Neutral Citation Number: [2022] EWHC 1278 (Admin)

Case No: DT/30/2006

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/05/2022

Before :

MR JUSTICE FOXTON

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IN THE MATTER OF SIMON PRICE	**Applicant**
- and -	
CROWN PROSECUTION SERVICE	**Respondent**

- -
- -

Dr Simon Price (in person**)**
Michael Newbold (instructed by and for the **Crown Prosecution Service**)

Hearing dates: 12 May 2022
Further submissions: 19 May 2022
Draft Judgment to parties: 20 May 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Thursday 26 May 2022 at 10:00am.

Mr Justice Foxton :

Introduction

1. This is the hearing of an application by Dr Simon Price to discharge:

    i) A Confiscation Order made on 20 March 2007; and

    ii) A Restraint Order made on 25 May 2006.

2. As will be apparent from those dates, the applications have a long and complex background, and issues relating to these orders have been before the courts on a number of previous occasions. Dr Price candidly informed the court that the application had been brought for the purpose of exhausting any potential domestic remedies, so that he could bring a challenge under the European Convention on Human Rights to the European Court of Human Rights. That reflected, at least so far as the Administrative Court is concerned, a realistic assessment of the effect of prior decisions of the court or statutory provisions whose status and effect is not open to argument before me.

3. For those reasons, I mean no discourtesy to either party in not setting out the detailed history of this matter at length. It is well-known to both of them and has been comprehensively set out in one of the many judgments which I have been referred to, the decision of Mr Justice Garnham in *Price v Crown Prosecution Service* [2016] EWHC 455 (Admin), [9]-[17]. In short:

    i) Dr Price was convicted on 11 July 2005 of being knowingly concerned in the importation of cocaine and sentenced to 28 years' imprisonment. The Restraint Order and the Confiscation Order followed in 2006 and 2007 (the Confiscation Order being for some £2.3m). Appeals against these orders failed, save to the extent of a 3-year reduction in sentence.

    ii) Applications to vary the Restraint Order were dismissed on 21 October 2010, 11 May 2011 and 18 May 2013, as were attempts to appeal those orders.

    iii) On 15 May 2015, Dr Price was committed to a term of 10 years imprisonment in default of payment of the Confiscation Order, to run from the date he became eligible for release from the 25-year sentence at the end of December 2016.

    iv) On 7 March 2016, Mr Justice Garnham rejected an application by Dr Price for a Certificate of Inadequacy (which would have certified that his realisable property was less than the amount of the Confiscation Order). Had such a Certificate of Inadequacy been granted, Dr Price could then have applied to the Crown Court to vary the terms of the Confiscation Order.

    v) On 6 November 2019, Mrs Justice Steyn dismissed a further application for a Certificate of Inadequacy.

    vi) Dr Price was released from imprisonment in November 2021 after serving a 5-year period of imprisonment in default of satisfying the Confiscation Order.

The challenge to the Confiscation Order

4. Dr Price's challenge to the Confiscation Order is advanced on two grounds:

   i) First, that it was imposed under the wrong statute, the Drug Trafficking Act 1994 ("DTA 1994") instead of the Proceeds of Crime Act 2002 ("POCA 2002").

   ii) Second, that it was imposed without affording to those interested in property which was subject to the Confiscation Order the opportunity to be heard and represented on the making of the application. In this connection, Dr Price relies on the decision of the Court of Justice of the European Union in *Reference for a Preliminary Ruling under Article 267 TFEU from the Apelativen sad – Varna* in Joined Cases C-845/19 and C-836/19. Dr Price's particular complaint appeared to be the effect of the Confiscation Order on the interests of Ms Susan Bond, Ms Laura Bond and/or Mr Christopher Bond in the French Property (see [21] below), albeit I accept that the complaint may go wider than this.

