*994 Paulet v United Kingdom

Application No.6219/08

Before the European Court of Human Rights

13 May 2014

(2015) 61 E.H.R.R. 39

The President , Judge Ziemele ; Judges Nicolaou , Bianku , Tsotsoria , Kalaydjieva , Mahoney , Wojtyczek :

13 May 2014

Confiscation orders; Fair balance; Peaceful enjoyment of possessions; Proportionality;

H1 The applicant was living illegally in the United Kingdom having arrived in January 2001. He successfully applied for three jobs using a false French passport and he worked between April 2003 and February 2007. In January 2007 the falsity of the passport was discovered when the applicant used it to apply for a provisional driving licence. The applicant pleaded guilty in the Crown Court to offences relating to his possession and use of the false passport and driving offences. He received a sentence of imprisonment and a recommendation was made for his deportation. The prosecution sought a confiscation order under s.6 of the Proceeds of Crime Act 2002 in respect of the applicant's earnings after tax and national insurance payments had been deducted. The applicant had assets of £21,649.60 that he had saved from his earnings and an order was made for that amount with a default sentence of 12 months' imprisonment.

H2 The applicant's application for an extension of time to appeal was refused. The applicant renewed his application before the Court of Appeal on the basis that: his earnings were not a relevant benefit from criminal conduct; and the decision to seek a confiscation order constituted an abuse of process. In light of the decision in *R. v Carter* the applicant abandoned the first ground of appeal. The DPP subsequently issued guidance for prosecutors on the circumstances under which a confiscation order could be sought. In July 2009 the Court of Appeal held that the decision to seek a confiscation order against the applicant did not constitute an abuse of process. The court held that an abuse of process could not be founded on the basis that the consequences of the proper application of the law could produce an oppressive result with which the judge might be unhappy. The applicant's case was not distinguished from the previous ruling in *R. v Carter* . The court concluded that throughout his employment the applicant had unlawfully obtained a pecuniary advantage by relying upon a continued dishonest representation and in the context of the wider public interest, had deliberately circumvented the prohibition against him seeking remunerative employment which established an appropriate link between his earnings and his offending. The Court of Appeal refused to certify a point of law of general public important to be considered by the Supreme Court. *995

H3 **Held:**

(1) unanimously that the application was admissible;

(2) by six votes to one that there had been a violation of art.1 of Protocol No.1 ;

(3) by five votes to two that the respondent State pay a sum in respect of non-pecuniary damage, costs and expenses; and

(4) unanimously that the remainder of the applicant's claim for just satisfaction be dismissed.

1. The imposition of a confiscation order (art.1 of Protocol No.1)

H4 The applicant had submitted before the Court of Appeal that a confiscation order was oppressive or an abuse of process in accordance with domestic law, where the benefit figure far exceeded the value of the defendant's crimes and could be described as disproportionate in light of art.1 of Protocol No.1 . At the time the applicant brought his complaint before the domestic courts it was appropriate for him to argue his case in terms of oppression and abuse of process. The domestic courts had an opportunity to align the criteria for the application of the domestic-law test with the test set out in the Court's case-law but failed to do so. The applicant had taken the necessary steps to advance his complaint at the domestic level. [50]–[51]

H5 The confiscation order amounted to an interference with the applicant's right to peaceful enjoyment of his possessions. Confiscation orders fell within the scope of the second paragraph of art.1 of Protocol No.1 which allowed the State to control the use of property to secure the payment of penalties. The provision had to be construed in light of the general principle set out in the first paragraph of art.1 of Protocol No.1 and there had to be a reasonable relationship of proportionality between the means employed and the aim to be realised. An interference was disproportionate where the property owner bore an "individual and excessive burden". The striking of a fair balance between the protection of the right to property and the requirements of the general interest was dependent on many factors. Article 1 of Protocol No.1 did not contain explicit procedural requirements and the issue in the present case was whether the proceedings as a whole provided the applicant with a reasonable opportunity to put his case to the competent authority so that a fair balance between the conflicting interests could be achieved. [64]–[65]

H6 In assessing whether the confiscation order was oppressive and constituted an abuse of process, the Court of Appeal concluded that the order was in the public interest. However, the court failed to assess whether the requisite balance was maintained in a manner consistent with the applicant's right to peaceful enjoyment of his possessions. As a result the scope of the review carried out by the domestic courts was too narrow to satisfy the requirement of seeking a fair balance and there had been a violation of art.1 of Protocol No.1 . [64]–[69]

The following cases are referred to in the Court's judgment:

AGOSI v United Kingdom (1987) 9 E.H.R.R. 1

Ahmet Sad#k v Greece (1997) 24 E.H.R.R. 323

Azinas v Cyprus (2005) 40 E.H.R.R. 8

Cardot v France (1991) 13 E.H.R.R. 853

Castells v Spain (1992) 14 E.H.R.R. 445

Civet v France (2001) 31 E.H.R.R. 38
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Fressoz v France (2001) 31 E.H.R.R. 2

Guzzardi v Italy (1981) 3 E.H.R.R. 333

Hentrich v France (1994) 18 E.H.R.R. 440

Jacobsson v Sweden (No.1) (1990) 12 E.H.R.R. 56

Jokela v Finland (2003) 37 E.H.R.R. 26

Lithgow v United Kingdom (1986) 8 E.H.R.R. 329

Marckx v Belgium (1979–80) 2 E.H.R.R. 330

Sporrong v Sweden (1983) 5 E.H.R.R. 35

Phillips v United Kingdom (41087/98) 5 July 2001

Elçi v Turkey (23145/93 and 25091/94) 13 November 2003

Ismayilov v Russia (30352/03) 6 November 2008

The following domestic cases are referred to in the judgment:

R. v Carter [2006] EWCA Crim 416

R. v Shabir [2008] EWCA Crim 1809

Separate Opinion of Judge Kalaydjieva Joined by Judge Bianku:

Bongiorno v Italy (4514/07) 5 January 2010

Broniowski v Poland (2006) 43 E.H.R.R. 1

Phillips v United Kingdom (41087/98) 5 July 2001

Dissenting Opinion of Judge Wojtyczek:

Sporrong v Sweden (1983) 5 E.H.R.R. 35

Separate Opinion of Judge Kalaydjieva Joined by Judge Bianku as regards art.1 of Protocol No.1 to the Convention [30]

OI-1 My reasons for finding a violation of art.1 of Protocol No.1 go further than those of the majority. In my understanding, the issues which this case raises are far from limited to the deficiencies in the procedural protection of the applicant's right to peaceful enjoyment of property that were reflected in the narrow scope of the review carried out by the domestic courts and their failure to seek and strike the "fair balance" inherent in the second paragraph of art.1 of Protocol No.1 . [31]

OI-2 I find myself unable to agree with the majority's conclusions [32] that the present case is

analogous to previous case-law of this Court on the confiscation of the proceeds of crime. [33]

OI-3 The present case appears to depart substantially from this case-law on several major points which seem to be determinative for the proper analysis of the circumstances. In the case of *Phillips* the Court noted that "in respect of every item taken into account the [national] judge was satisfied … that the obvious inference was that it had come from an illegitimate source". In the present case (which concerns the application of different domestic legislation), it has not been contested that, having entered the territory of the United Kingdom by using a false passport, the applicant used it to obtain employment and thus earn his income. Unlike in *Phillips* , however, it has not been submitted that such employment constituted itself a crime on the part of the applicant, or that the regulation of the domestic labour market went so far as to make any irregularly obtained employment criminal or punishable in any manner. Likewise, it has not been contended that the applicant's work caused any public or private harm rather than contributing to the public welfare. Notwithstanding this situation, the applicant's genuinely earned savings were defined and confiscated as the "proceeds of the crime" of using a false passport—an act for which the applicant was punished in separate proceedings. The difference between the reasonable assumption as to the criminal origin of the ***1013*** confiscated property in the case of *Phillips* and the remote or indeed non-existent link between the use of a false passport and the genuine earning of the confiscated amounts in the present case appears quite obvious.

