that the defendant has a criminal lifestyle. The assumptions are not directly relevant to the present issue.

20. Section 11 provides that, unless the Court orders otherwise, the full amount ordered to be paid under a confiscation order must be paid on the day on which the order is made. If any amount is not paid on the due date, section 12(1) provides for the payment of interest on outstanding amounts. The amount of that interest must be treated as part of the amount to be paid under the confiscation order: see section 12(4).

21. Sections 19 to 26 of the Act are grouped under the heading "Reconsideration". Section 19 allows the prosecutor to apply within six years in a case where the Court had not previously proceeded under section 6 and where evidence becomes available to the prosecutor that was not available at the date of conviction or when a decision not to proceed under section 6 was taken. Similarly, section 20 allows the prosecutor to apply within 6 years of the date of conviction if the court has earlier decided that the defendant did not benefit from his criminal conduct and there is evidence which was not available to the prosecutor when the Court made that original decision.

22. Sections 21 and 22 are central to this appeal and state as follows:

> **21 Order made: reconsideration of benefit**
>
> **(**1) This section applies if—
>
> (a) a court has made a confiscation order,
>
> (b) there is evidence which was not available to the prosecutor at the relevant time,

(c) the prosecutor believes that if the court were to find the amount of the defendant's benefit in pursuance of this section it would exceed the relevant amount,

(d) before the end of the period of six years starting with the date of conviction the prosecutor applies to the Crown Court to consider the evidence, and

(e) after considering the evidence the court believes it is appropriate for it to proceed under this section.

(2) The court must make a new calculation of the defendant's benefit from the conduct concerned, and when it does so subsections (3) to (6) below apply.

…

(7) If the amount found under the new calculation of the defendant's benefit exceeds the relevant amount the court—

(a) must make a new calculation of the recoverable amount for the purposes of section 6, and

(b) if it exceeds the amount required to be paid under the confiscation order, may vary the order by substituting for the amount required to be paid such amount as it believes is just.

(8) In applying subsection (7)(a) the court must—

(a) take the new calculation of the defendant's benefit;

(b) apply section 9 as if references to the time the confiscation order is made were to the time of the new calculation of the recoverable amount and as if references to the date of the confiscation order were to the date of that new calculation.

…

(11) In deciding under this section whether one amount exceeds another the court must take account of any change in the value of money.

(12) The relevant time is—

(a) when the court calculated the defendant's benefit for the purposes of the confiscation order, if this section has not applied previously;

(b) when the court last calculated the defendant's benefit in pursuance of this section, if this section has applied previously.

(13) The relevant amount is—

(a) the amount found as the defendant's benefit for the purposes of the confiscation order, if this section has not applied previously;

(b) the amount last found as the defendant's benefit in pursuance of this section, if this section has applied previously.

…

22 Order made: reconsideration of available amount

(1) This section applies if—

(a) a court has made a confiscation order,

(b) the amount required to be paid was the amount found under section 7(2), and

(c) an applicant falling within subsection (2) applies to the Crown Court to make a new calculation of the available amount.

(2) These applicants fall within this subsection—

(a) the prosecutor;

…

(c) a receiver appointed under section 50.

(3) In a case where this section applies the court must make the new calculation, and in doing so it must apply section 9 as if references to the time the confiscation order is made were to the time of the new calculation and as if references to the date of the confiscation order were to the date of the new calculation.

(4) If the amount found under the new calculation exceeds the relevant amount the court may vary the order by substituting for the amount required to be paid such amount as—

(a) it believes is just, but

(b) does not exceed the amount found as the defendant's benefit from the conduct concerned.

…

> (7) In deciding under this section whether one amount exceeds another the court must take account of any change in the value of money.
>
> (8) The relevant amount is—
>
> > (a) the amount found as the available amount for the purposes of the confiscation order, if this section has not applied previously;
> >
> > (b) the amount last found as the available amount in pursuance of this section, if this section has applied previously.
>
> (9) The amount found as the defendant's benefit from the conduct concerned is—
>
> > (a) the amount so found when the confiscation order was made, or
> >
> > (b) if one or more new calculations of the defendant's benefit have been made under section 21 the amount found on the occasion of the last such calculation.

