Neutral Citation Number: [2024] EWCA Civ 715

Case No: CA-2023-000500

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE DOVE
[2023] EWHC 88 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/06/2024

Before :

THE LADY CHIEF JUSTICE OF ENGLAND AND WALES
(Baroness Carr of Walton-on-the-Hill)
LORD JUSTICE BEAN
and
LADY JUSTICE ANDREWS

- -

Between :

THE KING (on the application of WORLD UYGHUR CONGRESS)	**Claimant and Appellant**
- and –	
NATIONAL CRIME AGENCY	**Third Defendant and Respondent**
-and-	
SPOTLIGHT ON CORRUPTION	**Intervenor**

- -

Jonathan Fisher KC, Tom Forster KC, Anita Clifford, Russell Hopkins and **Admas Habteslasie** (instructed by **Bindmans LLP**) for the **Appellant**
Sir James Eadie KC, David Perry KC and Katherine Hardcastle (instructed by the **Government Legal Department**) for the **Respondent**
Kennedy Talbot KC (instructed by **Kingsley Napley LLP**) for the **Intervenor**

Hearing dates: 15 and 16 May 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 27 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

The Lady Chief Justice, Lord Justice Bean and Lady Justice Andrews:

Introduction

1. This appeal raises a single, narrow issue, namely, whether the Respondent, the National Crime Agency ("NCA") misdirected itself in law in one or more material respects when reaching the decision (i) not to investigate alleged offences under Part 7 of the Proceeds of Crime Act 2002 ("POCA") and (ii) not to commence a civil recovery investigation under Part 5 of POCA, in respect of certain cotton products brought into the UK and monies derived from or connected to their purchase.

2. This was just one of the issues which Dove J ("the Judge") considered in the underlying claim for judicial review brought by the Appellant, the World Uyghur Congress, against three law enforcement agencies, including the NCA, challenging their decisions not to carry out investigations into whether consignments of cotton goods originating from the Xinjiang Uyghur Autonomous Region of China ("XUAR") being imported into the UK were the product of forced labour or other human rights abuses perpetrated by the People's Republic of China.

3. No other challenge is, or could be, made to the Judge's conscientious judgment or the conclusions to which he came. In consequence of this, the other two original defendants, the Secretary of State for the Home Department (acting through Border Force) and Commissioners for His Majesty's Revenue and Customs ("HMRC"), have ceased their involvement, and the claim against the NCA is the only one that continues to be pursued.

4. The Appellant contends that it is clear on the face of the decision letter that the NCA was labouring under two fundamental misapprehensions, namely:

   i) That it is necessary to identify a specific product as criminal property before commencing an investigation into whether a money-laundering offence has been committed;

   ii) That the presence within a supply chain of a person who can rely on the exemption under section 329(2)(c) of POCA has the effect of "cleansing" criminal property so as to preclude its recovery from anyone who subsequently acquires it, or the recovery of the proceeds of its onward sale.

5. It is well-established that decisions of this nature are ones with which the courts will be slow to interfere, for the reasons explained by Lord Bingham in *R (Corner House Research) v Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756. After citing at [30] a long line of authorities for the proposition that "only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator", Lord Bingham stated at [31] that the reasons for this are well understood:

> "They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised (as it was

described in the cited passage from *Matalulu v Director of Public Prosecutions)* [1]

> 'the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.'

Thirdly, the powers are conferred in very broad and unprescriptive terms."

6. However, Lord Bingham went on to confirm at [32] that the powers of such a decision-maker are not unfettered, and that "[h]e must direct himself correctly in law."

7. It is important to appreciate that there is not, and never has been, any attempt to challenge the substance of the decision on *Wednesbury* principles. The Judge recognised this, recording at [26] that it was essentially common ground that, absent the errors of law contended for, there would be no proper basis for interfering with the Defendants' exercise of discretion. As he identified at [79], the starting point is the position expressed by the NCA in correspondence, and the question of whether that position incorporated any error of law or misdirection which would entitle the Appellant to the grant of relief. Indeed, that is not only the starting point of the inquiry, but the end point.