5. There has, however, already been an appeal against the Confiscation Order which was refused on 14 December 2009 (*R v Simon Price* [2009] EWCA Crim 2918). It is the Court of Appeal Criminal Division ("CACD") to which any such challenge would have to be referred, and it is not open to Dr Price simply to issue an application in the Administrative Court. The application would need to be brought:

   i) by way of a reference to the CACD by the Criminal Cases Review Commission ("CCRC") under s.9 of the Criminal Appeal Act 1995. I accept Mr Newbold's submission that a confiscation order could, in an appropriate case, be referred by the CCRC to the CACD under this provision, having regard to s.50(1)(d) of the Criminal Appeal Act 1968 which defines an appeal against "sentence" as including an appeal against "a confiscation order under the Drug Trafficking Act 1994 other than one made by the High Court". Section 30(2) of the 1995 Act provides that "in section 9 sentence has the same meaning as in the 1968 Act";

   ii) or, possibly, to the CACD itself under Crim. PR 36.15 (although that procedure can only properly be invoked in very narrow circumstances, as discussed in *R v Yasain* [2016] QB 146 and *R v Gohil and Preko* [2018] 1 WLR 3697).

6. In these circumstances, as I think Dr Price realistically accepted, the points argued before me are not ones which are open at first instance. However, in the hope of narrowing and focussing any further argument, I make some brief observations on them.

The wrong statute?

7. As I have mentioned, Dr Price argues that the Confiscation Order should not have been made under the DTA 1994 but under POCA 2002. I note that it was common ground when the Confiscation Order was made that it should be made under the DTA 1994. A restraint order had originally been made under POCA 2002, but it was replaced by the Restraint Order under the DTA 1994. In this context, Dr Price's counsel, Mr Nathan QC, described POCA 2002 at the hearing of 20 March 2007 as "the wrong legislation".

8. Dr Price was convicted of two offences. The first was the offence of being "knowingly concerned in a fraudulent attempt at evasion of a prohibition on the importation of goods, contrary to section 170(2)(b) of the Customs and Excise Management Act 1979". The indictment was in respect of conduct between 1 April 2004 and 30 June 2004. The second offence, assisting in the United Kingdom in the commission outside the United Kingdom of an offence punishable under a corresponding law, contrary to section 20 of the Misuse of Drugs Act 1971, was in respect of conduct between 1 January 2003 and 30 June 2004.

9. Part 2 of POCA 2002 (containing the provisions for criminal confiscation) came into force with effect from 24 March 2003 by virtue of Article 2 of the Proceeds of Crime Act 2002 (Commencement No.5, Transitional Provisions, Savings and Amendments) Order 2003 (SI 2003/333) ("the 2003 Order"). Article 3(1) of the 2003 Order provides that:

> "Section 6 of the Act (making of confiscation order) shall not have effect where the offence, or any of the offences, mentioned in section 6(2) was committed before 24th March 2003."

10. In cases where POCA 2002 does not apply, Article 10(1)(e) of the 2003 Order preserved the provisions of the DTA 1994.

11. Article 1(3) of the 2003 Order provides:

> "Where an offence is found to have been committed over a period of two or more days, or at some time during a period of two or more days, it shall be taken for the purposes of this Order to have been committed on the earliest of those days."

12. As the second count of which Dr Price was convicted was indicted over a period of time commencing before 24 March 2003, it appears to be the position that, by virtue of Article 1(3), the offence was taken to have been committed on the earliest date indicted (1 January 2003) with the result that POCA 2002 did not apply, and the DTA 1994 continued to apply. Dr Price will need to consider these provisions if he wishes to take this point further.