23. Sections 23 and 24 make provision for adjusting or discharging the original confiscation order in the event that the available amount proves to be inadequate for the payment of any amount remaining to be paid under it, as follows:

> **23 Inadequacy of available amount: variation of order**
>
> (1) This section applies if—
>
> > (a) a court has made a confiscation order, and
> >
> > (b) the defendant or the prosecutor, or a receiver appointed under section 50, applies to the Crown Court to vary the order under this section.
>
> (2) In such a case the court must calculate the available amount, and in doing so it must apply section 9 as if references to the time the confiscation order is made were to the time of the calculation and as if references to the date of the confiscation order were to the date of the calculation.
>
> (3) If the court finds that the available amount (as so calculated) is inadequate for the payment of any amount remaining to be paid under the confiscation order it may vary the order by substituting for the amount required to be paid such smaller amount as the court believes is just.
>
> …

(5) The court may disregard any inadequacy which it believes is attributable (wholly or partly) to anything done by the defendant for the purpose of preserving property held by the recipient of a tainted gift from any risk of realisation under this Part.

…

24 Inadequacy of available amount: discharge of order

(1) This section applies if—

(a) a court has made a confiscation order,

(b) the designated officer for a magistrates' court applies to the Crown Court for the discharge of the order, and

(c) the amount remaining to be paid under the order is less than £1,000.

(2) In such a case the court must calculate the available amount, and in doing so it must apply section 9 as if references to the time the confiscation order is made were to the time of the calculation and as if references to the date of the confiscation order were to the date of the calculation.

(3) If the court—

(a) finds that the available amount (as so calculated) is inadequate to meet the amount remaining to be paid, and

(b) is satisfied that the inadequacy is due wholly to a specified reason or a combination of specified reasons,

it may discharge the confiscation order.

(4) The specified reasons are—

(a) in a case where any of the realisable property consists of money in a currency other than sterling, that fluctuations in currency exchange rates have occurred;

(b) any reason specified by the Secretary of State by order.

…

24. Section 25 provides for orders to be discharged where there is £50 or less outstanding.

25. It is sufficient at this point to note that sections 21 to 24 are evidently a suite of provisions dealing with cases (a) where a "new calculation" of the defendant's benefit exceeds the benefit as originally calculated, which may lead to an increase in the original confiscation order: section 21; (b) where (without

adjusting the benefit figure) a "new calculation" of the defendant's available assets exceeds the available amount as originally calculated, which may lead to an increase in the original confiscation order: section 22; and (c) where a calculation of the available amount shows it to be inadequate for the payment of any amount remaining to be paid under the original confiscation order, which may lead to the original confiscation order being varied or discharged: sections 23 and 24. Sections 21 and 22 refer to a "new calculation"; sections 23 and 24 do not.

The legislative purpose of the Act

26. The purpose of the Act is readily apparent from section 6(1) and (5) and 7(1) and (2). If a person has benefited from his criminal conduct, the default position is that he should be required to repay the full value of that benefit. Only if he can satisfy the Court (the burden being on him) that his available amount (calculated as defined in section 9) is less than the full value of his benefit from his criminal conduct will the Court make an order for a sum less than his full benefit.

27. Even if the point were free from authority, it would be obvious that the purpose of the Act is to recoup from a defendant the entirety of the benefit they have obtained from their criminal conduct; but the Court will not make an order which, on the evidence before it, is incapable of fulfilment because the defendant satisfies the Court that the available amount is less than the benefit. The obvious temptation for a defendant either to conceal or undervalue their assets means that the evidence available when the Court makes its original confiscation order may not paint the true picture of the defendant's assets; and, even if it does, that picture may change in a number of ways. For that reason it is necessary for provision to be made for reconsideration of the Court's original order with a view to either increasing or decreasing the liability imposed on the defendant by the original confiscation order. Sections 21 to 25 are the relevant sections by which the Act addresses that necessity.

