



Neutral Citation Number: [2023] EWHC 3420 (Admin)

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

Case No. AC-2023-LDS-000071

The Courthouse  
1 Oxford Row  
Leeds  
LS1 3BG

Thursday, 16<sup>th</sup> November 2023

Before:

RICHARD WRIGHT KC  
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

B E T W E E N:

R (ON THE APPLICATION OF BUTLER)

Claimant

and

LEEDS MAGISTRATES' COURT

Defendant

And

THE CROWN PROSECUTION SERVICE

Interested Party

MR C BOTT KC appeared on behalf of the Claimant  
MR M NEWBOLD appeared on behalf of the Interested Party

APPROVED JUDGMENT

*This Transcript is Crown Copyright. It may not be reproduced in whole or in part, other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.*

*WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of*

*the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.*

RICHARD WRIGHT KC:

### **Introduction**

1. This is a claim for judicial review, brought with the permission of HHJ Jackson, which was granted on 18 September 2023. A subsequent application for bail was refused by HHJ Gosnell on 23 October 2023 on which date he ordered that this hearing should be expedited.
2. The claim concerns the decision of the Leeds Magistrates' Court taken on 22 November 2022 on which date the Court refused the application of the claimant to adjourn the Proceeds of Crime Act 2002 enforcement hearing listed before it and, having proceeded to hear the case, committed the claimant to custody for a period of 2,317 days.
3. The claimant seeks an order from this Court quashing the decision of the Leeds Magistrates' Court to commit the claimant to prison and ordering that his case should be remitted to the lower court for a hearing before a differently-constituted bench.

### **The Facts**

4. Following his conviction on 22 March 2018 for offending that engaged the confiscation provisions of the Proceedings of Crime Act 2002, the claimant was sentenced to a nine-year term of imprisonment. That sentence has been served. Confiscation proceedings were initiated and, in due course, the claimant was made the subject of a confiscation order by HHJ Jameson KC sitting in the Crown Court at Leeds on 26 April 2021.
5. The order (that was the subject of inconsequential administrative variation on 13 July 2021) was to the effect that the Court determined that the claimant had benefitted from criminal conduct in the sum of £5,915,191.77, and that the available amount in accordance with section 9 of the Proceeds of Crime Act was £1,112,670.24. The Court made a confiscation order in that sum. The Court ordered payment within three months of the order and determined the sentence in default of payment to be one of seven years' imprisonment.
6. The order made by the Crown Court in those terms was agreed between the parties. The figure representing the available amount had been advanced by the claimant's then solicitors

in correspondence on 22 March 2021. After making the order the Crown Court subsequently extended the period of time for payment until 21 October 2021.

7. The order was not fully satisfied though there was some modest partial payment. As to the balance the claimant asserted that his assets were inadequate to satisfy the order that had been made. Correspondence between the parties on this topic began in July 2021. Subsequently, a draft application to vary the order on grounds of inadequacy pursuant to section 23 of the Proceeds of Crime Act 2002 was provided to the interested party by the claimant. On 10 August 2022, the interested party confirmed that it was minded to oppose any such application.
8. No application was, in fact, formally lodged with the Crown Court at any time. The first hearing of enforcement proceedings was listed before the defendant Magistrates' Court on 9 February 2022 but was vacated administratively as were subsequent hearings that had been listed on 25 May 2022 and 24 August 2022. The Court listed an enforcement hearing for 22 November 2022.
9. On 15 November, an application was made by the claimant to vacate the hearing of the 22<sup>nd</sup>. That application was refused by the Court on the papers. The enforcement hearing proceeded as listed on 22 November 2022. The claimant was present and both he and the interested party were represented. The hearing began with the claimant making a further application to adjourn so that he could pursue an application pursuant to section 23 of the Act before the Crown Court. By that stage, it appears that the Crown Court had agreed, at least, to list the case before HHJ Jameson KC in December 2022.
10. For the purposes of clarity I interpose in the approved transcript that it is agreed between the Claimant and the Interested Party that the particular assets specified in the confiscation order as being available to the Claimant are not in fact available to him and were not available at the time the order was made. The Claimant's position is that he consented to the order made in error and that accordingly it should never have been made as it was. The position of the Interested Party is that confiscation orders are made 'in personam', that is to say they are made against the offender and not against particular property. At the time the order was made the Claimant was accepting that he had assets to at least that value and accordingly the order stands.
11. The application for an adjournment of the enforcement proceedings was refused by the Magistrates. It was common ground in the argument before me that an application under Section 23 of the Proceeds of Crime Act was misconceived and that the only route available to the claimant was to seek to appeal the making of the order to the Court of Appeal Criminal Division.
12. Having refused the adjournment request the Magistrates' Court then heard submissions from both parties and determined that the claimant had culpably neglected to pay the confiscation order made by the Crown Court. It committed him to prison to serve 2,317 days in default.