The Varna point

13. *Varna* was concerned with Bulgarian legislation which "confiscated in favour of the state …. property which had been the subject matter or instrument of a criminal offence": Article 53 of the Nakazatelen kodeks (the Bulgarian Criminal Code). The case arose from the conviction of two drug dealers, DR and TS. A sum of money was found at an address where DR lived with his mother and grandmother. A further sum of money was found at the address where TS lived with his mother. Confiscation orders were sought in respect of both sums before the Regional Court in Varna. It was DR's evidence at that hearing that the money belonged to his grandmother, who did not take part in the proceedings because this was not permitted as a matter of Bulgarian law. It was TS's evidence that the sum of money found where he lived belonged to his mother and sister. TS's mother was not permitted to participate in the proceedings, although she did give evidence.

14. The Regional Court did not make confiscation orders on the basis that the offences of which DR and TS had been convicted did not fall within the scope of the confiscation legislation. On appeal, the Varna Court of Appeal referred certain questions to the Court of Justice of the European Union for a preliminary ruling, including whether the confiscation legislation was compatible with Article 47 of the Charter of Fundamental Rights of the European Union ("the Charter") – "the fourth question". At [72], the Court of Justice defined the fourth question as follows:

> "By its fourth question, the referring court asks, in essence, whether Article 47 of the Charter must be interpreted as precluding national legislation which allows for the confiscation, in favour of the State, of property which is claimed to belong to a person other than the perpetrator of the criminal offence at issue, without that person having the right to appear as a party in the confiscation proceedings."

15. The context in which the issue came before the Court of Justice was that the relevant provisions of the Bulgarian Criminal Code were passed to implement EU Directive 2014/42 establishing minimum rules on the freezing of property with a view to possible subsequent confiscation and on the confiscation of property in criminal matters. It was because the Bulgarian Criminal Code was implementing EU law that the issue as to the effect of Article 47 of the Charter arose.

16. The Court of Justice found that the first and second paragraphs of Article 47 of the Charter (requiring that everyone whose rights and freedoms guaranteed by the law of the European Union are violated have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article and, in particular, is entitled to a fair hearing) had not been complied with. It is apparent from [76] of the Court of Justice's judgment that the individuals whose Article 47 rights had not been given effect to were the third parties. This was because they were not required to be informed of nor permitted to appear at the confiscation hearing, albeit that third parties "who claim that their right to property has been infringed in the course of such proceedings [have] an opportunity to bring their claim before a civil court", including for the recovery of ownership ([83]).

17. If, before an appropriate judicial body, Dr Price is able to show that Article 47 of the Charter is engaged in respect of the Confiscation Order, a number of issues are likely to arise. These may well include the following:

    i) Whether any Article 47 complaint, if justiciable, is a complaint which Dr Price has standing to assert, or a complaint only open to those individuals Dr Price contends stand in similar position to the grandmother, mother and sister in *Varna*.

    ii) The effect of the confiscation order in *Varna* appears to have been to vest title in the money in the state, albeit with the possibility of the third parties recovering the property by civil proceedings. By contrast, the effect of the Confiscation Order is to order Dr Price to pay the specified sum of money, which amount is to be calculated by reference to the value of the realisable property held by the defendant together with the value of all gifts caught by the DTA 1994. As Lord Hobhouse observed in *In re Norris* [2001] WLR 1388, [12] about a predecessor statute, the Drug Trafficking Offences Act 1986, "'confiscation orders' is a

misnomer. The orders are financial orders ordering a defendant convicted of a drug trafficking offence to pay sums of money to the state".

iii) Further, it has been noted of the confiscation provisions of POCA 2002, which in this respect are in very similar terms to those of the DTA 1994, that "the overarching principle of POCA is that neither a confiscation order under Part 2, nor a civil recovery order under Part 5, nor the money laundering provisions in Part 7 interfere with existing third-party property rights" (*Aquila Advisory Ltd v Faichney v CPS* [2021] UKSC 49, [33])). A similar observation was made by Lord Hobhouse in *In re Norris* [12]-[17] in respect of the confiscation regime under the Drug Trafficking Offences Act 1986.