OI-4 This difference raises questions as to whether the circumstances of the present case fall to be considered under the first or the second paragraph of art.1 of Protocol No.1 . It is true that under the established case-law of the Court, the confiscation of the proceeds of crime is seen as a measure compatible in principle with the Convention and its Protocols. However, I find myself unable to agree that in the present case the confiscated amounts could be clearly and necessarily defined as the proceeds of crime. Such an assumption is apt to regard any irregular employment as criminal, with the result that any earnings from such employment would be subject to confiscation in the exercise of

> "the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties"

within the meaning of the second paragraph of art.1 of Protocol No.1 to the Convention. In my understanding, the Court has hitherto regarded the confiscation of the "proceeds of crime" as compatible with the Convention where a direct link between criminal conduct and the proceeds could be established or reasonably assumed. In the absence of such a direct link, I would venture to express doubts as to the clarity of the law and the foreseeability of the imposed measure.

OI-5 Given that the applicant's employment as such was not of a criminal nature and that the criminal origin of the confiscated earnings cannot be established or reasonably assumed, a question arises whether the circumstances in the present case fall more appropriately to be examined under the first paragraph of this provision, which calls for closer scrutiny of the public interest pursued by the measure and of the clarity and foreseeability of the conditions provided for by law for the purposes of such confiscation. In assessing compliance with art.1 of Protocol No.1 , the Court normally makes an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of, including the conduct of the parties, the means employed by the state and their implementation. [34]

OI-6 Limiting the scope of the present case to only some of its "procedural aspects", the majority failed to express any views on whether the applicable legislation was sufficiently precise as to the conditions for forfeiture, whether the domestic courts were required to analyse the link between the assets proposed for forfeiture and the specific crime, and whether they did so in the present case.

OI-7 It might be true that the findings of the majority with regard to the limited judicial scrutiny performed are sufficient to enable the Court to conclude that there has been a violation of art.1 of Protocol No.1 . [35] However, the limited findings as to the "procedural nature" of the established violation [36] neither afford relevant redress in respect of art.1 of Protocol No.1 , nor do they seem to require a subsequent domestic review with a scope sufficiently wide to satisfy the requirement

of seeking and ***1014*** striking a "fair balance" required by the said provision. [37] In this regard the view that it is not necessary to reach any conclusions in respect of (the lawfulness and/or) the proportionality of the confiscation order leaves the applicant's essential grievances unaddressed both at the domestic level and by the Court.

OI-8 For these reasons I also disagree with the majority's view as to the "absence of a proximate causal link between the procedural violation found and financial loss sustained by the applicant by reason of the confiscation order".[38] In the absence of any subsequent examination of this causal link and/or the proportionality of the uncontested interference, the applicant should have been awarded compensation in pecuniary damage, and not merely for moral damage.

Concurring opinion of Judge Mahoney [39]

OII-I have voted with the majority of my colleagues in finding a violation of a procedural character as regards the interference with the applicant's right of property resulting from the confiscation order made against him. I did, however, have some hesitations in connection with the assessment of the scope of the review of fair balance and proportionality that the national courts are required to carry out under art.1 of Protocol No.1 .

OII-2 As regards the assessment of fair balance and proportionality, the qualifying criterion for the state's exercise of its discretionary power to regulate the enjoyment of the right of property is stated in the text of art.1 of Protocol 1 to be "the public interest" (the second sentence of the first paragraph) or "the general interest" (the second paragraph, this being the relevant provision in the present case).[40] "The public interest" and "the general interest" are wide-ranging notions that allow the national authorities a rather broad area of discretion. The fair-balance test under art.1 of Protocol No.1 , as the Court expressed it in the landmark judgment of *Sporrong v Sweden* , [41] requires determining whether the person who is the subject of a contested regulatory measure has had to bear "an individual and excessive burden". Overall, what is involved is a far less constraining restriction on the state's regulatory power than, for example, that of "necessity in a democratic society" in the pursuit of certain specified legitimate aims, as enunciated in arts 8–11 of the Convention. The threshold of the restriction is lower. The intensity of the scrutiny that the national courts, and thereafter this Court, are called on to undertake in relation to the merits of fair balance and proportionality under art.1 of Protocol 1 is, correspondingly, less than that under arts 8–11 . This is so whether the national courts effect their scrutiny in terms of domestic-law concepts—as in the present case—or in terms of the Convention and its case-law—as the British courts were henceforth enjoined to do in 2012 by the Supreme Court in the case of *Waya* . [42]

OII-3 It is true that, on this analysis, the level of protection afforded to the individual, notably as regards the substantive content of proportionality and the procedural requirement as to the intensity of any judicial scrutiny of proportionality to be carried out at national level, is lower under art.1 of Protocol 1 than that under other articles of the Convention, but that is the direct and inevitable consequence of the ***1015*** different and less constraining wording employed in art.1 of Protocol 1 in order to define the content of the right guaranteed.

OII-4 The hesitation I had was whether the reasoning employed in the present judgment does not involve too strict a standard for the scrutiny of fair balance and proportionality to be carried out by national courts in relation to measures that constitute the "control of the use of property", within the meaning of the second paragraph of art.1 of Protocol 1 .

OII-5 The reasoning of the Court of Appeal in Mr Paulet's case [43] was as follows:

> "The reality is that throughout the period of his employment the appellant [Mr Paulet] was relying on a continuing dishonest representation to three different employers. He deceived them into thinking that he was entitled to obtain employment with them. That was a crucial element of his criminality. His earnings, of course, reflected the fact that he had done the necessary work, as we shall assume, to the satisfaction of his various employers. But the opportunity for him to do so, that is the pecuniary advantage, was unlawfully obtained. If the employee worked to his employer's satisfaction, and he paid his tax and National Insurance contributions on his earnings, and his deception either lacked any significant wider public interest, or, perhaps because of the passage of time, but for whatever reason, had ceased to have any meaningful effect on his employers' decision to continue his employment, the resolution of the issue might well

> be different. As it is, there was here a wider public interest. The appellant was deliberately circumventing the prohibition against him seeking remunerative employment in this country in any capacity. No basis for interfering with the order made in the Crown Court has been shown. In our judgment the appropriate link between the appellant's earnings and his criminal offences, in the context of the wider public interest, was plainly established."

OII-6 It can be seen, as the present judgment concedes, [44] that the Court of Appeal did verify that there existed a general interest prompting the confiscation order. The language used by the Court of Appeal can also, I believe, be read as weighing the applicant's personal interest in retaining his earnings against "the wider public interest" in upholding the prohibition against dishonestly obtaining paid employment and as concluding that the applicant's case disclosed no circumstances capable of outweighing that public interest.

OII-7 The judgment of the Court, [45] in referring to the 2012 judgment by the Supreme Court in *Waya* , should not be understood as suggesting that only an analysis under art.1 of Protocol 1 , with explicit reference to this Court's case-law on proportionality under that article, would suffice and that a national court's proceeding in substance to the same kind of examination of proportionality in terms of domestic-law concepts is not good enough. While, from this Court's point of view, incorporation of the Convention and its case-law into domestic law and direct examination of issues under the Convention and its case-law represent an ideal manner for the Contracting States to implement their general obligation under art.1 of the Convention, it is not contrary to the Convention for a guaranteed right to be implemented by means of equivalent provisions framed in terms of domestic-law ***1016*** concepts, provided of course that the minimum standard laid down by the Convention is complied with.