28. The point, however, is not free from authority: far from it. In *R v Waya* [2012] UKSC 51, [2013] 1 AC 294 Lord Walker (in passages agreed by all other members of the Court) said:

> "2. POCA is concerned with the confiscation of the proceeds of crime. Its legislative purpose, like that of earlier enactments in this field, is to ensure that criminals (and especially professional criminals engaged in serious organised crime) do not profit from their crimes, and it sends a strong deterrent message to that effect."

and

> "21. … The purpose of the legislation is plainly, and has repeatedly been held to be, to impose upon convicted defendants a severe regime for removing from them their proceeds of crime. … Its essence, and its frequently declared purpose, is to remove from criminals the pecuniary proceeds of their crime. Just one

> example of such declarations is afforded by the Explanatory Notes to the statute (paragraph 4): "The purpose of confiscation proceedings is to recover the financial benefit that the offender has obtained from his criminal conduct.""

and

> "27. Similarly, it can be accepted that the scheme of the Act, and of previous confiscation legislation, is to focus on the value of the defendant's obtained proceeds of crime, whether retained or not. It is an important part of the scheme that even if the proceeds have been spent, a confiscation order up to the value of the proceeds will follow against legitimately acquired assets to the extent that they are available for realisation."

29. To the same effect, the Supreme Court in *R v Ahmad* [2014] UKSC 36, [2015] AC 299 at [38] said:

> "The overall aim of the statute is to recover assets acquired through criminal activity, both because it is wrong for criminals to retain the proceeds of crime and in order to show that crime does not pay."

30. It is plain from the existence of the provisions for reconsideration, that the purposive interest in recouping the defendant's benefit from criminal conduct continues after the making of an original confiscation order. If authority for this proposition were to be required, it is to be found in the judgment of Rose LJ (in relation to the similar wording and approach of section 16 of the Drug Trafficking Act 1994) in *R v Tivnan* [1991] 1 Cr. App. R. (S.) 92, 97.

31. We do not regard this statutory purpose as being a "broad generalisation" of the type referred to by Lord Hope in his dissenting opinion in *R v Peacock* [2012] UKSC 5, [2012] 1 WLR 550 at [61]. To the contrary, we consider that the statutory purpose identified in the passages cited above is clearly to be seen once the Court focuses, as it must, very closely on the language of the statutory provisions in question: see *R v May* [2008] AC 1028 at [48(4)] per Lord Bingham.

32. This statutory purpose must inform all aspects of the Court's consideration (and reconsideration) of orders made or to be made pursuant to the Act. It must also inform the Court's approach to interpretation of the provisions of POCA which, as has been said before, are not always perfectly clear or comprehensive. We reiterate, however, that there is no substitute for a detailed focusing on the terms of the statute in order to see what it means. We shall consider how it should inform the Court's approach to what is "just" under section 22(4) of the Act when considering Ground 2 later in this judgment.

Interpreting POCA

33. The general approach to the interpretation of statutes is well known and does not have to be investigated or restated in detail here. One recent formulation is

sufficient. In *R (on the application of O (A Child)) v SSHD* [2022] UKSC 3, [2022] 2 WLR 353 at [29]-[32] Lord Hodge DPSC (with whom the other members of the Court agreed) said:

> "29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierverke Waldhof-Aschaffenburg AG* [1975] AC 591,613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context." (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397: "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."
>
> 30. External aids to interpretation therefore must play a secondary role… . But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity ….
>
> 31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme* [2001] 2 AC 349, 396, in an important passage stated:
>
> "The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House … Thus, when courts say that such-and-such a meaning

> 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.""

34. The need to avoid absurdity was highlighted in the context of interpreting POCA by the Supreme Court in *R v McCool* [2018] UKSC 23, [2018] 1 WLR 2431 at [23]-[25] per Lord Kerr and at [106] per Lord Hughes, with whom Lady Black agreed. As Lord Millet said in *R (Edison First Power Ltd) v Central Calculation Officer* [2003] 4 All ER 209 at [116]-[117]:

> "116. The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless.
>
> 117. But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it …"

35. *Waya* directly concerned the issue whether a confiscation order made pursuant to the provisions of POCA was or could amount to a violation of a defendant's right to peaceful enjoyment of his property as guaranteed by A1P1. The answer rested on the need for the order not to be disproportionate to the purpose underlying POCA. The approach to be adopted by the Court was summarised by Lord Walker at [8]:

> "Although the statute has often been described as "draconian" that cannot be a warrant for abandoning the traditional rule that a penal statute should be construed with some strictness. But subject to this and to HRA, the task of the Crown Court judge is to give effect to Parliament's intention as expressed in the language of the statute. The statutory language must be given a fair and purposive construction in order to give effect to its legislative policy."