8. The Appellant's complaint, in essence, is that, having correctly identified the nature of its challenge, the Judge failed to address the substance of it, but instead dealt with it as though it were a rationality challenge. Having referred to the relevant passages in the decision letter of 10 September 2021 from the Government Legal Department which communicated the NCA's decision and the reasons for it to the Appellant ("the decision letter"), the Judge posed the correct question, namely: "does this approach amount to a misdirection of law?" However, the Appellant contends that he then failed to answer it, choosing instead to focus on what would be necessary to prove an offence under the relevant provisions of POCA, in the process misunderstanding (or else mischaracterising) the NCA's approach. To the extent that he did address it, the Appellant submits that the Judge reached the wrong answer, and that in particular he was wrong when he said at [80] that: " the Defendant is correct to point out that in relation to each of the offences the starting point must be the identification of criminal property applying the definition set out in section 340 of [POCA]."

9. The NCA contends that on a proper reading of the decision letter, it did not make the first mistake alleged, and that the second error (which it now accepts) was an immaterial one which did not affect the substance or validity of its reasoning. The Judge rightly understood that its position, as set out in the letter, was that, on an orthodox reading of the requirements of POCA, there was insufficient evidence from which to develop an investigation which had any realistic prospect of bearing fruit.

[1] [2003] 4 LRC 712, 735-736, a decision of the Supreme Court of Fiji cited in *Corner House* at [30].

10. If that was indeed the NCA's reasoning, the Appellant accepts that the NCA was entitled to take that view.

11. This appeal therefore turns on the correct interpretation of the relevant paragraphs of the decision letter. Sir James Eadie KC, on behalf of the NCA, very frankly accepted that, as a matter of law, it would be wrong to refuse to commence an investigation under POCA because criminal property could not be identified at that time. But he made the powerful forensic point that to reason that you need to know what the outcome of an investigation will be before you can decide to commence the investigation is so obviously absurd and illogical that it was highly improbable that this was the approach that was taken in this case. He said that it would be an "extraordinary error" for the NCA to have made to say that it needed a fact to be proved before it launched an investigation into whether that fact existed.

12. Despite the force of that submission, we are satisfied that on a natural reading of the letter, this was indeed the approach that was taken, and that it was a clear misdirection in law. For reasons that we will go on to explain, the decision-maker also made a fundamental error in treating the exemption from liability under section 329(2)(c) of POCA as if it had an impact on the status of property as criminal property or recoverable property, and as a result misunderstood the consequences of the hypothetical presence within a supply chain of an individual who can rely on that exemption. This mistake, when placed in its context, cannot be regarded as immaterial, as it seemingly played an important part in the decision-maker's line of reasoning.

The Parties

13. The Appellant is a non-governmental organisation that aims to promote the collective interests of the Uyghurs, an ethnically and culturally Turkic people living in the XUAR.

14. The NCA is responsible for the investigation of serious and organised crime in the UK. Its functions are set out in sections 1(4) to 1(6) of the Crime and Courts Act 2013. Among its responsibilities are the investigation of possible offences under POCA, with a view to bringing criminal prosecutions under Part 7 or proceedings for civil recovery under Part 5 of that Act.

15. The Intervenor, Spotlight on Corruption ("Spotlight"), is a UK registered charity whose objectives include the promotion of the sound administration of the law in the field of anti-corruption. It was permitted to intervene in the appeal by order of Dingemans LJ dated 26 May 2023.

Background

16. There were two major areas of common ground in the court below and before us:

    i) It was accepted that there is a diverse, substantial, and growing body of evidence that serious human rights abuses are occurring in the XUAR cotton industry on a large scale. The Judge referred to a "striking consensus" as to the clear and widespread exploitation and abuses in that industry involving forced labour, and that forced labour accounts for a significant proportion of all

cotton originating from China. The unchallenged evidence was that 85% of cotton grown in China comes from the XUAR.

ii) It was also not in dispute that products derived from forced labour occurring anywhere in the world can amount to "criminal property" for the purposes of a money-laundering offence in Part 7 of POCA, or "recoverable property" for the purposes of civil recovery in Part 5 of that Act. It was agreed that funds from the sale of such products, and any property into which such funds were put, could also be criminal property or recoverable property.

