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R v Andrewes: judgment day for CV fraudsters? Case commentary on the Supreme Court decision reported at [2022] UKSC 24

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ABSTRACT

Crime pays. Therefore, it is paramount that offenders are not permitted to retain the illicit profits derived from their course of offending. That is the purpose of the criminal law confiscation regime, which applies to a plethora of different offences where the state confiscates the ill-gotten gains the offender has retained after sentencing. This commentary focuses on one of these offences, the colloquially named *curriculum vitae* (CV) fraud. A relatively novel phenomenon in English law, CV fraud has come to the fore as a result of *R v Andrewes*, a recent Supreme Court decision. This commentary assesses this decision and ultimately concludes that while the Supreme Court's approach is sound in principle, it does not provide a solution which encompasses the broader spectrum of cases falling within the category of CV fraud. The *Andrewes* approach to the calculation of 'criminal benefit' may therefore require considerable adaptation in future cases. Perhaps most importantly, the absence of discussion on causation leaves this corner of the confiscation regime a grey area. This commentary sets out to offer a principled solution which might resolve this issue.

Keywords: *Andrewes*; proceeds of crime; confiscation; employment; CV fraud; causation; proportionality.

INTRODUCTION

The phenomenon of *curriculum vitae* (CV) fraud has recently found itself thrust into the legal limelight as a result of prominent litigation, news coverage, and academic discussion on the matter. In its simplest form, CV fraud denotes falsifying the details of one's educational history or work experience for the purposes of

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obtaining employment. The precise nature of CV fraud can vary in scope, ranging from a seemingly innocuous exaggeration as to one's skills and extracurricular interests, to the more serious cases which involve a consistent chain of falsehoods relating to the applicant's qualifications, academic achievements and employment history. It is on the more serious end of this spectrum where *R v Andrewes* lies, the final appeal in a course of litigation which provided the Supreme Court with the opportunity to determine the circumstances in which a confiscation order based on salary obtained through CV fraud will be proportionate.[1]

BACKGROUND

Mr Jon Andrewes applied for the position of Chief Executive Officer (CEO) at St Margaret's Hospice, Taunton, in October 2004. Under 'essential' requirements, applicants were to possess a first degree and 10 years' management experience with three years in a senior appointment. 'Desirable' attributes included an MBA and five years' experience in a senior appointment. In his application, Mr Andrewes claimed to hold a degree in social policy and politics, an MPhil in poverty and social justice, and an MBA in management science. He also claimed to be undertaking a PhD in ethics and management. Regarding his employment history, he indicated that he had been on secondment at the Home Office between 1979 and 1982, and had held numerous senior management and executive positions in the charitable sector from 1985 onwards.

However, these claims about his employment and educational history were no more than a 'staggering series of lies', which went undetected and enabled him to acquire the hospice CEO position in December 2004 at an initial annual salary of £75,000. Mr Andrewes maintained this façade during his tenure, and in 2006 informed his colleagues that he had completed his PhD, thereafter asking to be addressed as 'Dr Andrewes'. Using corresponding falsehoods, Mr Andrewes subsequently applied for and obtained two further remunerated appointments: first, the position of non-executive director at Torbay NHS Care Trust in 2007; second, chair of the Royal Cornwall NHS Hospital Trust in 2015. Despite the drastic disparity between his falsified background and actual experience, Mr Andrewes' performance was always appraised as either 'strong' or 'outstanding'. In 2015, however, the truth began to emerge, and Mr Andrewes' precariously assembled house of cards collapsed, bringing his employment and appointments to an end.

1 [2022] UKSC 24. *Andrewes* has since been followed in *R v Jiang (Shunjian)* [2022] EWCA Crim 1516, where the entire 'benefit' of an illegal enterprise was confiscated.

PROCEDURAL HISTORY

Criminal proceedings were initiated on three counts: one count of obtaining a pecuniary advantage by deception under section 16(1) of the Theft Act 1968; and two counts of fraud by false representation under section 2 of the Fraud Act 2006. Mr Andrewes pleaded guilty to all three counts, and was sentenced to two years' imprisonment in March 2017, with His Honour Judge Mercer QC noting that Mr Andrewes had proliferated 'a series of staggering lies' on which his 'outwardly prestigious life' was precariously perched for over a decade.

Subsequent confiscation proceedings were heard by Recorder Meeke QC, who determined that Mr Andrewes' full earnings of £643,602.91 (net of tax and national insurance) constituted benefit from particular criminal conduct. The recoverable amount was £96,737.24,[2] and a confiscation order was made for that sum. The recorder rejected the submission that Mr Andrewes had not benefited from criminal conduct because he had earned remuneration from the work performed, and that any benefit was thus too remote. He also did not regard the confiscation order as disproportionate under the Proceeds of Crime Act (POCA) 2002,[3] saying that it represented less than 15 per cent of the benefit figure.