36. To similar effect, the Supreme Court in *Ahmad* said at [38]

> "When faced with an issue of interpretation of the 2002 Act, the court must, of course, arrive at a conclusion based both on the words of the statute and on legal principles, but it is also very important to bear in mind the overall aim of the statute, the need for practicality, and Convention rights. The overall aim of the statute is to recover assets acquired through criminal activity, both because it is wrong for criminals to retain the proceeds of crime and in order to show that crime does not pay. Practicality involves ensuring that, so far as is consistent with the wording of the statute and other legal principles, the recovery process, both in terms of any hearing and in terms of physically locating and confiscating the assets in question, is as simple, as

> predictable, and as effective, as possible. Defendants are entitled to their Convention rights, in particular to a fair trial under article 6 and are only to be deprived of assets in accordance with A1P1."

Interpretation of section 22

37. Section 22 should not be read in isolation but in the context provided by the rest of the statute. Its immediate context is provided by sections 21, 23 and 24.

38. It is to be noted that the phrase "new calculation" appears in section 21(2) and obviously means a calculation of the defendant's benefit taking into account the evidence referred to in section 21(1). In other words, the statutory purpose is to ensure that the defendant's benefit is correctly calculated in the light of all available and admissible evidence. Where that "new calculation" results in an assessment of the defendant's benefit that exceeds the amount found as the defendant's benefit at the time and for the purposes of the original confiscation order, section 21(7)(a) requires the court to make a "new calculation" of the recoverable amount for the purposes of section 6; and section 21(7)(b) gives the court power, if the result of the "new calculation" of the recoverable amount exceeds the amount required to be paid under the original confiscation order, to vary the original order by substituting for the amount to be paid under the original order such amount as it believes to be just. In other words, if the "new calculation" of the defendant's benefit exceeds that found for the purposes of and adopted as the benefit figure in the original order, there shall be a "new calculation" of the recoverable amount which may lead to an adjustment of the original order. In practice, of course, the recoverable amount under the original order will have depended upon the calculation of the available amount, assuming that there is a shortfall: see section 7(2). The same will be true where "new calculations" are carried out pursuant to section 21.

39. The provisions of section 21 for adjustment of the defendant's benefit and the available amount refer naturally to carrying out a reassessment of the original findings of benefit and available amount, updating them in the light of all currently available evidence. There is no pre-ordained limitation on what can be taken into account when re-assessing the defendant's benefit. That being so, there could be no rhyme or reason in limiting the re-assessment of the defendant's available assets to those which he still has in his possession at the time of the re-assessment.

40. Turning to the wider statutory context, what we consider to be the natural meaning of the terms of section 21 – including what is meant by a "new calculation" of the defendant's available assets – is self-evidently in accordance with the purpose of removing from convicted defendants the proceeds of their crime. Limiting the assets that are brought into the "new calculation" under section 21 to those currently held by the defendant would have the perverse effect that, if and to the extent that assets scheduled under the original confiscation order have been used to pay off part of the order, the re-assessment of the defendant's available assets for the purposes of discharging the order and enabling the state to recover the proceeds of his crime will be reduced pound for pound. Assume, for example, a case where the defendant's benefit as originally assessed is £1.5 million and, at the time of the original confiscation

order, his available assets are thought to be £700,000 so that a confiscation order in that amount is made. Those assets are liquidated and used to pay off the original confiscation order, leaving £800,000 of the defendant's benefit outstanding and un-recouped. Assume also that, on an application under section 21, (a) the Defendant's benefit is re-assessed at £2 million and (b) it emerges that he had hidden a further £500,000 of assets which are now identified and are the proceeds of crime. If the "new calculation" of the recoverable amount is limited to his currently held assets, it will lead to a finding of the recoverable amount in the sum of £500,000, which does not exceed the amount required to be paid under the original confiscation order (namely, £700,000). On this approach, the defendant would keep his newly identified assets despite them being the proceeds of crime. Such a result, which we would characterise as (a) contrary to the clear purpose of the statute and (b) absurd, is avoided if the "new calculation" involves a re-assessment of all of the defendant's relevant assets on the basis of the currently available evidence, including both those currently held and those previously identified but now no longer held, for whatever reason.