17. The background facts are set out in detail in the judgment below at [6] to [18] and it is unnecessary to repeat them for the purposes of this judgment. In summary, in the light of its ongoing concerns in relation to the importation of cotton products emanating from the XUAR, the Appellant provided a substantial body of evidence that it had gathered concerning the issues of forced labour and human rights abuses in the XUAR to the three law enforcement agencies who became the defendants to the claim for judicial review, with the aim of persuading them to take action.

18. As the Judge identified at [20] and [21], the correspondence (which began in April 2020 and continued for around 18 months) ultimately revealed two areas of complaint. The first was that the Defendants ought to have been actively investigating, and thereafter prohibiting the importation of goods originating from the XUAR, using the powers available under section 1 of the Foreign Prison-Made Goods Act 1897 ("the 1897 Act") and section 139 of the Customs and Excise Management Act 1979 ("CEMA"). The second was that the NCA ought to have started an investigation under POCA, on the basis that cotton goods originating from the XUAR (or their proceeds) could be criminal property and trading in them criminal conduct.

19. Whilst the earlier correspondence provides some context, we agree with the Judge that the key document is the decision letter, which came to be written in the following circumstances. In April 2021, HMRC advised the Appellant that the information provided to it by the Appellant had been passed on to the NCA, because the NCA was the authority with the responsibility for investigating potential breaches of the UK prohibition on the importation of goods made in foreign prisons. In a subsequent letter written by the Appellant to the NCA, it was suggested that one course of action open to it was to commence an investigation under Part 7 of POCA. That suggestion was not addressed specifically in the NCA's response, which merely confirmed that the NCA was not currently conducting an investigation into "any potential breaches of the law" in relation to cotton imported into the UK which had been sourced or processed in the XUAR, and had not previously conducted such an investigation. It did not provide any reasons.

20. The Appellant then sent a long and detailed Judicial Review pre-action Protocol letter before claim, dated 16 July 2021, in which it identified four decisions it proposed to challenge. "Decision 2" was defined as:

> "Ongoing failure by the Operational Authorities and/or the NCA to progress an investigation into potential contraventions of the Foreign Prison Made Goods Act 1897 and/or the Proceeds of Crime Act 2002."

It was noted that the NCA had not yet clarified whether any investigation of POCA offences relating to these matters would fall within its remit. In paragraph 49 of that letter the Appellant stated that it was its position at that stage:

> "that the authorities have so far irrationally failed to justify not investigating potential breaches of these provisions in circumstances where [the Appellant] has provided them with names of specific suppliers in Xinjiang that are implicated in Uyghur forced labour and enslavement, in addition to named importers with connections to those suppliers".

21. The justification sought by the Appellant was provided in the decision letter, which was sent by the Government Legal Department as the response on behalf of all three Defendants, and dealt compendiously with the many matters raised in the letter before claim. The decision letter summarised the position of the Defendants in respect of all four "Decisions" under challenge, in paragraph 8. Both facets of what was then "Decision 2" were addressed in paragraph 8 (ii):

Paragraph 8(ii) A stated that:

> "There is no offence of breaching of s.1 of [the 1897 Act] (even if such a breach could be established on the evidence) and no sufficiently clear evidential basis on which to justify an investigation into potential breaches of the prohibition at this stage."

Paragraph 8(ii)(B) stated that:

> "An investigation premised on potential breaches of the Proceeds of Crime Act 2002 ("POCA") is *misconceived*. In the absence of *specifically identified criminal property and criminal conduct, POCA is of no application*." [Emphasis supplied]

22. As regards the first area of complaint identified by the Judge, the letter concluded at paragraph 27 that there was no current basis for concluding that any specific consignment of goods had been imported in breach of section 1 of the 1897 Act. It observed that the letter before claim appeared to concede that establishing such an evidential connection was "practically implausible", and that the Appellant's assertion that an *assumption* should be applied in respect of material identifiable as originating from XUAR that it was the product of forced labour (based on an inference to be drawn from the relevant statistics) was unsupported by authority.

23. The letter then went on in paragraph 29 to explain why it had been decided not to investigate any potential breaches of CEMA. It did so by making specific reference to resource implications; the absence of available evidence to specifically link any final product, manufacturer, wholesaler, or retailer in the UK to goods manufactured in prison or through forced labour; operational priorities; and the feasibility of any successful prosecution (bearing in mind that substantial evidential difficulties might have to be overcome in relation to events taking place in overseas jurisdictions).