OII-8 The Supreme Court did indeed state in 2012 in *Waya* that "the better analysis" of cases such as the applicant's was that confiscation orders

> "ought to be refused by the judge on the grounds that they would be wholly disproportionate and a breach of [Article 1 of Protocol 1]." [46]

Until this clarification by the Supreme Court, "the appropriate remedy" was taken by the national courts to be an application for a stay of proceedings on the ground of abuse of process (see the statement of the Court of Appeal to this effect in the applicant's case).[47] The UK courts themselves believed that their power of review in relation to applications for a stay of a confiscation order on the ground of "oppression" was sufficiently wide to enable the issue of proportionality, for the purposes of the protection of the right of property afforded by art.1 of Protocol 1 , to be adequately examined. This is illustrated by the Court of Appeal's analysis in the 2008 case of *Shabir* [48] :

> "The court retains the jurisdiction to stay an application for confiscation, as any other criminal process, where it amounts to an abuse of the court's process. In the present context, that power exists where it would be oppressive to seek confiscation, or to do so on a particular basis.
>
> …
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> This country's confiscation regime has consistently been held to be a proportionate and legitimate response to crime and thus to occasion no infringement of [Article 1 of Protocol 1]: see for example *Phillips v United Kingdom [no. 41087/98, ECHR 2001-VII*] and *R v Rezvi [2003] 1 AC 1099 . Even if it be accepted that the Protocol may be capable of being infringed by a truly oppressive and thus disproportionate individual order for confiscation …, it is clear that the court's power to stay for oppression provides the remedy." (Emphasis supplied.)*

OII-9 The question that therefore arises is whether the scrutiny carried out by the Court of Appeal in Mr Paulet's case was wide enough to encompass, in substance, the considerations (fair balance, proportionality and avoidance of "an individual and excessive burden") which are stated in the Court's case-law as being those that have to be taken into account to justify any measure

of interference with the right of property as guaranteed by art.1 of Protocol No.1 .

OII-10 I found the facts of the present case in that regard, notably in relation to the reading to be given to the language used by the Court of Appeal in carrying out its examination of the impact of the general interest in the particular circumstances, to be borderline. In the end, I overcame my hesitations and joined the majority of my colleagues in concluding that the national courts' review of lawfulness under the concepts of "abuse of process" and "oppression" was too narrow in scope to secure the applicant the balancing exercise to which he was entitled under art.1 of Protocol No.1 , even having regard to the fact that the scrutiny of fair balance and proportionality to be carried out in relation to regulation of the enjoyment of the right of property is less intense than that required in relation to interferences with ***1017** the exercise of other Convention rights. The violation found may, in any event, hopefully be regarded as an historical one, in view of the intervening guidance given by the Supreme Court in *Waya* .

Dissenting Opinion of Judge Wojtyczek [49]

OIII-1 I respectfully disagree with the view of the majority that there has been a violation of art.1 of Protocol No.1 and I also disapprove of the methodology applied in the reasoning of the judgment.

OIII-2 The confiscation of the proceeds of crime raises many difficult legal questions such as the nature of the link between the crime and the proceeds, the distribution of the burden of proof in establishing this link and the methodology used in calculating the value of assets acquired through crime. Without trying to discuss the matter in an extensive way, I would like to point very briefly to a few problems that arise from the judgment in the instant case.

OIII-3 In the reasoning of the judgment the majority decides to focus on the review of the measure confiscating possessions stemming from a crime. The legal argument seems to be based on several implicit assumptions: (1) that the question whether or not acts which result in proceeds being confiscated fall within the ambit of the rights protected under the Convention (or the Protocols) is irrelevant from the viewpoint of the Convention; (2) that the confiscation of the proceeds of crime should be dealt with under the Convention in the same way as any other interference with property rights [50] ; (3) that such a measure may accepted only if its application is made subject to a proportionality test carried out by the court which applies it; and (4) that the decision to confiscate the proceeds should be subject to review by a higher court from the viewpoint of proportionality. In my view, all those assumptions should be refuted.

OIII-4 When examining the instant case the majority does not see the need to distinguish between measures applied in respect of acts falling within the ambit of the rights protected under the Convention or its Protocols and those remaining outside their scope. However, this question is of paramount importance.

A punishment is by definition an interference with freedom or with property. When assessing the compatibility with the Convention of a punishment or other measure prescribed by criminal law, it is necessary to distinguish between two situations. The first one is a punishment or measure applied in respect of acts that fall outside the scope of the Convention. In such a case, any punishment should comply with the requirements of art.3 and, in particular, should not be grossly disproportionate. A grossly disproportionate punishment may constitute inhuman or degrading treatment prohibited by art.3 of the Convention.

The second situation is a punishment or other measure in respect of an act which falls within the scope of application of a right protected under the Convention. Many provisions of the Convention require any interference with the rights protected under the Convention to meet the test of proportionality. Therefore, the assessment of the compatibility of a measure with the applicable provisions of the Convention may require the proportionality test to be carried out. This pertains also to punishments and other types of measures prescribed by criminal law. ***1018**

OIII-5 The second assumption on which the judgment is based is that the confiscation of the proceeds of a crime should be dealt with under the Convention in the same way as any other interference with property rights. However, there is a fundamental difference between possessions acquired in a lawful way and possessions acquired through crime. Furthermore, the assumption in question is difficult to reconcile with the very wide margin of appreciation left to

states in the field of criminal law, especially if the punishable acts fall outside the scope of the rights protected under the Convention and the Protocols. In principle, states are free to establish their criminal policy in that field provided that they observe the standards of criminal law set forth in arts 3 and 7 of the Convention.

The confiscation of the proceeds of crime is a criminal-law measure that may be based on natural justice. One of its aims is to ensure that a crime does not profit the perpetrator. Illegal gains should not be protected under the Convention and should not be considered to fall within the scope of application of art.1 of Protocol No.1 . This last provision comes into play, however, when the parties dispute the source of some possessions.

The paradox of the approach adopted by the majority is that possessions obtained as a result of crime enjoy protection under art.1 of Protocol No.1 against excessive interference. According to the approach proposed by the majority, they may be retained by a criminal if their confiscation would not strike a fair balance between the individual and public interests at stake.

Moreover, the approach taken by the majority opens the way to the review of the proportionality of punishments imposed by the domestic courts in criminal matters, and may transform the Court into a further instance assessing the merits of criminal cases. In this regard I am not persuaded that the Convention enshrines a general requirement of proportionality of criminal law applicable outside the scope of the specific rights protected under this international instrument and going beyond the minimum requirements of art.3 of the Convention.

OIII-6 The majority states in a very general way that the scope of the review carried out by the domestic courts was too narrow to satisfy the requirement of seeking the “fair balance” inherent in the second paragraph of art.1 of Protocol No.1 , and criticises the Court of Appeal. In this context it should be noted that a second-instance court should not in principle have wider powers than the first-instance court. The review of a measure from the viewpoint of proportionality makes sense only if the first-instance court is entitled to assess the situation from the viewpoint of this principle when applying a specific measure. The judgment implies therefore that the first-instance court applying the measure under consideration should also be entitled to carry out the proportionality test.

Given the vagueness of the wording, it is difficult to understand clearly the logic underlying this approach and in particular to identify the individual interests and circumstances that should be taken into account when assessing the compatibility with the Convention of the confiscation of proceeds under the “fair balance” test. It should be stressed in this context that once the general principle of confiscation of the proceeds of crime is accepted, there is little room for an assessment as to whether the confiscation was proportionate in a specific case. I agree, nonetheless, that in some specific circumstances it may be necessary to take into account some legitimate interests of the perpetrator and to mitigate the measures to be taken. The typical question, however, is not whether the proceeds of crime should be confiscated but to what extent the applicant is able to repay them. It would be ***1019*** preferable for this matter to be clearly addressed in the reasoning and for the different factors that should be taken into account to be clearly identified.

OIII-7 As noted above, the majority criticises the Court of Appeal for the way it carried out the review of the decision taken by the Crown Court. In particular, it disagrees with the view that the British courts lack any discretion to interfere with the confiscation decision if it has been made in accordance with the law. [51] The reasoning thus suggests that the decision to confiscate the proceeds of crime should not only be subject to review from the viewpoint of its conformity with the legal rules, but also that the second-instance court should be entitled to assess the necessity of the measure applied from the viewpoint of some unspecified extra-legal criteria, although the domestic law does not refer to any such standards and does not require the application of such standards by the first-instance court.