iv) There are orders which can be made under the DTA 1994 which are capable in principle and in certain circumstances of having an impact on third parties – including restraint orders, charging orders and the power to appoint a receiver for the purpose of realising the value of the offender's realisable property and applying the proceeds in discharge of the confiscation order. In realising the value of the offender's interest in property in which third parties also have an interest, the "legislative steer" provided by s.31(4) of the DTA 1994 is that "the powers shall be exercised with a view to making available for satisfying the confiscation order or, as the case may be, any confiscation order that may be made in the defendant's case, the value for the time being of realisable property held by any person, by means of the realisation of such property." Section 29(8) provided "The court shall not in respect of any property exercise the powers conferred by subsection (3)(a), (5) or (6) above unless a reasonable opportunity has been given for persons holding any interest in the property to make representations to the court."

v) In whatever judicial context any argument in reliance on *Varna* is pursued, it will be necessary to consider which particular order is said to be the equivalent of the orders under Article 53 of the Bulgarian Criminal Code in that case which had the effect of transferring the confiscated amounts to the state, why it is said that any such orders "substantially affect" the rights of other persons, and why it is said that the protections required by Articles 81(1), (7) and (9) of Directive 2014/42 (if applicable) were not available.

Should the court grant a certificate of inadequacy?

18. Dr Price has also argued that the Confiscation Order serves no purpose because it is "obvious even to a fool that [I] did not have £2.3m" and that "it must be obvious to anyone with a modicum of intelligence that the confiscation order and interest charges will never be paid". In so far as this involves an assertion that the Confiscation Order should not have been made and/or not made in the same terms as those in which it was made, it faces the same difficulties before me as those I have referred to above.

19. It would be possible to treat this argument as an application for a Certificate of Inadequacy under s.17 of the DTA 1994. That application is one which can be made to the High Court, and if granted, as I have indicated, would provide Dr Price with a basis to go back to the Crown Court and to ask it to vary the Confiscation Order (s.17(4)). There are, however, insuperable difficulties to this application:

i) First, it is clear that the basis on which the complaint is put is that the order should not have been made in the first place. However, an application for a certificate of inadequacy cannot be used as a mechanism for relitigating matters determined against the applicant at the confiscation hearing (*Glaves v CPS* [2011] EWCA Civ 69, [18], [54] and *Price v CPS* [2016] EWHC 455 (Admin), [27]-[37]).

ii) Second, as I have mentioned, there have already been two applications by Dr Price for a Certificate of Inadequacy, which were determined in 2016 and 2019. It would require a material change of circumstances before a further such application could be made (*Lloyds Investment (Scandinavia) Ltd v Ager Hanssen* [2003] EWHC 1740 (Ch), [71]). Dr Price had not suggested or established that this has occurred.

The challenge to the Restraint Order

The background

20. It is necessary to say a little more about the background to the dispute relating to the Restraint Order. A restraint order serves a similar function to a freezing order, preventing someone against whom a confiscation order has been or is to be sought from disposing of or dealing with their realisable property. Realisable property includes property in which the defendant has an interest, and property received by others by way of gift from the defendant (ss.6(2) and 62(5)(a) of the DTA 1994). There are cases in which persons other than the defendant will be made subject to a restraint order:

    i) where it is sufficiently arguable that they have been the recipients of gifts from the defendant;

    ii) where it is sufficiently arguable that they hold property on behalf of or as nominee for the defendant (the issue addressed in the freezing order context by the *Chabra* jurisdiction); and

    iii) where it is arguable that both the defendant and the other party hold an interest in the same property.