24. That approach can be contrasted with the explanation given for the decision not to investigate under POCA, which appears in paragraphs 31 and 32 of the decision letter, and on its face appears to be confined to an investigation under Part 7:[2]

> "31. So far as concerns an alleged failure to investigate possible money laundering offences under POCA, the Letter Before Claim *proceeds on a misapprehension*. *There is no proper basis for a POCA investigation*.
>
> 32. For the purposes of POCA, offences contrary to s.1 of the Modern Slavery Act and/or s.51 of the International Criminal Court Act 2001 are capable of constituting criminal conduct within the meaning of s.340 POCA. However:
>
> (i) It is a requirement of s.340 of POCA that *any criminal conduct is clearly and specifically identified and that the resultant property is specifically identified.* It is insufficient, for the purposes of POCA, to deal in hypothetical scenarios or presumptions. *In the absence of identifying a specific consignment of goods that is the product of the relevant criminality, the requirements of s.340 are not met* and no POCA offence can arise: see *R v GH* [2015] UKSC 24.
>
> (ii) Whilst the Letter Before Claim raises both the offences contrary to ss 328 and 329 POCA, it is apparent that, in the context of a supply chain, s.329 is the apposite offence (namely the acquisition, use and possession of criminal property, as opposed to entering into an arrangement which facilitates money laundering). *However, it is a defence under s.329(2)(c) for a person to acquire or have possession of criminal property for adequate consideration. That provision reflects the policy aim of POCA, that it is not the function of the regime to taint the bona fide purchaser for value.* Rather it is to seek the recovery of the proceeds of crime in the hands of a criminal. *To the extent that it may be possible (which is currently doubted) to identify any specific product as criminal property, and any particular person as engaging in criminal conduct, within the meaning of s.340, it would nevertheless be the case that if that product has been the subject of a transaction for adequate consideration, the relevant criminal property would be the proceeds of that transaction in the hands of the criminal as seller, and not the product in the hands of the purchaser."*
>
> [Emphases supplied]

[2] It was confirmed in subsequent correspondence that the same reasoning applied to the failure to start a civil recovery investigation under Part 5 POCA.

25. Mr Jonathan Fisher KC, on behalf of the Appellant, accepted that paragraph 32(i) was an uncontroversial statement of what needs to be proved at trial in order to secure a conviction for an offence arising under sections 327 to 329 of POCA (though not for other offences under that Act, e.g. under section 330). However, he submitted that the existence of criminal property does not have to be established when deciding whether to investigate. The whole point of carrying out an investigation is to see what emerges. The investigating authority cannot refuse to investigate a possible criminal offence on the basis that it does not already have sufficient evidence to prosecute for that offence, but that, he submitted, was the stance which the NCA adopted. Paragraph 31 was plainly reflecting and expanding upon what had been said earlier in paragraph 8(ii)(B), which is expressed in the present tense.

26. Mr Fisher submitted that the first sentence of paragraph 32(ii) was also uncontroversial; but the remainder of that paragraph betrayed a fundamental misunderstanding of the legislation. If the NCA believed that as soon as someone who could rely on section 329(2)(c) entered the supply chain, the criminal property would cease to be recoverable, or that no further offences could be committed in relation to dealings with that property or its proceeds, it was plainly wrong. The author of the letter was wrong to characterise section 329(2)(c) as providing a "defence" rather than an exemption from a liability that would otherwise arise. They had confused the effect of that section with section 308, which provides for the circumstances in which property which is "recoverable property" for the purposes of the civil recovery regime under Part 5 of POCA ceases to be recoverable. The adequacy of consideration for the transfer of criminal property (or recoverable property) would never be sufficient in itself to preclude the NCA from recovering it.

27. It was accepted by the NCA in its skeleton argument, and again by Sir James and by Mr David Perry KC in their oral submissions on behalf of the NCA that:

    i) An investigation into proceeds of crime can commence before specific criminal property (or recoverable property) is identified;

    ii) Where there is only evidence of criminality in a general sense and at a high level, that is no bar to the commencement of an investigation;

    iii) Money laundering can be proven in a criminal trial without proof of a specific offence carried out by a particular person, provided that either (i) the general type of crime is established (e.g. fraud) or (ii) if no such type can be shown, the property alleged to be criminal property was dealt with in such a way as to give rise to an irresistible inference that it is the proceeds of crime; and

    iv) The possibility that payment was made in return for the acquisition of the property (even if it constituted adequate consideration) is never a bar to an investigation under POCA.