OIII-8 Under the established case-law of the Court, confiscation of the proceeds of crime is a measure compatible in principle with the Convention and its Protocols. As stated above, once we accept that the proceeds of crime may be confiscated, there is little room left for the analysis of proportionality.

It has to be stressed that the applicant in the present case was punished for acts which do not fall within the scope of protection of the rights protected by the Convention and its Protocols. The

applicant failed to demonstrate that in the circumstances of the case the Convention required the measure applied to him to be mitigated. Nonetheless, in applying the domestic-law criterion of "oppressiveness", the domestic courts weighed in the balance the general interest of the community and the individual interest of the applicant in retaining the proceeds of his illegal earnings and concluded:

> "… throughout the period of his employment [the applicant] was relying on a continuing dishonest representation to three different employers. … His earnings, of course, reflected the fact that he had done the necessary work, as we shall assume, to the satisfaction of his various employers. But the opportunity for him to do so, that is the pecuniary advantage, was unlawfully obtained. If … his deception either lacked any significant wider public interest, or … had ceased to have any meaningful effect on his employers' decision to continue his employment, the resolution of the issue might well be different. As it is there was here a wider public interest. The appellant was deliberately circumventing the prohibition against him seeking remunerative employment in this country in any capacity."

In the absence of any evidence to suggest that the applicant bore an individual and excessive burden there are no reasons for this Court to substitute its own assessment of the facts for that made by the domestic courts. ***1020**

THE FACTS

I. The circumstances of the case

4 The applicant was born in 1984 and lives in Leeds.

5 The facts of the case may be summarised as follows.

A. The criminal proceedings against the applicant

6 The applicant arrived in the United Kingdom on 26 January 2001 and thereafter lived illegally at an address in Bedford.

7 Whilst living in the United Kingdom the applicant successfully applied for three jobs using a false French passport. Between April 2003 and November 2004 he was employed by a recruitment agency. Between August 2004 and January 2006 he was employed in a cash and carry business and between January 2006 and February 2007 he was employed as a forklift truck driver.

8 The applicant had used the false passport to support his assertion that he was entitled to work in the United Kingdom. All of his employers subsequently stated that they would not have employed him had they known of his true immigration status. Between April 2003 and February 2007 the applicant earned a total gross salary of £73,293.17 from his employment. At the end of this period he had total savings of £21,649.60.

9 In January 2007 the applicant applied to the Driving and Vehicle Licensing Agency for a provisional driving licence. The application was accompanied by the same false French passport that the applicant had used to obtain employment in ***997** the United Kingdom. When the falsity of the passport was discovered, the police were informed.

10 On 4 June 2007 the applicant pleaded guilty in the Crown Court at Luton to three counts of dishonestly obtaining a pecuniary advantage by deception (Counts 1, 2 and 3 on the indictment). He also pleaded guilty to one count of having a false identity document with intent (Count 4), one count of driving whilst disqualified (Count 5) and one count of driving a motor vehicle without insurance (Count 6). On 29 June 2007 the applicant was sentenced to concurrent terms of fifteen months' imprisonment for the first four counts together with a consecutive sentence of two months' imprisonment for the offence of driving whilst disqualified. No separate sentence was imposed for driving without insurance. The trial judge also recommended the applicant for deportation.

11 In addition to the custodial sentence and the recommendation for deportation, the prosecution sought a confiscation order under s.6 of the Proceeds of Crime Act 2002 in respect of the applicant's earnings. [1] The trial judge accepted that the applicant had paid all the tax and national insurance due on his earnings and that the money he had made from his employment had been truly earned. After deducting tax and national insurance payments, it was calculated that the benefit the applicant received from his earnings was £50,000. It was agreed that of the £50,000 the applicant still had assets of £21,949.60. On this basis, on 29 June 2007 the trial judge imposed a confiscation order in the sum of £21,949.60 upon the applicant, with a consecutive sentence of 12 months' imprisonment to be served in default of payment. Thus, the confiscation order had the effect of depriving the applicant of all of the savings that he had accumulated during the four years of employment.

12 On 8 April 2008 the applicant sought an extension of time within which to appeal to the Court of Appeal against the imposition of the confiscation order. In his grounds of appeal, he contended that the grant of the confiscation order had not respected "European law". That application was refused on 13 June 2008. The single judge noted that the applicant had failed to establish good reason for the extension of time sought and that he had no arguable grounds of appeal because he had benefited from the use of the false passport to the extent that it had enabled him to work and earn money and there had been no breach of his rights under the Convention.

13 The applicant renewed his application before the Court of Appeal which, on 14 November 2008, granted him an extension of time and leave to appeal. Leading counsel was appointed on his behalf. Counsel initially argued first; that the applicant's earnings were not a relevant benefit from criminal conduct within the meaning of the Proceeds of Crime Act 2002 ; and secondly, that the prosecutor's decision to seek a confiscation order in this case constituted an abuse of process.

14 The Court of Appeal heard part of the appeal on 18 February 2009. However, it decided to adjourn the appeal pending the publication by the Department of Public Prosecution (the DPP) of guidance for prosecutors on the circumstances under which a confiscation order could be sought.

15 In a supplementary skeleton argument dated 5 June 2008, counsel for the applicant accepted that in light of the decision in *R. v Carter* , [2] the court was bound to reject the first ground of appeal, namely that the applicant's earnings were not ***998*** a relevant "benefit". He therefore accepted that the issue on appeal was whether it was oppressive and therefore an abuse of process for the Crown to seek and the court to impose a confiscation order for what amounted to the applicant's entire savings over nearly four years of genuine work. In this regard, counsel submitted that there would be an abuse of process where, on a correct application of the law to the facts, the resulting "benefit" figure yielded a disproportionate or oppressive result. He further noted that Parliament has intended the Proceeds of Crime Act 2002 to be applied in a manner compatible with the requirements of the Convention. Therefore, in light of art.1 of Protocol No.1 , in order to remain proportionate the application of the confiscation regime had to remain rationally connected to the public interest aims pursued and go no further than necessary to achieve them. It was therefore submitted that to seek the imposition of a confiscation order on the basis of a benefit figure which far exceeded the value of the defendant's crimes could properly be described as disproportionate—either in the traditional sense used in criminal sentencing ("not fitting the punishment to the crime") or in the language of the Convention—and was therefore an abusive exercise of jurisdiction.

16 The applicant further submitted that a confiscation order could be described as oppressive where it did not pursue any of the legitimate aims of the confiscation regime and/or did not further the Parliamentary intent of stripping defendants of the proceeds of crime. He reiterated that Parliament had intended the legislation to be compatible with the Convention.

17 On 28 July 2009, after the DPP guidance had been promulgated, [3] the Court of Appeal held that the decision to seek a confiscation order against the applicant did not constitute an abuse of process. The court therefore dismissed the applicant's appeal against the order. In reaching this conclusion, the Court of Appeal said that the guidance represented a fair analysis of the effect of previous Court of Appeal and House of Lords decisions on the confiscation order regime.