That was the period that remained after payments that had been made in part satisfaction of the order were taken into account.

13. The Magistrates' Court results sheet records the following reasons for the decision of the Court:

“Sentence of 2,317 days activated. Satisfied that there has been culpable neglect. The Crown Court was satisfied that he had benefited from crime to that amount and the def agreed the assets at that time and cannot go behind this. We have taken account of all submissions and the fact the def says that the assets are not available. We cannot go behind the findings of the Crown Court”.
14. It is agreed that the hearing before the magistrates was a relatively short one and that no evidence was called before the magistrates by either party. The Court had the benefit of submissions made by Mr Hammond who was then acting on behalf of the claimant, and Mr Newbold who was acting on behalf of the Crown, then, as now.
15. Although subsequent events cannot bear upon the exercise of judgment by the defendant Magistrates' Court in refusing the application for an adjournment or committing the claimant to prison, it should be noted that after the committal of the claimant into custody, his case was indeed listed before HHJ Jameson KC sitting in the Crown Court at Leeds in connection with the proposed application under section 23 of the Act.
16. The judge rightly declined to make any orders or directions given that no application under section 23 had, in fact, been formally lodged, and, as is now accepted, any application under that provision was fundamentally misconceived. In August 2023, the claimant lodged an application with the Court of Appeal Criminal Division for an extension of time and leave to appeal against the terms of the confiscation order. Those applications are, as yet, undetermined.

### **The claim**

17. The claim was originally brought on a dual basis:
  - (1) that the Magistrates' Court erred in refusing to grant an adjournment to the enforcement proceedings; and
  - (2) that they acted unlawfully in committing the claimant to custody without proper application of section 82(4) of the Magistrates' Courts Act 1980.

HHJ Jackson granted permission on the second ground only and, in any event, Mr Bott KC properly concedes that the magistrates were entitled to refuse the adjournment request. It was not unreasonable for them to do so. His argument, advanced in writing and orally

before me, is that having done so, they fell into error by ordering the claimant to serve the default term as they did.

## **The Statutory Framework**

### **(i) The making of a confiscation order**

18. On making a confiscation order under the Proceeds of Crime Act 2002, the Court is required to follow a stepped approach. First, it must determine whether an offender has “a criminal lifestyle” as defined by section 75 of the Act.
19. Second, it must determine whether or not the offender has benefitted from criminal conduct (either general or particular) in accordance with section 76.
20. Third, the judge must determine the value of the offender’s proceeds (or benefit) of crime. That is his “recoverable amount” as defined by section 7 of the Act.
21. Fourth, the judge must make a confiscation order in that sum unless the offender can prove that his existing assets are less than his benefit from crime so that this lesser available amount becomes the recoverable amount for the purposes of any confiscation order.
22. Fifth, the judge must consider the proportionality of the order that would be contemplated at stage four.
23. In this case, the terms of the confiscation order, in particular, the sum of the available amount, were agreed between the parties. Although the confiscation order was, therefore, to all intents and purposes, made by consent, it remains an order of the Crown Court made in accordance with the Proceeds of Crime Act and following the stepped approach required by the Act that I have set out.
24. Once made, and assuming that the 56-day period within which a case can be returned to the Crown Court under the slip rule has expired, the circumstances in which a defendant can seek to vary a confiscation order are limited. Section 23 of the Proceeds of Crime Act provides a mechanism for an offender to seek a variation of the order where there is a deficiency in the amount available to satisfy it. That provision, as Mr Bott KC concedes on behalf of the claimant, could not assist him in this case given the long line of authority to the effect that such an application cannot be made in order for an offender to seek to correct deficiencies in the case he presented at the time the order was made; see, in particular, *Gokal v The Serious Fraud Office* [2001] EWCA Civ 368, *McKinsley v Crown Prosecution*