28. In the light of those concessions (which were rightly made) the debate between the parties became focused upon whether the decision not to investigate was based on what the NCA accepted would be errors of law, or whether, on a proper understanding of what was being said in the decision letter, the NCA did not make those errors but instead conveyed the results of the type of polycentric decision-making that cannot be impeached other than on grounds of irrationality. This means that it is unnecessary

for the purposes of this judgment to undertake a detailed analysis of POCA, and that all that suffices is a broad overview of the relevant provisions.

The relevant provisions of POCA

29. Part 7 of POCA creates three distinct "money laundering" offences (sections 327-329):

Section 327(1) is concerned with certain specified dealings with "criminal property". It provides:

> "327 Concealing etc.
>
> (1) A person commits an offence if he –
>
> (a) conceals criminal property;
> (b) disguises criminal property;
> (c) converts criminal property;
> (d) transfers criminal property;
> (e) removes criminal property from England and Wales or from Scotland or from Northern Ireland."

Section 328(1) creates an offence of becoming involved in an arrangement to launder "criminal property". It provides as follows:

> "328 Arrangements
>
> (1) A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person."

Section 329(1) creates an offence of acquiring, using, or possessing "criminal property". It provides:

> "329 Acquisition, use and possession
>
> (1) A person commits an offence if he –
> (a) acquires criminal property;
> (b) uses criminal property;
> (c) has possession of criminal property."

30. For the purposes of each of the offences contained in sections 327 to 329, "criminal property" is defined in the interpretation section, section 340, by reference to another concept, "criminal conduct". Section 340 provides, so far as is relevant:

> "(2) Criminal conduct is conduct which –
> (a) constitutes an offence in any part of the United Kingdom, or

> (b) would constitute an offence in any part of the United Kingdom if it occurred there.
>
> (3) Property is criminal property if –
> (a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and
> (b) the alleged offender knows or suspects that it constitutes or represents such a benefit.
>
> (4) It is immaterial–
> (a) who carried out the conduct;
> (b) who benefited from it;
> (c) whether the conduct occurred before or after the passing of this Act.
>
> (5) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.
>
> …
>
> (8) If a person benefits from conduct his benefit is the property obtained as a result of or in connection with the conduct.
>
> (9) Property is all property wherever situated and includes—
> (a) money;
> (b) all forms of property, real or personal, heritable or moveable;
> (c) things in action and other intangible or incorporeal property."

31. It will therefore be seen that the concept of "criminal property" is not only very broadly expressed, but it is a fluid one which depends on the state of mind of the alleged offender. The property in question must not only be or represent a benefit from someone's criminal conduct, but the alleged offender must know or suspect that to be the case at the time of carrying out one of the activities prohibited by sections 327 to 329. This means that the same property can be criminal property in the hands of A but not criminal property in the hands of B, depending on their respective states of mind.

32. Each of sections 327 to 329 contain provisions which exempt from criminal liability a person with the relevant state of mind who does something which would otherwise be an offence under those sections. For example, by sections 327(2)(a), 328(2)(a), and 329(2)(a), a person does not commit any of the substantive money laundering offences if he makes "an authorised disclosure" to the NCA and obtains consent to the activity before it is carried out.

33. Section 329(2)(c) contains a specific exemption which has no equivalent in sections 327 and 328. It provides that a person will not commit an offence *contrary to section*

329(1), if he "acquired or used or had possession of the property for adequate consideration". Section 329(3) sets the boundaries for what amounts to "adequate consideration":

> "For the purposes of this section–
>
> > (a) a person acquires property for inadequate consideration if the value of the consideration is significantly less than the value of the property;
> >
> > (b) a person uses or has possession of property for inadequate consideration if the value of the consideration is significantly less than the value of the use or possession;
> >
> > (c) the provision by a person of goods or services which he knows or suspects may help another to carry out criminal conduct is not consideration."