18 The court stated:

> "Abuses of the confiscation process may occur and, when they do, the appropriate

> remedy will normally be a stay of proceedings. However an abuse of process cannot be founded on the basis that the consequences of the proper application of the legislative structure may produce an 'oppressive' result with which the judge may be unhappy. Although the court may, of its own initiative, invoke the confiscation process, the responsibility for deciding whether properly to seek a confiscation order is effectively vested in the Crown. When it does so, the court lacks any corresponding discretion to interfere with that decision if it has been made in accordance with the statute. The just result of these proceedings is the result produced by the proper application of the statutory provisions as interpreted in the House of Lords and in this court. However to conclude that proceedings properly taken in accordance with statutory provisions constitute an abuse of process is tantamount to asserting a power in the court to dispense with the statute.
>
> As a matter of principle, that is impermissible, and this court has said so. This, in *R v. Shabir [2009] 1 CAR (S) 497* , it was observed:
>
> 'This jurisdiction must be exercised with considerable caution, indeed sparingly. It must be confined to cases of true oppression. In particular, ***999*** it cannot be exercised simply on the grounds that the judge disagrees with the decision of the Crown to pursue confiscation, or with the way it puts its case on that topic.'
>
> We repeat what was said at an earlier hearing involving Paulet.
>
> 'The abuse of process jurisdiction is one which needs to be exercised with great circumspection. The jurisdiction cannot be converted on a case by case basis into a structure which involves, on proper analysis, something like wholesale undermining of the statutory provisions. It is not easy to conclude that it is an abuse of process for those responsible for enforcing legislation to see that it is indeed properly enforced.'"

19 The Court of Appeal found that applicant's case could not be distinguished from its previous ruling in *R. v Carter* . [4] It concluded:

> "The reality is that throughout the period of his employment [the applicant] was relying on a continuing dishonest representation to three different employers. He deceived them into thinking that he was entitled to obtain employment with them. That was a crucial element of his criminality. His earnings, of course, reflected the fact that he had done the necessary work, as we shall assume, to the satisfaction of his various employers. But the opportunity for him to do so, that is the pecuniary advantage, was unlawfully obtained. If the employee worked to his employer's satisfaction, and he paid his tax and National Insurance contributions on his earnings, and his deception either lacked any significant wider public interest, or, perhaps because of the passage of time, but for whatever reason, had ceased to have any meaningful effect on his employers' decision to continue his employment, the resolution of the issue might well be different. As it is there was here a wider public interest. The appellant was deliberately circumventing the prohibition against him seeking remunerative employment in this country in any capacity. No basis for interfering with the order made in the Crown Court has been shown. In our judgment the appropriate link between the appellant's earnings and his criminal offences, in the context of the wider public interest, was plainly established. The appeal therefore fails."

20 On 27 October 2009 the Court of Appeal refused to certify a point of law of general public importance which ought to be considered by the Supreme Court.

21 Enforcement proceedings have since been instigated against the applicant.

B. The asylum and deportation proceedings

22 On 28 June 2007 the applicant applied for asylum in the United Kingdom, alleging that his

father had been killed in a land dispute between the Dioula and Bete community and that he would be at risk in Ivory Coast owing to his Dioula ethnicity. On 4 October 2007 his application was refused by the Secretary of State for the Home Department, who found no objective evidence that the Dioula were targeted solely on account of their ethnicity, and that the delay in claiming asylum had adversely affected the credibility of the rest of the applicant's claim. A deportation order made by the Secretary of State was served on the applicant on ***1000*** 19 November 2007. On 24 April 2008 the applicant brought judicial review proceedings challenging the refusal of asylum and the decision to make a deportation order. This application was refused by the High Court on 16 May 2008 as the application had been lodged out of time and, in any event, the applicant had failed to avail himself of his statutory appeal rights by applying to the then Asylum and Immigration Tribunal. His renewed application for judicial review was rejected by the High Court on 27 June 2008. However, it appears that on 3 April 2008 the applicant submitted a notice of appeal to the Asylum and Immigration Tribunal. This was rejected by the Tribunal on 29 April 2008 as out of time.

II. Relevant domestic law and practice

A. The Proceeds of Crime Act 2002

23 Confiscation proceedings are now governed by the Proceeds of Crime Act 2002. Section 6(4) sets out the approach to be followed by the court:

> "(a) it must decide whether the defendant has a criminal lifestyle;
>
> (b) if it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct;
>
> (c) if it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct."

24 Section 6(5) provides that where the court decides that the defendant has benefited from the conduct referred to, it must decide the "recoverable amount" and make a confiscation order requiring him to pay that amount.

25 Under s.7 , the "recoverable amount" is defined as an amount equal to the defendant's benefit from the conduct concerned unless the defendant shows that the available amount is less than that benefit. In that case the recoverable amount becomes the available amount.

26 Section 8 sets out the test for determining the defendant's benefit from his criminal activity. It reads as follows:

> "(1) If the court is proceeding under section 6 this section applies for the purpose of—
>
> (a) deciding whether the defendant has benefited from conduct, and
>
> (b) deciding his benefit from the conduct.
>
> (2) The court must—
>
> (a) take account of conduct occurring up to the time it makes its decision;

(b) take account of property obtained up to that time."

27 Section 9 defines the recoverable amount as follows:

"(1) For the purposes of deciding the recoverable amount, the available amount is the aggregate of—

(a) the total of the values (at the time the confiscation order is made) of all the free property then held by the defendant minus the total amount payable in pursuance of obligations which then have priority, and

(b) the total of the values (at that time) of all tainted gifts. ***1001**

(2) An obligation has priority if it is an obligation of the defendant—

(a) to pay an amount due in respect of a fine or other order of a court which was imposed or made on conviction of an offence and at any time before the time the confiscation order is made, or

(b) to pay a sum which would be included among the preferential debts if the defendant's bankruptcy had commenced on the date of the confiscation order or his winding up had been ordered on that date."

28 Section 76(3)–(7) defines, inter alia, particular criminal conduct [5] and benefit as follows:

"(3) Particular criminal conduct of the defendant is all his criminal conduct which falls within the following paragraphs—

(a) conduct which constitutes the offence or offences concerned;

(b) conduct which constitutes offences of which he was convicted in the same proceedings as those in which he was convicted of the offence or offences concerned;

(c) conduct which constitutes offences which the court will be taking into consideration in deciding his sentence for the offence or offences concerned.

(4) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.

(5) If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.

(6) References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained both in that connection and some other.

(7) If a person benefits from conduct his benefit is the value of the property obtained."

B. The Criminal Justice Act 1998

29 The above provisions of the Proceeds of Crime Act replaced similar provisions contained in s.71 of the Criminal Justice Act 1988 . It gave the Crown Court (and where appropriate magistrates' courts) the power to make confiscation orders. Section 71(2) provided:

"The Crown Court may make such an order against an offender where—

(a) he is found guilty of any offence to which this Part of this Act applies; and

(b) it is satisfied—

(i) that he has benefited from that offence or from that offence taken together with some other offence of which he is convicted ***1002*** in the same proceedings, or which the court takes into consideration in determining his sentence, and which is not a drug trafficking offence …."

30 Section 71(4) and (5) provided:

"(4) For the purposes of this Part of this Act a person benefits from an offence if he obtains property as a result of or in connection with its commission and his benefit is the value of the property so obtained.

(5) Where a person derives a pecuniary advantage as a result of or in connection with the commission of an offence, he is to be treated for the purposes of this Part of this Act as if he had obtained as a result of or in connection with the commission of the offence a sum of money equal to the value of the pecuniary advantage."

C. R. v Carter [2006] EWCA Crim 416

31 In *Carter* the defendants were convicted of offences of dishonesty and deception in connection with a business supplying casual labour comprising illegal immigrants and asylum seekers. One defendant was convicted of conspiracy to use false instruments, possession of false registration cards, possession of replica immigration stamps and concealing the proceeds of criminal conduct, namely money laundering. Two other defendants, who had obtained work on the basis of the false documents, were convicted of obtaining a pecuniary advantage by

deception and various other counts associated with the conspiracy.

32 Confiscation orders were made under s.71 of the Criminal Justice Act in respect of the wages the defendants had earned in the course of the business. The defendants argued that their wages did not constitute benefit for the purposes of the Criminal Justice Act 1988 . In response the Court of Appeal stated:

> "It seems to us to be obvious that where you obtain an opportunity to work from an offer of employment being made to you, and the offer has been induced by a false representation that you are entitled to work, the false representation continues thereafter for the benefit of the offender who, permitting the representation to continue, is able to retain employment.
>
> Once made it continues to have effect throughout the employment which has been taken up. At any stage had the representation been corrected, it is plain the employment would have ceased."