21. The CPS contends that Dr Price has an interest in real property at Les Cailletieres, Genac, France ("the French Property"), and the French Property is specifically identified in and made subject to the Restraint Order. There is a dispute between Dr Price and the CPS as to whether Dr Price has an interest in the French Property. By way of a rough summary, Dr Price says that the French Property was acquired with funds from his partner, Ms Susan Bond (who has since died). Ms Susan Bond had a son (Mr Christopher Bond), and Dr Price and Ms Susan Bond had a daughter (Ms Laura Bond). It is Dr Price's case that he was named on the title of the French Property to give effect to an arrangement whereby Ms Susan Bond would pass a half-share to Mr Bond, and Dr Price would pass his half-share to Ms Laura Bond. That is disputed by the CPS. As matters stand:

    i) It is common ground that, under French inheritance laws, the half of the French Property held by Ms Susan Bond passed to Mr Bond on Ms Susan Bond's death.

ii) The CPS contend that Dr Price holds the other half (such that the French Property falls within category [20(iii)] above), whereas Dr Price, Ms Laura Bond and Mr Bond deny this, saying that Dr Price has no interest in the French Property, such that it does not constitute "realisable property" on the part of Dr Price and should not be subject to the Restraint Order.

22. There have been various applications to remove the French Property from the scope of the Restraint Order or to challenge steps taken by the CPS to enforce the Confiscation Order against the French Property. These have been brought by Dr Price, Mr Bond and Ms Laura Bond. These have included:

i) Applications of May 2007 by Mr Bond and Ms Bond to remove the French Property from the scope of the Restraint Order, which applications were withdrawn in May 2008.

ii) An application by Dr Price to exclude the French Property from the scope of the Restraint Order, which was rejected by Mr Justice King on 21 October 2010.

iii) Further applications by Mr Bond and Ms Bond to exclude the French Property from the scope of the Restraint Order, which were dismissed by Mr Justice Mitting on 11 May 2011 ("the Mitting Order").

iv) A further application by Dr Price to exclude the French Property from the scope of the Restraint Order, which was dismissed by Mr Justice Ouseley on 18 July 2013 ("the Ouseley Order").

v) A further application by Dr Price to the same effect, and to discharge the Restraint Order, which was dismissed by Mrs Justice May on 13 July 2016 and certified as totally without merit.

vi) A challenge to the certificate granted by HHJ Zeidman QC on 31 March 2017 to allow the Confiscation Order to be enforced in France. This was dismissed by Mr Justice Freedman on 6 March 2020 and permission to appeal was refused.

23. Dr Price has served unsigned witness statements in the names of Mr and Ms Bond in which it is said that they want to be joined to this application, although no such applications have been issued or intimated by them directly. However, I have treated the issues raised in their statements as matters raised by Dr Price.

The issues raised

24. The following points have been raised as reasons why the Restraint Order should not continue, or at least should not continue in relation to the French Property:

i) That Mr Justice Mitting had made it clear that the Restraint Order could not extend to Mr Bond's 50% share.

ii) That the Restraint Order should not have been made against and should not be maintained against Mr and Ms Bond because they are outside the jurisdiction.

iii) That Dr Price has no realisable property, such that the Restraint Order serves no useful purpose, and is wholly disproportionate given the prejudicial effect the

Restraint Order is having, and the combined effect of these matters is to breach his Article 3 ECHR right.

Mr Justice Mitting's observation

25. The Mitting Order rejected the applications of Ms Bond and Mr Bond to remove the French Property from the scope of the Restraint Order.

26. After hearing extensive evidence, and for reasons set out in a very detailed judgment reported at [2011] EWHC 2330 (Admin), Mr Justice Mitting rejected the contention that Dr Price had no legal or beneficial interest in the French Property, holding that he had "full title" in half of the French Property. Following judgment, there was the following exchange between Mr Bodnar (counsel for Mr Bond and Ms Bond) and the judge in the context of costs:

> "Mitting J: The claim brought by Christopher has in fact always been academic, has it not? I am not sure why he has ever been an applicant?
>
> Mr Bodnar Because the restraint order still restrains him from dealing with any part of [the French Property].
>
> Mitting J Ah, well, there is no basis for that".