34. This exemption from liability, like all other such exemptions, is personal to the individual concerned. It applies to all transactions where valuable consideration is provided for the acquisition of criminal property, including in the form of goods or services. But, in order for the exemption to operate, the property still has to be "criminal property" whose acquisition, use, or possession would attract potential criminal liability, and that depends on the state of mind of the individual providing the consideration for it. If they do not know or suspect the property to be or to represent a benefit from a criminal offence, they do not need to rely on the exemption from liability because it would not be "criminal property" in his hands. Indeed, if the individual meets all the requirements of section 308, the property they have purchased will cease to be recoverable property for all purposes.

35. Therefore section 329(2)(c) is <u>not</u> about bona fide purchasers, and it has no impact on the status of the property.

36. Irwin J's *obiter* comment in *Hogan v DPP,* [2007] EWHC 978 (Admin); [2007] 1 WLR 2944 at [16], quoted by the Judge at [77], that "if criminal property is acquired for 'adequate consideration' then no offence is committed under [POCA]" is incorrect: the accurate position is that no offence would be committed under section 329(1). Section 329(2)(c) would afford protection to the purchaser while he had the property in his possession even if he knew it was criminal property, but it would not protect him if, for example, in that knowledge, he transferred it to someone else, or took it out of the country and thereby became potentially liable under section 327(1)(d) or (e).

37. The provision of "adequate consideration" by someone who can rely on section 329(2)(c) does not preclude the property from being "criminal property" in the hands of someone else with the requisite knowledge or suspicion. If it did, and a business delivering financial services had the benefit of that provision on receiving money from a customer in its account, which it suspected to be the proceeds of crime, there would be no need for the specific exemption from liability under section 327(2D).

38. Sections 330 and 331 require financial institutions and businesses in the "regulated sector" (including banks and other financial institutions) or various individuals within that sector to report to the UK Financial Intelligence Unit, which is part of the NCA, any suspicions about criminal property or money laundering. This is known as the suspicious activity reporting ("SAR") regime. The requirement to make a disclosure under section 330 is triggered when the person knows or suspects or has reasonable grounds for knowing or suspecting that another person is engaged in money laundering, and the information or other material on which his knowledge or suspicion is based, or which gives rise to the reasonable grounds for such knowledge or suspicion, came to him in the course of a business in the regulated sector. There are a number of specific exemptions under subsection (6), including for the receipt of privileged information and for professional legal and other advisers.

39. An offence can be committed under section 330 without the need to prove that the property was in fact criminal property or that a specific criminal offence has been committed. It follows that an investigation could be commenced into whether an offence had been committed under that section without establishing either of those matters.

40. Part 5 of POCA provides a scheme to reclaim the proceeds of crime through civil proceedings. It permits the recovery of criminal assets where there has been no conviction. Section 240 explains that the purpose of Part 5 is to enable the recovery in civil proceedings of property which is, or which represents, "property obtained through unlawful conduct", as well as enabling such property to be forfeited in civil proceedings.

41. Section 241 defines unlawful conduct in the following terms:

> "241 'Unlawful conduct'
>
> (1) Conduct occurring in any part of the United Kingdom is unlawful conduct if it is unlawful under the criminal law of that part.
>
> (2) Conduct which–
>
> > (a) occurs in a country or territory outside the United Kingdom and is unlawful under the criminal law applying in that country or territory, and
> >
> > (b) if it occurred in a part of the United Kingdom, would be unlawful under the criminal law of that part, is also unlawful conduct.
>
> (2A) Conduct which–
>
> > (a) occurs in a country or territory outside the United Kingdom,
> >
> > (b) constitutes, or is connected with, the commission of a gross human rights abuse or violation (see section 241A), and

> (c) if it occurred in a part of the United Kingdom, would be an offence triable under the criminal law of that part on indictment only or either on indictment or summarily, is also unlawful conduct.
>
> (3) The court or sheriff must decide on a balance of probabilities whether it is proved– (a) that any matters alleged to constitute unlawful conduct have occurred, or (b) that any person intended to use any property in unlawful conduct."

42. Thus, the general rule for the purpose of the civil recovery scheme under Part 5 is that, if the criminal conduct occurs abroad, it is not sufficient to establish only that the conduct would be a criminal offence in this jurisdiction. By virtue of section 241(2) it must be shown that the conduct would *also* be a criminal offence in the other jurisdiction. However, section 241(2A) provides an exception to that rule for "gross human rights abuse or violation" (as defined in section 241A). Any such behaviour which would be an offence triable on indictment or triable either way if it occurred in any part of the UK will constitute "unlawful conduct" regardless of whether it would be a criminal offence in the country where it is committed, dispensing with the need to satisfy the dual criminality test in section 241(2).