*Service* [2006] EWCA Civ 1092. As Elias LJ observed in *R v Najafpour* [2009] EWCA Crim 2723:

“The intention of this provision is clear: it is to ensure that a defendant does not serve the period in default where it turns out he is, in fact, unable to raise the money which the Court anticipated he would be able to do when it imposed the confiscation order”.

25. The alternative mechanism open to an offender seeking to argue that the order made by the Crown Court is deficient is to appeal against the order as an appeal to the Court of Appeal Criminal Division. Indeed, that is the route that the Court of Appeal identified in the hidden asset case of *R v Younis* [2008] EWCA Crim 2950; a decision recently reaffirmed by *R v Blackledge* [2020] EWCA Crim 1108.

## **(ii) Enforcement**

26. Whereas by section 6 of the Proceeds of Crime Act 2002, the power to make a confiscation order is vested in the Crown Court, the Act provides that the enforcement of confiscation orders made by the Crown Court is a function to be exercised by the Magistrates’ Court. Section 35(2) of the Proceeds of Crime Act 2002 provides that:

“Sections 129(1) to (3) and (5) and section 132(1) to (4) of the Sentencing Act 2002...apply as if the amount ordered to be paid were a fine imposed on the defendant by the Court making the confiscation order”

27. Those sections of the Sentencing Act, in turn, provide that a fine is to be enforced in accordance with the provisions of the Magistrates’ Courts Act 1980. Section 76(2) of the Magistrates’ Courts Act empowers the Court to issue a warrant of commitment to custody subject to section 82(4) of the Magistrates’ Courts Act 1980 which is in these terms:

“(4) Where a Magistrates’ Court is required by subsection 3 above to inquire into a person’s means, the Court may not on the occasion of the inquiry or at any time thereafter, issue a warrant of commitment for a default in paying any such sum unless:

(a) in the case of an offence punishable with imprisonment, the offender appears to the Court to have sufficient means to pay the sum forthwith; or

(b) the Court:

(i) is satisfied that the default is due to the offender’s wilful refusal or culpable neglect; and

(ii) has considered or tried all other methods of enforcing payment of the sum and it appears to the Court that they are inappropriate or unsuccessful”.

28. Subsection 4A goes on to set out the methods of enforcing payment that are mentioned in subsection 4(b)(ii) above. They include a warrant of control under section 76, an application to the High or County Court for enforcement and a number of other enforcement measures.