41. Section 22 tackles the question of revision of an original order where the applicant considers that the amount found as the available amount for the purposes of the original confiscation order (the "relevant amount" for the purposes of section 22) is inadequate. There is no statutory limitation upon the reasons why the available amount for purposes of the original confiscation order may be inadequate, save that section 22(7) requires the court to take account of any change in the value of money in deciding whether one amount exceeds another. Subject to section 22(7) it is common ground between the parties, and we would hold, that the reasons could include both the identification of additional available assets that had not previously been brought into account or an increase in the assessed value of an asset that had been included in the original calculation of the available amount.

42. In this way, provision is made by sections 21 and 22 for potentially increasing the sum ordered to be confiscated where the defendant's benefit or available assets warrant it; and provision is made by sections 23 and 24 to provide relief where the available assets prove to be inadequate to enable the defendant to discharge the original order.

43. It is to be noted that what the applicant applies for pursuant to section 22(1)(c) is that the court should "make a new calculation of the available amount." It therefore does no violence to the terms of Section 22(3) to read it as saying (by implication) and meaning that "in a case where [section 22] applies the court must make the new calculation [*of the available amount*] and in doing so it must apply section 9 as if references to the time of the [*original*] confiscation order is made were to the time of the new calculation [*of the available amount*] and as if references to the date of the [*original*] confiscation order were to the date of the new calculation [*of the available amount*]."

44. What section 22 does not deal with expressly or by necessary implication is how the Court should treat the fact that, where an application under section 22 is made, the defendant may have paid all or part of the original confiscation order and (as in this case) may have disposed of some of the assets that were included

in the original calculation of the available amount. In our judgment, it makes no sense at all of section 22, any more than it would of section 21 where it applies, simply to ignore either the fact of the original confiscation order or that this has happened; yet that is the effect of the approach for which the Appellant contends. The better view is that, under section 21, the question is whether the original order should be adjusted upwards because of the new calculation of the defendant's benefit and the new calculation of the available amount taking into account the original order and all currently available evidence. And, under section 22, though the defendant's benefit is not adjusted, the question is whether the original order should be adjusted upwards because of a revaluation and recalculation of the defendant's available amount. This suggests that, although only some new assets have been identified as available or subject to revaluation, what matters is the amount that is or has been available to the defendant as a whole.

45. In our judgment the immediate context for section 22 is potent: the meaning of "new calculation" in section 21 is clear on the natural meaning of the words. There is no reason to give the same words a different meaning where they appear in section 22.

46. Looking at the wider statutory context for section 22 brings into play the statutory purpose which we have identified at [26]-[32] above. In our judgment, that statutory purpose militates strongly against the interpretation for which the Appellant contends. Adopting the Appellant's technical tripwire of a supposedly literal interpretation would provide a powerful additional incentive to concealment or undervaluing of assets at the time of the original confiscation order; and it would have the perverse effect of preventing a real or realistic appraisal of what assets the defendant has had available, when viewed overall, to enable him to repay the benefit he obtained from his criminal conduct.

47. Furthermore, as was pointed out in argument, the Appellant's interpretation would have absurd consequences. The first (characterised as being "a penny more, a penny less") is that if his limited "new calculation" based on currently held assets were to have resulted in a sum that was one penny more than the £610,564.94 found to be available on making the Original Confiscation Order, the entire sum would be liable to be substituted for the original sum, whereas if it were one penny less, no variation would be possible; and this result would follow even if the assets brought into account in the "new calculation" had all previously been hidden by the Appellant and were the direct proceeds of crime. Mr Waddington QC, who appeared for the Appellant before us, was not able to suggest any rationale to support such an outcome. Nor, reverting to the example we gave at [40] above, did he explain what adjustment the court should make if the previously hidden assets had a value, not of £500,000 but £700,001. Should the adjustment increase the recoverable amount to £700,001 or to £1,400,001? If the former, it may reasonably be asked what is the point of section 22? No answer is immediately apparent.