43. Section 242 provides as follows, in relation to obtaining property through unlawful conduct:

> "242 'Property obtained through unlawful conduct'
>
> (1) A person obtains property through unlawful conduct (whether his own conduct or another's) if he obtains property by or in return for the conduct.
>
> (2) In deciding whether any property was obtained through unlawful conduct–
>
> (a) it is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct,
>
> (b) it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct."

44. Consequent upon these provisions, section 304 of POCA provides that property which has been obtained through unlawful conduct is recoverable property, and further, that recoverable property obtained by unlawful conduct may be followed into the hands of a person obtaining it on a disposal, either by the person who through the conduct obtained the property, or a person into whose hands it may be followed as a result of these provisions. Sections 305 and 306 further provide for the tracing of recoverable property, including when mixed with other property.

45. The "family" of recoverable property can expand, by the application of sections 304 to 306, hence the need for the statutory limits on recovery provided for in section 278. This is so even if the property passes through the hands of a person who can rely on section 329(2)(c). If, and to the extent that, some of the observations in *R v Afolabi* [2009] EWCA Crim 2879 at [33] to [35] appear to cast doubt upon that analysis, they are mistaken. *Afolabi* is properly explained as a case in which there was a bona fide purchaser for value without notice, and the property ceased to be recoverable by virtue of the operation of section 308.

46. Section 308 sets out the general exceptions to recovery. By virtue of subsection (1), if a person disposes of recoverable property and the person who obtains it on the disposal does so in good faith, for value and without notice that it was recoverable property, the property may not be followed into that person's hands, and accordingly it ceases to be recoverable. This is closely analogous to the equitable defence to a proprietary tracing claim afforded to a bona fide purchaser. However, the fact that the individual paid the market value for the property is not enough in and of itself to prevent it from being recoverable. They must show that they acted in good faith and were not on notice that the property was obtained by unlawful conduct. A person who suspected that it was would not be able to rely on section 308.

47. Finally, section 341 defines "Investigations". Section 341 (2) provides that:

> "(2) For the purposes of this Part a civil recovery investigation is an investigation for the purpose of identifying recoverable property or associated property and includes
>
> a) investigation into whether property is or has been recoverable property or associated property…"

It is obvious from this definition that the investigating body does not need to know that recoverable property exists before commencing an investigation, since the specific purpose of that investigation may be to ascertain that fact.

Discussion and conclusion

48. It appeared to be accepted by all counsel that the Judge never directly answered the question that he posed in [79], namely, whether the position expressed by the NCA in the correspondence incorporated any error of law or misdirection of the kind alleged by the Appellant. It is true that he said at the start of [80] that he was not satisfied that there was any legal error or misdirection in the approach taken by the NCA *to the provisions of the 2002 Act*, but (apart from the error regarding the effect of section 329(2)(c), which the Judge appears to have endorsed at [75]) that was not the nub of the Appellant's complaint. The Judge then proceeded to consider what would be needed to establish the various offences at trial, and devoted [81] to the evidential difficulties he had identified earlier in the judgment when considering a different ground of challenge, Ground 1.

49. However, Ground 1 concerned what needed to be established by the relevant authorities at the time of using their powers under section 1 of the 1897 Act or under CEMA to seize goods at the border or prevent their entry. It was not addressing what, if anything, needed to be established for the purpose of commencing an investigation

under POCA. As set out above, the fact that there might not be sufficient evidence to justify the use of those powers at the time of importation would not preclude the launch of an investigation for the purposes of POCA.

50. Further, the Judge's approach would involve reading across into paragraphs 31 and 32 of the decision letter justifications given elsewhere in the decision letter for other (separate) decisions. There was no such cross-referencing on the face of paragraphs 31 and 32, and the reasoning in paragraphs 31 and 32 is quite different.