## **The submissions**

29. Mr Bott KC, on behalf of the claimant, submits that the Magistrates' Court gave "no meaningful attention" (his phrase), to the requirements of section 82(4) of the Magistrates' Courts Act. There was no lawful basis for ordering the claimant's commitment to prison at what was a short hearing without any close examination of the reasons why the order had not been satisfied. Had there been such an examination, it would have been seen that the claimant had not agreed the order so that he could gain a tactical advantage for himself.
30. An error had been made in consenting to the order for good reason, and, accordingly, he could not be described as being "in culpable neglect". Mr Bott KC submits that the hearing conducted by the magistrates was perfunctory and failed to meet any minimum procedural requirements. It was, in effect a rubber-stamping exercise and not one in which the Court paid any or any proper attention to the requirements of section 82(4) of the Act before deciding to commit the claimant to custody for a further draconian period of imprisonment.
31. Mr Newbold, on behalf of the interested party, submits that the Magistrates' Court was bound by the conclusion of the Crown Court, that the claimant had £1,112,670.24 available to him as of 26 April 2021. The Magistrates' Court had to consider the application of section 82(4) on that basis. He submits that the claimant presented no evidence and advanced no argument to show that he had not wilfully refused or culpably neglected to pay the order other than what Mr Newbold, describes as the "impermissible argument" that the claimant did not have that sum available to him when the order was made.
32. There being no permissible reason for non-payment, the inevitable conclusion, submits Mr Newbold, was that the non-payment was wilful and culpable. He adds that no alternative means of payment were identified and that, therefore, committal was the only option. This was not a case where, for example, property was about to be sold that would satisfy the order and a little more time was required.
33. He submits that the claimant's opportunity to argue that he did not have the sum available to him had been in the Crown Court when the order was made or in the Court of Appeal when seeking to challenge the making of the order. He accepts the hearing was a relatively brief one but he submits that the Court applied the test correctly to the facts that were before it.
34. He argues that any hearing in these circumstances would be bound to be short because the Court had to follow the order made at the Crown Court and this was not a case in which the claimant could have given evidence of the efforts he had made to satisfy the order; rather, he could only have said, as he did through his advocate in any event, that the original order was wrong and should never have been made.

## Reasons

35. The Proceeds of Crime Act entrusts the making of confiscation orders to the Crown Court and the enforcement of orders that are made, to the Magistrates' Court. That is a clear division provided for by statute. As is clear from the statutory provisions, once the Crown Court has made a lawful confiscation order, then the order must be satisfied within the time limit permitted by the Crown Court and, if it is not, enforcement proceedings will be commenced in the Magistrates' Court. Those enforcement proceedings can only proceed on the basis that the order of the Crown Court was lawfully made. It follows that the Magistrates' Court must proceed on the basis that at the time the order was made by the Crown Court, the claimant had available to him assets equal, at least, to the sum specified in the confiscation order.
36. It is both the principle of finality and the operation of the statutory regime that requires the Magistrates' Court to proceed on that basis. The Magistrates have no power to amend an order and the Proceeds of Crime Act reserves that right to the Crown Court through section 23 of the Act. Similarly, if it is arguable that an order was made erroneously, the Court of Appeal Criminal Division has the exclusive jurisdiction to determine any such appeal. As Stuart-Smith LJ held in *R v Harrow Justices, ex parte DPP* [1991] 1 WLR 395:  
"The mere fact of a confiscation order is evidence that at the date it was made, there were realisable assets available to meet the requirements of the order".
37. The justices were not only entitled to proceed on this basis, in my judgment, they were required to do so. As Schiemann LJ found in *R v Hastings and Rother Justices, ex parte Anscombe* [1998] 162 JP 340:  
"They (the justices) proceeded on the basis that the Crown Court judge had established that at the time of the hearing in front of him, Mr Anscombe had sufficient assets to satisfy the order and that they were bound by his finding until it was changed by some other Court. They were right to adopt this approach".
38. In this case, therefore, the Magistrates had to proceed on the basis that the confiscation order had been lawfully made by the Crown Court; it had not been varied pursuant to section 23 or any other provision; indeed, there was no extant application for variation and it is conceded now that none could have been made, and no appeal against the making of the order had been lodged at the time of the hearing before them. The picture presented to the Magistrates, therefore, was that the claimant had been found to have assets available to at least the value of the order at the point of it being made, but he now claimed that he did not have assets to that value because he asserted the order should never have been made as it was.
39. Against that factual and legal backcloth, did the magistrates fail to have proper regard to the provisions of section 82(4) of the Magistrates' Courts Act 1980? Is the submission of the claimant that the hearing was inadequate and the resulting committal, therefore, unlawful, well-founded? In my judgment, it is not.