33 The Court of Appeal considered that, in determining whether benefit was obtained within the meaning of s.71(4) of the Criminal Justice Act 1988 , the question was whether the deception was "an operative cause" of obtaining the benefit. On the facts in *Carter* , that test was met. The court also stated that, whilst the confiscation order regime was "draconian", it was satisfied that it was proportionate for the purposes of art.1 of Protocol No.1 .

D. R. v May [2008] UKHL 28

34 In *May* the House of Lords emphasised the broad principles to be followed by those called upon to exercise the power to make confiscation orders: ***1003**

> "(1) The legislation is intended to deprive defendants of the benefit they have gained from relevant criminal conduct, whether or not they have retained such benefit, within the limits of their available means. It does not provide for confiscation in the sense understood by schoolchildren and others, but nor does it operate by way of fine. The benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or any amounts payable to co-conspirators.
>
> (2) The court should proceed by asking the three questions posed above: (i) Has the defendant (D) benefited from relevant criminal conduct? (ii) If so, what is the value of the benefit D has so obtained? (iii) What sum is recoverable from D? Where issues of criminal life style arise the questions must be modified. These are separate questions calling for separate answers, and the questions and answers must not be elided.
>
> (3) In addressing these questions the court must first establish the facts as best it can on the material available, relying as appropriate on the statutory assumptions. In very many cases the factual findings made will be decisive.
>
> (4) In addressing the questions the court should focus very closely on the language of the statutory provision in question in the context of the statute and in the light of any statutory definition. The language used is not arcane or obscure and any judicial gloss or exegesis should be viewed with caution. Guidance should ordinarily be sought in the statutory language rather than in the proliferating case law.
>
> (5) In determining, under the 2002 Act, whether D has obtained property or a pecuniary advantage and, if so, the value of any property or advantage so obtained, the court should (subject to any relevant statutory definition) apply ordinary common law principles to the facts as found. The exercise of this jurisdiction involves no departure from familiar rules governing entitlement and ownership. While the answering of the third question calls for inquiry into the financial resources of D at the date of the determination, the answering of the first two questions plainly calls for a historical inquiry into past transactions.
>
> (6) D ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else. He ordinarily obtains a pecuniary advantage if

> (among other things) he evades a liability to which he is personally subject. Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property. It may be otherwise with money launderers."

E. R. v Mohammed Shabir [2008] EWCA Crim 1809

35 The case of *Shabir* involved a defendant whose defalcations were accepted to amount to £464 but from whom the Crown sought a confiscation order of over £400,000. The applicant argued, inter alia, that the confiscation order was oppressive and/or a breach of his rights under art.1 of Protocol 1 to the Convention.

36 In considering these arguments, the Court of Appeal concluded: ***1004***

> "The court retains the jurisdiction to stay an application for confiscation, as any other criminal process, where it amounts to an abuse of the court's process. In the present context, that power exists where it would be oppressive to seek confiscation, or to do so on a particular basis.
>
> …
>
> This jurisdiction must be exercised with considerable caution, indeed sparingly. It must be confined to cases of true oppression. In particular, it cannot be exercised simply on the grounds that the Judge disagrees with the decision of the Crown to pursue confiscation, or with the way it puts its case on that topic. A specific example of that principle is that it is clearly not sufficient to establish oppression, and thus abuse of process, that the effect of confiscation will be to extract from a defendant a sum greater than his net profit from his crime(s). That is inherent in the statutory scheme.
>
> …
>
> This country's confiscation regime has consistently been held to be a proportionate and legitimate response to crime and thus to occasion no infringement of the Protocol: see for example *Phillips v United Kingdom (2001) 11 BHRC 280* and *R v Rezvi [2003] 1 AC 1099* . Even if it be accepted that the Protocol may be capable of being infringed by a truly oppressive and thus disproportionate individual order for confiscation (as to which we express no opinion), it is clear that the court's power to stay for oppression provides the remedy.
>
> …
>
> The enormous disparity between the excess of Shabir's inflated claims (some few hundreds of pounds) and the confiscation order of over £212,000 raises the real likelihood that this order is oppressive. As it seems to us, however, such a disparity will not in every case by itself establish oppression. If it is a case in which the criminal lifestyle provisions of the Act can legitimately be applied, and with them the several section 10 assumptions as to the source of assets, it may well be perfectly proper for a confiscation order to be massively greater than the gain from the offences of which the defendant has been convicted. That is the whole purpose of the criminal lifestyle provisions. They extend the reach of confiscation beyond the particular offences of which the defendant has been convicted."

F. R. v Waya [2012] UKSC 51

37 The applicant in this case had obtained a loan of £465,000, which he combined with £310,000 of his own money to purchase a property for £775,000. The mortgage was subsequently redeemed. The applicant was later convicted of making false statements in obtaining the £465,000 loan. By the time of confiscation proceedings in 2008, the value of the property was £1,850,000. At the suggestion of the Crown, the judge assessed his "benefit" as the value of the property at the time of trial, less his original untainted contribution of £310,000. This led to an order being made in the sum of £1,540,000. The Court of Appeal reduced the confiscation order

to £1,100,000, being 60 per cent of the market value of the flat, since 60 per cent of the purchase price came from the tainted mortgage.

38 On appeal, the Supreme Court considered, inter alia, the impact of the Human Rights Act 1998 on the Proceeds of Crime Act 2002 . It held unanimously that the ***1005*** provisions of the 2002 Act were capable of operating in a manner which violated art.1 of Protocol No.1 to the Convention. Consequently, the 2002 Act had to be given effect in a way which was compatible with the Convention. In practice, that meant that a judge should,

> "if confronted with an application for an order which would be disproportionate, refuse to make it but accede only to an application for such sum as would be proportionate."

39 The Supreme Court considered the Court of Appeal's judgments in a number of cases, including that of *Shabir* . It noted that:

> "Whilst the outcomes of those cases were, as is conceded, correct, the better analysis of such situations is that orders such as those there considered ought to be refused by the judge on the grounds that they would be wholly disproportionate and a breach of [Article 1 of Protocol No.1]. There is no need to invoke the concept of abuse of process."

G. Guidance for Prosecutors on the Discretion to Instigate Confiscation Proceedings

40 The above Guidance was issued by the Crown Prosecution Service on 28 May 2009. The Guidance sets out four circumstances when it may be inappropriate for prosecutors to decide to instigate confiscation proceedings. The first was where the Crown has reneged on an earlier agreement not to proceed with confiscation. The second was where the defendant had voluntarily paid full compensation to the victim or victims, or was ready, willing and able immediately to repay all of the victims to the full amount of their losses, and had not otherwise profited from his crime. The third was where a court might be compelled to find that property obtained in the most part legitimately by the defendant, and to which the defendant would have been entitled but for his criminal conduct, must be treated as "benefit". The example was given of a case where the defendant was in fact entitled to the property which he had instead chosen to obtain by deception.

41 The Guidance considered that a fourth situation would be where a defendant had obtained paid employment by a false representation to his employer. The Guidance stated:

> "The defendant's wages may be his benefit (*R v Carter [2006] EWCA Crim 416*), but some cases will arise where the link between the criminality and the receipt of payment from dishonestly obtained employment is too remote, for example, where had the representation been corrected, the employment would have continued, or where after many years of otherwise lawful employment, a relatively minor previous conviction is discovered."

JUDGMENT

I. Alleged violation of art.1 of Protocol No.1 to the Convention

42 The applicant complains that the confiscation order was a disproportionate interference with his right to peaceful enjoyment of his possessions within the meaning of art.1 of Protocol No.1 , which reads as follows: ***1006***

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

43 The Government contested that argument.

A. Admissibility

44 The Government contended that the application should be rejected as inadmissible on the ground that the applicant had failed to exhaust domestic remedies contrary to the requirement of art.35(1) of the Convention as his principal complaint—that the confiscation order disproportionately interfered with his rights under art.1 of Protocol No.1 —was never articulated, either in form or substance, before the domestic courts. On the contrary, his complaints were framed only by reference to the established principles of domestic law.