51. It is true that in the middle of [78] the Judge recorded a contention by the NCA that "there is little point in commencing investigations which do not have realistic prospect of any successful conclusion". However, that reasoning does not appear anywhere in the relevant parts of the decision letter. What the decision letter actually said was that there was "*no proper basis* for a POCA investigation", and that the letter before claim was based on a "*misapprehension*", hearkening back to Paragraph 8(ii)(B) of the decision letter. Paragraph 8(ii)(B) had described a POCA investigation as *"misconceived"* because "in the absence of specifically identified criminal property and criminal conduct, *POCA is of no application.*" [emphasis added] It was in that context that the letter then made reference to what had to be established under section 340.

52. Mr Perry, on behalf of the NCA, submitted that it could be inferred clearly from a reading of the judgment as a whole that the Judge did not accept that the NCA had expressed the view that the Appellant ascribed to it, namely that the existence of criminal property had to be established before launching an investigation under POCA. Rather, the Judge had understood paragraphs 31 and 32 of the decision letter as meaning that the NCA had started off by considering what they would need to prove at the end of the day, and had reached an unimpeachable value judgment that an investigation was unlikely to provide them with sufficient evidence to do so.

53. We are not persuaded that this analysis emerges from the judgment. Indeed there are passages that could be interpreted as an acceptance by the Judge of quite the opposite - that it was necessary to establish the existence of criminal property before launching an investigation. In particular, there is the statement in [80] that "the Defendant is correct to point out that in relation to each of the offences the starting point must be the identification of criminal property applying the definition set out in section 340 of the Act."

54. It may be that the "starting point" to which the Judge was referring was not a reference to what needed to be established at the commencement of an investigation. The rest of [80] focuses on what has to be proved to make out the specific offences at trial, and the next paragraph addresses the difficulty of obtaining the necessary evidence to do so. However, there is legitimate concern that the Judge's judgment is to be understood as endorsing the proposition that there is a need to establish criminal conduct or criminal property before an investigation under POCA can begin.

55. It was this concern that prompted Spotlight to intervene in this appeal. As Mr Kennedy Talbot KC explained in his focused and succinct written and oral submissions on behalf of Spotlight, that understanding of the judgment, if left undisturbed, would discourage the NCA, the police and other UK investigative bodies from commencing investigations into corruption (particularly where it occurs

overseas) in the absence of concrete evidence of particular crimes carried out by particular persons.

56. Spotlight was also concerned by the Judge's analysis at [75] which was said to suggest that criminal liability for money laundering or civil recovery or forfeiture of the proceeds of crime would be removed where such proceeds have passed through a number of hands in a business context where "adequate consideration" is paid. In [75], the Judge appeared to accept a submission on behalf of the NCA that "where the importer is paying market value for the purchased goods they would not be tainted as a result of the operation of [section 329]." That proposition is wrong in law, for the reasons stated in paragraphs 33 to 37 above.

57. Whilst the Judge was right in general terms when he went on to state in [75] that, if a purchaser has bought a consignment of cotton goods from China *bona fide* and at a market value, any taint passes to the purchase price and the criminal property remains in China, that is only because of the operation of section 308, *not* section 329(2)(c). A purchaser or importer who suspects the goods to be the product of forced labour or other human rights abuses would not be able to rely on section 308. If, and to the extent that, the Judge accepted the NCA's submission recorded in the final sentence of [75] that, at any point in a market supply chain stretching many thousands of miles, the chain could be broken merely by the use of adequate consideration in any of the transactions involved, he was wrong to do so.

58. There is force in the Appellant's submission that the Judge never addressed properly its grounds for challenge to the decision not to investigate under POCA, and instead treated the challenge as if it were a rationality challenge. But, more importantly, it is clear that, on a fair reading of the decision letter, the NCA proceeded on the basis of an error of law. The decision letter, read as a whole, would convey to the reasonable reader that the NCA proceeded on the basis i) that it was necessary to be able to identify specific criminal property and criminal conduct before there can be a "proper basis" for a POCA investigation, (whether criminal or civil) and moreover ii) that the provision of "adequate consideration" anywhere in the supply chain would prevent any goods imported into the UK from being identified as criminal property or recoverable property. Both those propositions are, and are now accepted to be, wrong as a matter of law.

59. For those reasons, this appeal must be allowed and the decision quashed. Accordingly, the question of whether to carry out an investigation under Part 7 or Part 5 of POCA will be remitted to the NCA for reconsideration.