48. In our judgment, the Appellant's appeal to literalism fails. A reasonable and purposive interpretation of "new calculation" as it appears both in section 21 and section 22 does not confine that calculation to a reconsideration of assets held at the time of the "new calculation". Rather, it involves looking at all of

the assets held by the defendant that are or have been available in the context of the original confiscation order and in the light of all the evidence available at the time of the "new calculation". As such it must take into account what has happened to the assets that formed the basis for the original confiscation order, even if they are no longer held.

Resolution – Ground 1

49. It follows from the reasoning we have just set out that Ground 1 fails for reasons that are essentially the same as those identified more succinctly by the Judge below. In our judgment, and subject to Grounds 2 and 3 below, he was correct to conclude that the result of the "new calculation" was not merely the increment of £311,891.26 attributable to the four properties currently held but £922,456.20 achieved by adding the increment to the recoverable amount under the Original Confiscation Order of £610,564.94.

Resolution – Grounds 2 and 3

50. It is common ground, and we would hold, that section 22(4) requires the court to exercise a broad discretion, with an express statutory requirement that any increase in the order should be limited to an amount that the court believes to be just.

51. It is also common ground, and we would hold, that both delay in making the application under section 22 and consequential hardship are at least potentially material factors for the court to take into account when exercising its discretion.

52. Additional features that may potentially be relevant were identified by Lord Wilson in *Peacock* at [47], as follows:

> "… factors such as the defendant's abandonment of a life of crime, the legitimate nature of his acquisition of the assets, the passage of time since the confiscation order was made and matters of exceptional hardship may be relevant to the exercise of the discretion."

To similar effect, Irwin J giving the judgment of the Court in *Padda* identified competing arguments bearing upon the exercise of the Judge's discretion on the facts of that case at [25]:

> "Firstly, it is undoubtedly the policy of the legislation to maximise the recovery of assets from those responsible for serious crime. Secondly, as emphasised by the defendant, there could be said to be a public interest in the rehabilitation of offenders and a need to encourage those guilty of serious offences to act in a legitimate way, once they have served whatever sentence has been imposed on them and, as a corollary of such encouragement, not to cause or permit a perverse incentive either to revert to crime or to seek to conceal assets even where they come from a legitimate source."

Neither of these citations is intended to provide an exhaustive catechism of relevant features.

53. Both in his written submissions and orally, Mr Waddington relied upon the delay in bringing the application. While accepting that no representation was made to the Appellant that a section 22 application would not be made, he submitted that the Appellant was open with the prosecution in his attempts to pay off the sum required by the Original Confiscation Order and that he was not told that an application would be made. So, it is submitted, the Appellant had some justification for believing that the prosecution would not make an application under section 22 and so place in jeopardy his continued possession and occupation of the House as his family home. His primary argument was, and had to be, that the Judge's order would impose unacceptable hardship on the Appellant because of its implications for the continued ownership and occupation of the House, which he described as the Appellant's last remaining asset. He asserted that the Judge failed to give proper weight to the prospect (which in oral submissions he described as "plain as a pikestaff") that the House would have to be sold or to the fact that this was not a windfall case. He relied upon evidence that was before the Court below to the effect that the Appellant has no income (as the Judge noted at [26] of his ruling) and asserted that "the prejudice caused by the delay in this case was that the [Appellant] acted to his detriment by remaining in the family home rather than selling it and rehousing his family when he was better placed to do so."

54. We are unable to accept these submissions. In short, they amount to no more than submissions about weight, since it is apparent from paragraphs 32-40 of the Judge's reasons, which we have set out at [12] above, that he considered each of the points now made and weighed them in the balance.