45 In particular, the Government submitted that the applicant could have asserted directly before the Crown Court and the Court of Appeal that his rights under art.1 of Protocol No.1 would have been infringed by the grant of the confiscation order in the circumstances of his case. However, despite being represented by leading counsel in the proceedings before the Court of Appeal, this argument was not articulated. As a consequence, the domestic courts were deprived of the opportunity of addressing the particular Convention violation alleged against the respondent State.

46 The applicant submitted that the abuse of process jurisdiction was the appropriate means by which to challenge a confiscation order on the ground that it was a disproportionate interference with the right to peaceful enjoyment of possessions.

47 In any case, the applicant submitted that the substance of his complaint—that the confiscation order was disproportionate—was plainly raised in his skeleton argument and indeed art.1 of Protocol No.1 was expressly cited.

48 The Court recalls that the purpose of art.35(1) is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it. [6] Whereas art.35(1) of the Convention must be applied with some degree of flexibility and without excessive formalism, it does not require merely that applications should be made to the appropriate domestic courts and that use should be made of effective remedies designed to challenge decisions already given. It normally requires also that the complaints intended to be brought subsequently before the Court should have been made to those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law. [7]

49 In *Ahmet Sad#k v Greece* , [8] in deciding whether or not an applicant raised a Convention complaint in substance, the Court asked whether or not he had relied ***1007** on domestic-law arguments "to the same or like effect" as his Convention complaint. In *Castells v Spain* , [9] and *Fressoz and Roire v France* [10] the Court found that where the applicants had relied on equivalent provisions of domestic law, they had raised their Convention complaints in substance before the domestic courts. Likewise, in *Guzzardi v Italy* [11] the applicant was found to have "derived from the Italian legislation pleas equivalent, in the Court's view, to an allegation of a breach of the right guaranteed by Article 5 " and, in so doing, had "provided the national courts, in particular the Court of Appeal, with the opportunity … of putting right the violations alleged against them".

50 It is apparent from the applicant's skeleton argument that he raised two distinct grounds on appeal before the Court of Appeal: that his earnings did not amount to a benefit for the purposes of the 2002 Act; and that the making of a confiscation order was oppressive and/or an abuse of process. Prior to the hearing he accepted that he could not succeed on the first ground in view of the court's decision in *R. v Carter* . In respect of the second ground, he submitted that in light of art.1 of Protocol No.1 , in order to remain proportionate the application of the confiscation scheme had to remain rationally connected to the public interest aims pursued and go no further than necessary to achieve them. Thus, a confiscation order would be oppressive or an abuse of process in accordance with domestic law where the benefit figure far exceeded the value of the defendant's crimes and could properly be described as disproportionate—either in the traditional

sense used in criminal proceedings or in the language of the Convention. [12]

51 The Court notes that it was only in 2012, while giving judgment in *R. v Waya* , [13] that the Supreme Court indicated that it would be preferable under British law to analyse confiscation cases in terms of proportionality under art.1 of Protocol No.1 than for complainants to invoke the concept of abuse of process. Therefore, at the time the applicant brought his complaint before the domestic courts, it was appropriate for him to argue his case in terms of "oppression" or "abuse of process". [14] The Court of Appeal in the applicant's case itself stated that "abuses of the confiscation process may occur and, when they do, the appropriate remedy will normally be a stay of proceedings". [15] In fact, in arguing that a confiscation order would be oppressive if it was disproportionate pursuant to art.1 of Protocol No.1 the applicant gave the domestic courts an opportunity to align, in substance, the criteria for the application of the domestic-law test with the test stated in this Court's case-law for compliance with the Convention. [16] However, the domestic courts did not follow this approach and the Court does not consider that the applicant could—or should—have taken any further steps to advance his Convention complaint at the domestic level.

52 Consequently, the Court is not persuaded that the applicant's complaints under art.1 of Protocol No.1 to the Convention should be declared inadmissible for failure to exhaust domestic remedies. ***1008***

53 The Court further notes that the application is not manifestly ill-founded within the meaning of art.35(3)(a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

The parties' submissions

54 The applicant did not dispute that the statutory scheme providing for confiscation in appropriate cases was compatible with art.1 of Protocol No.1 . Moreover, he accepted that it was justified by the fight against drug-trafficking, money laundering and the financing of terrorism. However, he submitted that the confiscation order made in the present case was not proportionate.

55 In particular, he submitted that his case could be distinguished from case such as *Phillips* which concerned serious criminal offences such as drug-trafficking and organised crime, and in which there was clearly a compelling need to deter such criminal behaviour. In the present case, the "public interest" relied upon by the Government was that persons who had applied to enter the United Kingdom from overseas would feel justifiably aggrieved if those who had skipped the queue could retain the savings earned through illegal employment.

56 The applicant relied on the case of Ismayilov v Russia [17] as authority for the proposition that where the purpose of a confiscation order was punitive and not compensatory, it might pose an "individual and excessive burden" on an applicant if he had already been punished for the underlying offence by a period of imprisonment.

57 The applicant further averred that no harm had been caused either to his employers or the state; in fact, the sentencing judge indicated that the state had gained more in taxes from the applicant's employment than he himself had saved.

58 Finally, the applicant submitted that there was a discrepancy between the offence that he was convicted of (deceiving his employers) and the alleged justification for the confiscation order (a general deterrent to working without authority).

59 The Government submitted that the making of the contested confiscation order did not amount to a disproportionate interference with the applicant's peaceful enjoyment of his possessions. In particular, they submitted that the order was in accordance with the law; it represented a control of the use of property in accordance with a recognised public interest; and it was proportionate to the aim pursued.

60 The Government submitted that in implementing and enforcing a regime for confiscating the proceeds of crime, it sought to combat serious crime and provide a deterrent against the commission of further or other offences and reduce the profits available for use in future criminal activity. However, pursuit of such legitimate aims was not restricted to cases concerning

drug-trafficking or organised crime. In the present case, restrictions on the entitlement of persons such as the applicant to seek and obtain work in the United Kingdom were also in the general or public interest because otherwise persons who had applied to enter the United Kingdom through the visa system would be aggrieved that others could "skip the queue" and retain the benefits of their criminal conduct. ***1009***

61 With regard to the issue of proportionality, the Government submitted that the regime as a whole was proportionate because confiscation could only be ordered where an individual was convicted of a criminal offence; only available assets with a value equivalent to a person's benefit from criminal conduct could be the subject of a confiscation order; and the convicted criminal could only be responsible for paying what could be obtained from the realisable assets. Moreover, as recognised by the Guidance from the Crown Prosecution Service—and confirmed by the House of Lords in *R. v May* —procedures were available to the domestic courts to provide a remedy if a disproportionate order was sought.

62 Finally, the Government submitted that the order made in the present case was proportionate because it was made following the conclusion of fair proceedings; the sum confiscated was lower than the benefit obtained from the crime; and the applicant was able to realise the sum confiscated from assets in his possession.