40. Once the Crown Court had made the order that it did, the Magistrates' Court became responsible for its enforcement. They were required to proceed on the basis that the order was correct and that the claimant had those assets available to him at the time the order was made. It was not, in my judgment, a requirement of the proper exercise of the discretion of the Court under section 82(4) that it had to embark on a lengthy hearing to ascertain whether, in fact, those assets remained available to the claimant. As Schiemann LJ held in *Anscombe*:

“ It was submitted on behalf of Mr Anscombe that it was for the Customs and Excise to satisfy the magistrates that there were assets what and where they were. I reject that submission. Given the findings of the Crown Court, it was for the applicant to point to the assets and put forward proposals for transferring them from his control to the magistrates. He has singularly failed to do so. The justices did exactly what the Crown Court would have expected them to do, namely activate the penalty which the Crown Court had thought appropriate.”

41. It was not, in my view, for the Crown to be put to the proof of establishing that the claimant had, at least, the available amount to satisfy the order because that had already been established in the Crown Court. This was not a case like *R (on the Application of Sanghera) v Birmingham Magistrates' Court* [2017] EWHC 3323 (Admin) or *R v Barnett* [2011] EWCA Crim 2936 where the claimant was saying that he had the assets but had done his best to realise them and, so, had not wilfully refused to satisfy the order and was not culpably neglectful.
42. In such a case, it may be that the Court is required to hear and consider evidence of what may, in the event, turn out to be an involved hearing. However, in this case, the claimant was simply asserting that he had never had the assets available to satisfy the order and that the order was wrong; it should never have been made. The Court, in my judgment, could not properly engage with that submission having no power to go behind the order of the Crown Court, its function, by statute being to enforce that order.
43. I do not accept that the Magistrates' Court fell into error or acted with any procedural impropriety by fulfilling their enforcement role as they did by acting upon the order that was before them. It seems to me that the end point of the claimant's submissions is that even after applications pursuant to section 23 of the Act and applications to the Court of Appeal Criminal Division have been made and failed, it nonetheless remains open to an offender to contest enforcement proceedings on the basis that the Crown Court and the Court of Appeal are wrong and the order should never have been made. If in any case the Magistrates' Court accepted those submissions, the effect would be that the confiscation order would remain unsatisfied but with a default term that would be rendered entirely unenforceable. That is, in my view, as inconsistent with the underlying purpose of the Proceeds of Crime Act regime as it is with the authorities to which I have already referred.

44. I accept that there is clear authority that the Magistrates' Court must consider other methods of enforcing payment before proceeding to committal. Subsection 4A is to that effect and lists the methods that ought to be considered (see also, in that regard, *R v Harrow Justices, ex parte DPP*] 1991 83 Cr App R 388 QBC). However, I do not think that line of authority assists the claimant in this case. None of those methods were applicable in this case. The claimant was asserting, in terms, that he could not satisfy and, more than that, could never have satisfied the order that the Crown Court had made. In terms of enforcement, therefore, the magistrates were facing a stark choice of granting a further adjournment and taking no enforcement action on the off chance that the Crown Court might vary the order, or enforcing the order of the Crown Court in accordance with the legislation. In my judgment, they were right to exercise their discretion as they did.

### **Conclusion**

45. For the reasons I have given, I conclude that the defendant did not err in law in committing the claimant to prison on 22 November 2022. The Court's decision was neither irrational nor procedurally deficient or improper. It was, to the contrary, the logical conclusion for the Court to have reached by correctly applying the law to the facts.
46. It follows that this claim is dismissed.

### **End of Judgment.**

Transcript of a recording by Ubiquis (Acolad UK Ltd)  
291-299 Borough High Street, London SE1 1JG  
Tel: 020 7269 0370  
legal@ubiquis.com

Ubiquis (Acolad UK Ltd) hereby certify that the above is an accurate and complete record of the proceedings or part thereof

This transcript has been approved by the judge.