27. This is the passage now relied upon. The exchange continued between counsel for the CPS (Mr Stancombe) and the Judge:

> "Mr Stancombe The restraint order remains in place because, of course, Mr Christopher Bond, while he may have an interest in the property, there is a restraint order to prevent any dealings *with the property* pending the determination/satisfaction of the confiscation order, so that remains in place …
>
> Mitting J That is undoubtedly true, but on what basis can you prevent Christopher Bond from dealing with his share.
>
> Mr Stancombe Well, no, I accept that it cannot restrain him from *dealing with his share*, but the basis of the restraint order was that there was evidence filed to show that there was, it would seem, steps taken in France to sell the property, and that is why the restraint order was originally framed the way it was and that is the way it remained despite these applications".

28. It will be apparent that this debate reflected a distinction between Mr Christopher Bond's 50% share in the French Property, which he could not be restrained from dealing with, and the French Property (which could not be dealt with, although on its eventual sale there would be an accounting to whoever held the other 50% share by virtue of s.31(4) of the DTA 2014).

29. Once this distinction is appreciated, it will be apparent that the observations of Mr Justice Mitting provide no basis for the French Property to be excluded from the scope of the Restraint Order.

The fact that Mr and Ms Bond are outside the jurisdiction

30. Paragraph 23 of the Restraint Order provides:

> *"Effect of this order outside England and Wales and Scotland*. The terms of this order do not affect or concern anyone outside England and Wales and Scotland until it is declared enforceable or is enforced by a court of the relevant country"

(with certain exceptions). In effect, this is a *Babanaft* proviso.

31. It will be apparent from this provision that the Restraint Order only affects persons outside England and Wales when certain conditions are met. So far as France is concerned, where Mr and Ms Bond reside, one of those conditions has been met and the French authorities are in the course of enforcement action. In these circumstances, I am satisfied that the residence of Mr and Ms Bond provides no basis for setting the Restraint Order aside.

The Article 3 ECHR argument

32. The premise of this argument is that there is no property to which the Restraint Order can attach, such that it serves no useful purpose, while causing prejudice to Dr Price and others.

33. There are two immediate difficulties with that premise.

34. The first is that there has been detailed consideration, on two occasions, of whether Dr Price has an interest in the French Property (the hearings which culminated in the Mitting and Ouseley Orders) in which it was found that there was such an interest, or that it was sufficiently arguable that there was such an interest. Dr Price does not bring forward any new evidence or point to any material change in circumstances which would allow him a third bite at that particular cherry. The French Property alone, therefore, and the ongoing challenges in France to attempts to enforce the Confiscation Order against it, provides a sufficient basis for the Restraint Order, and has the effect that it addresses a legitimate interest on the part of the CPS in enforcing the Confiscation Order. To the extent that the assertion by the CPS of Dr Price's 50% interest has disincentivised Mr Bond from expending money in the maintenance of the French Property, that cannot be a ground for discharging the Restraint Order, both because that would give rise to a risk of dissipation in relation to the other 50%, and because it is the fact of the CPS's claim to the other 50%, rather than the Restraint Order, which is said to have disinhibited maintenance expenditure. Indeed, that was a point which Dr Price effectively made, when explaining why introducing an agreed exception to the Restraint Order to allow maintenance work on terms would not help.

35. It would be possible to stop there, because Dr Price only identified matters relating to the French Property when identifying the adverse and disproportionate effects which were said to flow from the continuation of the Restraint Order. However, Dr Price's assertion that there is no (or, perhaps no other) realisable property raises exactly the issues raised and determined in the two Certificate of Inadequacy applications, and in the previous application to set aside the Restraint Order in its entirety. For the reasons I have set out above, it is not open to Dr Price to make that same argument again in the absence of a material change of circumstances.

Conclusion

36. For these reasons, Dr Price's applications to discharge the Confiscation Order and the Restraint Order are dismissed. Against the background of the prior judgments and orders in this matter, those applications never had any prospect of success, and I am satisfied it is appropriate to certify them as being "totally without merit" under CPR 23.12.