The Court's assessment

63 Article 1 of Protocol No.1 in substance guarantees the right of property. [18] It comprises "three distinct rules": the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. [19] However, the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule. [20]

64 It is not in dispute that the confiscation order in the present case amounted to an interference with the applicant's right to peaceful enjoyment of his possessions as protected by the first sentence of art.1 of Protocol No.1 . Moreover, it is clear from *Phillips v United Kingdom* , [21] that confiscation orders fall within the scope of the second paragraph of art.1 of Protocol No.1 , which, inter alia, allows the Contracting States to control the use of property to secure the payment of penalties. However, this provision must be construed in the light of the general principle set out in the first sentence of the first paragraph and there must, therefore, exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised. [22]

65 An interference with art.1 of Protocol No.1 will be disproportionate where the property-owner concerned has had to bear "an individual and excessive burden", such that "the fair balance which should be struck between the protection of the right of property and the requirements of the general interest" is upset. [23] The striking of a fair balance depends on many factors. [24] Although the second paragraph of art.1 of Protocol No.1 ***1010*** contains no explicit procedural requirements, the Court must consider whether the proceedings as a whole afforded the applicant a reasonable opportunity for putting his case to the competent authorities with a view to enabling them to establish a fair balance between the conflicting interests at stake. [25]

66 The Court has already observed that at the time the applicant brought his complaint before the domestic courts, it was appropriate for him to argue his case in terms of "oppression" and "abuse of process". Although the applicant sought to argue that "oppression" should be interpreted in line with the proportionality test required by art.1 of Protocol No.1 , such an analysis was not adopted by the Court of Appeal. [26] It was only in 2012, while giving judgment in *R. v Waya* , [27] that the Supreme Court indicated that it would be preferable to analyse confiscation cases in terms of proportionality under art.1 of Protocol No.1 .

67 It is clear that in assessing whether or not the confiscation order in the present case was "oppressive" and thus an "abuse of process", the Court of Appeal did ask whether or not the order was in the public interest. However, having decided that it was, they did not go further by exercising their power of review so as to determine

> "whether the requisite balance was maintained in a manner consonant with the applicant's right to 'the peaceful enjoyment of his possessions', within the meaning of the first sentence of Article 1 ." [28]

On the contrary, the Court of Appeal made it clear that the abuse of process jurisdiction had to be exercised "sparingly". In particular, it noted that

> "the responsibility for deciding whether properly to seek a confiscation order is effectively vested in the Crown. When it does so, the court lacks any corresponding discretion to interfere with that decision if it has been made in accordance with the statute."

68 Consequently, the Court cannot but conclude that at the time the applicant brought the domestic proceedings, the scope of the review carried out by the domestic courts was too narrow to satisfy the requirement of seeking the "fair balance" inherent in the second paragraph of art.1 of Protocol No.1 .

69 The foregoing considerations are sufficient to enable the Court to conclude that in the circumstances of the applicant's case there has been a violation of art.1 of Protocol No.1 to the Convention. The Court does not consider it necessary to reach any further conclusions in respect of the proportionality of the confiscation order imposed on the applicant.

II. Application of art.41 of the Convention

70 Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party." ***1011***

A. Damage

71 The applicant claimed twenty-one thousand nine hundred and sixty-three pounds and eighty pence (£21,963.80), plus interest at such a rate as the Court considered appropriate, in respect of pecuniary damage.

72 The Government accepted that this was the sum which the applicant paid pursuant to the confiscation order but submitted that any interest should only run from the date of payment.

73 The Court recalls that the violation found in the present case was procedural in character, based as it was upon the lack of a review of the confiscation order capable of satisfying the requirements of art.1 of Protocol No.1 to the Convention. It cannot be excluded that, had a sufficiently wide review been conducted by the domestic courts, this Court would have found an outcome involving confiscation of the applicant's remaining assets, as occurred in the present case, to be consistent with the Convention. The sum claimed by the applicant in respect of pecuniary damage as just satisfaction under art.41 is in the region of the amount of the confiscation order made against him. [29] However, in the absence of a proximate causal link between the procedural violation found and financial loss sustained by the applicant by reason of the confiscation order, the Court cannot make an award to the applicant under this head. Nevertheless, the Court recognises that the applicant must have suffered some anguish and frustration as a result of the failure of the domestic courts to conduct a Convention-compliant review of the confiscation order. It would therefore award him €2,000 in respect of such non-pecuniary prejudice.

B. Costs and expenses

74 The applicant also claimed £13,353.50 for the costs and expenses incurred before the Court.

75 The Government submitted that this figure was excessive.

76 According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of €10,000 covering costs for the proceedings before the Court.

C. Default interest

77 The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added 3 percentage points.

Order

For these reasons, THE COURT:

1. *Declares* , unanimously, the application admissible.

2. *Holds* , by six votes to one, that there has been a violation of art.1 of Protocol No.1 to the Convention.

3. *Holds,* by five votes to two: ***1012**

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with art.44(2) of the Convention, the following amounts, to be converted into pounds sterling at the rate applicable at the date of settlement:

(i) €2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage; and

(ii) €10,000 (ten thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus 3 percentage points.

4. *Dismisses* , unanimously, the remainder of the applicant's claim for just satisfaction.

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1. See relevant domestic law and practice below.

2. *R. v Carter [2006] EWCA Crim 416* , see relevant domestic law and practice below.

3. See relevant domestic law and practice below.

4. *Carter [2006] EWCA Crim 416* , see relevant domestic law and practice, [31] below.

5. As used in s.6(4)(c) above.

6. See, inter alia, *Civet v France (2001) 31 E.H.R.R. 38* at [41].

7. See, among other authorities, *Cardot v France (1991) 13 E.H.R.R. 853* at [34]; Elçi v Turkey (23145/93 and 25091/94) 13 November 2003 at [604] and [605]; and *Azinas v Cyprus (2005) 40 E.H.R.R. 8* at [38].

8. *Ahmet Sad#k v Greece (1997) 24 E.H.R.R. 323* at [32].

9. *Castells v Spain (1992) 14 E.H.R.R. 445* at [30].

10. *Fressoz v France (2001) 31 E.H.R.R. 2* at [38].

11. *Guzzardi v Italy (1981) 3 E.H.R.R. 333* at [72].

12. See [13]–[16] above.

13. See [37]–[39], above.

14. See, e.g. *R. v Shabir* , in which the appellant argued, inter alia, that the confiscation order was oppressive and/or a breach of his rights under art.1 of Protocol 1 to the Convention, and the domestic courts primarily considered whether or not the order was oppressive.

15. See [18] above.

16. See, e.g. *Hentrich v France (1994) 18 E.H.R.R. 440* at [33].

17. Ismayilov v Russia (30352/03) 6 November 2008 .

18. See *Marckx v Belgium (1979–80) 2 E.H.R.R. 330* at [63].

19. See, inter alia, *Sporrong v Sweden (1983) 5 E.H.R.R. 35* at [61].

20. See *Lithgow v United Kingdom (1986) 8 E.H.R.R. 329* at [106].

21. *Phillips v United Kingdom (41087/98) 5 July 2001* at [51].

22. See, among many examples, *Jacobsson v Sweden (No.1) (1990) 12 E.H.R.R. 56* at [55].

23. See *Sporrong (1983) 5 E.H.R.R. 35* at [73].

24. *AGOSI v United Kingdom (1987) 9 E.H.R.R. 1* at [54].

25. *AGOSI (1987) 9 E.H.R.R. 1* at [55]; and *Jokela v Finland (2003) 37 E.H.R.R. 26* at [55].

26. See [17]–[19] above.

27. See [37]–[39], above.

28. See *Sporrong (1983) 5 E.H.R.R. 35* at [69].

29. See [11] and [71] above.

30. Paragraph numbering added by the publishers.

31. See [68].

32. See [64].

33. See *Phillips v United Kingdom (41087/98) 5 July 2001* ; and Bongiorno v Italy (4514/07) 5 January 2010 .

34. See *Broniowski v Poland (2006) 43 E.H.R.R. 1* at [151].

35. See [69].

36. See [73].

37. See [68].

38. See [73].

39. Paragraph numbering added by the publishers.

40. See [64] of the Court's judgment in the present case (the present judgment).

41. Cited at [65] of the present judgment.

42. See [37]–[39] of the present judgment.

43. Set out at [19] of the present judgment.

44. At [67].

45. At [66].

46. See [39] of the present judgment.

47. See [18] of the present judgment.

48. Quoted at [36] of the present judgment.

49. Paragraph numbering added by the publishers.

50. See the reference to the *Sporrong v Sweden (1983) 5 E.H.R.R. 35* at [67].

51. See [67] *in fine* .