55. Dealing first with delay, the Judge's approach in paragraphs 32 and 33 of his ruling cannot be faulted. The position might have been different if the delay (either on its own or in combination with other factors) could be interpreted as a representation that no application would be made and the Appellant had acted on that representation to his detriment; but that was not this case as it has always been accepted that nothing done by the prosecution amounted to such a representation. For reasons that we shall consider in a moment, the Appellant has not identified any prejudice as flowing from the delay and we are not able to identify any. That being so, the continuing purpose and intent of POCA to relieve convicted defendants of the benefit that they have obtained from their crime remains highly influential, as the Judge correctly recognised: see [39] of the ruling.

56. The Judge also considered the effect of delay properly in paragraph 34 of his ruling. He correctly identified by citation from *Mundy* the relevant principles to be applied. Although he did not cite paragraph [25] of *Padda* expressly, it is plain from his reference to the relevance of available amounts being acquired by hard work and not being a windfall that he turned his mind to the broad question of how the defendant had acted during the period of delay.

57. The Judge's treatment of the increase in value of the House during the period as "not quite a windfall" but also not "the result of hard work or legitimate

enterprise on [the Appellant's] part" was realistic and, if anything, generous since the obtaining of the House was the subject of two counts on the indictment (Counts 11 and 12) of which the Appellant stood convicted. Though Mr Waddington submits that it was "plain as a pikestaff" that the House would have to be sold, the Judge's approach to that question was measured and justifiable. Directions had been given for the service of evidence and the Appellant had served none. Although it is now suggested that the evidence of absence of income made it inevitable that the House would have to be sold, the Judge was entitled, in the absence of evidence, to take the view that the position was more balanced, not least in the light of the evidence that the Appellant had received substantial assistance from third parties in the past.

58. In addition, we do not accept that the delay in bringing the application caused any material prejudice to the Appellant. Specifically, we do not accept the submission that the Appellant would have been better placed to rehouse his family had he been forced to sell the House earlier. The complaint is that he will now be left without any assets or income with which to fund rehousing his family. But that would have been the case had he been required to sell the House earlier, since it would then have been his last remaining asset and he was then without income. The fact that property prices have increased in the interim makes no difference. He would have had no assets or income at any point and so could not be in a better position to rehouse his family than he will be now. He finds (and would have found) himself in that position because of his criminality, the benefits he obtained from his crime, and the need to dispose of his assets in order that the benefits might be recouped pursuant to the provisions of POCA. The Judge was correct to bring into the balance the countervailing benefit for the Appellant of having been able to live with his family in the House for six years when earlier disposal may have made it necessary for them to live in less comfortable accommodation during that period. In any event, Mr Waddington is unable to submit that the Judge failed to take the increased cost of purchasing property into account as he did so expressly at [36] of his ruling.

59. While we accept that only the relatively modest value attributable to the pension was a "new" asset, we do not accept that the Judge's exercise of his discretion was vitiated by that fact. Once the application and exercise of the Judge's discretion are seen in their proper statutory context, what matters most is the availability of assets that enable the Appellant's criminal benefit to be recouped.

60. Standing back, we are unable to detect any error in the Judge's approach to the question whether increasing the amount of the Original Confiscation Order was just. His careful and closely reasoned ruling demonstrates that he took all material factors into account and reached a conclusion that he was fully entitled to reach. It cannot be said that his conclusion was disproportionate to the proper purpose of the Act. There is therefore no basis upon which this Court could properly interfere with the Judge's exercise of his broad discretion. We would, however, go further and say that, in our judgment, his conclusion was both right and just given the statutory context in which he was obliged to exercise his discretion, for the reasons he gave.

Conclusion

61. For these reasons, we grant the application for permission to appeal but dismiss the appeal.

62. In doing so, we recognise that our decision may be said to leave some questions about the proper approach to a "new calculation" unanswered. First among those questions is what account should be taken of assets that are no longer retained but which were disposed of for significantly more than the value included in the schedule to the original confiscation order (as with the flat at 29A Mill Lane) or significantly less. We are not required to answer those questions and do not attempt to do so, leaving them to be answered in a case where they are necessarily raised and fully argued. For that reason, we say nothing more about them.