Mr Andrewes appealed against the confiscation order, and the Court of Appeal examined the case from the angles of causation and proportionality. The court found Mr Andrewes' causation arguments to 'fail at every level', concluding that provision of lawful and full value service for remuneration received did not break the causal chain.[4] The first reason given for this conclusion was Mr Andrewes' guilty plea to the three counts brought against him: 'by his pleas to counts 1–3 ... he plainly accepts, in terms, that he had [benefited from his particular conduct]'.[5] The court dismissed remoteness as a non-issue because the false representations were continuing[6] and cited the broadness of the

2 The recoverable amount is the lower figure of either the criminal benefit or the available amount, per POCA, s 7. In this case £96,737.24 was the available amount, 'available' meaning the amount Mr Andrewes could actually realise.

3 Under POCA, s 6(5).

4 *R v Andrewes* [2020] EWCA Crim 1055, [38]–[40], [68].

5 Ibid [26]. This assertion that a guilty plea equates to agreement or acquiescence that earnings were not too remote and that the money earned was thus criminal benefit runs the risk of retrospectively putting words in the mouth of the accused.

6 Ibid [70]–[72]. Continuation of misrepresentation is perhaps better categorised under factual causation than legal remoteness, in that 'but for' the continuance of his misrepresentations Mr Andrewes would have lost the opportunity to earn.

language of section 76(4) and (5) of POCA[7] to justify focusing simply on satisfaction of the 'but for' test. However, the court concluded that a confiscation order for any amount would be disproportionate because Mr Andrewes had given full value for his earnings in rendering services to a high standard.

The Crown appealed to the Supreme Court solely on the grounds of proportionality, Mr Andrewes having conceded that he had relevantly benefited from his criminal conduct. The Crown continued to advocate for a 'take all' approach (confiscation of full net earnings) while Mr Andrewes endorsed the 'take nothing' approach adopted by the Court of Appeal. The certified question for the Supreme Court was as follows:

> Where a defendant obtains remuneration as a result of or in connection with an offence of fraud based upon the obtaining of employment by false representations or non-disclosure, in what circumstances (if any) will a confiscation order based on the wages earned be disproportionate within the terms of section 6(5) of the Proceeds of Crime Act 2002, or contrary to Article 1, Protocol 1 (A1P1) of the European Convention on Human Rights?

IN THE SUPREME COURT

The Supreme Court unanimously allowed the Crown's appeal. Lord Hodge and Lord Burrows delivered the main judgment, with which Lord Kitchen, Lord Hamblen and Lord Stephens agreed. Before turning to the decision, however, it is first necessary to consider (albeit briefly) a chronology of the confiscation regime leading up to *Andrewes*.

Before the seminal judgment in *R v Waya*,[8] which is considered below, the confiscation regime was without a keystone. The first version of the POCA was passed in 1995, itself an amending statute intended to remedy the significant practical differences spawned by its piecemeal predecessors. However, after the enactment of the Human Rights Act (HRA) in 1998, the statute had to be read in a way which gave effect to rights[9] under the European Convention on Human Rights (ECHR) and in light of this, any application of the POCA became rather problematic. In particular, the 1995 Act effectively removed the Crown Court's discretion in the making of a confiscation order if

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7 POCA s 76(4) provides: 'A person benefits from conduct if he obtains property as a result of or in connection with the conduct.' S 76(5) provides: '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.'

8 [2012] UKSC 51.

9 HRA, s 3.

it was successfully applied for by the prosecution and the statutory requirements were satisfied.[10] The court therefore had no discretion to mould a confiscation order to secure justice in each case, opening the door to grossly disproportionate results.

Initially, the position remained the same under the POCA 2002. Under this version (as enacted), the court was only required to determine the recoverable amount of money and make a confiscation order for that amount.[11] While the POCA 2002 was subsequently certified as Convention compliant,[12] the underlying question remained: would the application of POCA's rules for calculating the confiscation order amount to a contravention of Convention rights? As the certified question indicates, the relevant Convention right has always been article 1, protocol 1 (A1P1) of the ECHR, which provides for the peaceful enjoyment of property to the extent that it is not prohibited by law, the public interest, or the principles of international law. This provision requires, via the rule of fair balance, that there be a reasonable relationship of proportionality between the means employed by the state in depriving criminals of their property and the legitimate aims sought by that deprivation.[13]

Nevertheless, in the cases preceding *Waya*, there was little reference to this notion of proportionality. In *R v Rezvi*,[14] for instance, Lord Steyn, whilst acknowledging the legitimate aim of depriving criminals of the profits of their crime, strongly emphasised the importance of punishment and deterrence, an emphasis which was cited and applied in many subsequent cases.[15] Yet, in light of this interpretative obligation, the reference to these provisos was plainly incorrect, specifically because the regime was not intended to be penal or deterrent in effect. A confiscation order is not an additional fine or penalty; it simply strips the profits of crime.[16] The punishment received by the offender is to be contained in the sentence passed following a finding of guilt, and confiscation proceedings are entirely distinct from the sentencing process. While *R v May* subsequently recognised the importance of proportionality, noting that a failure to consider the proportionality proviso could lead to an 'oppressive' interference with Convention rights,[17] there yet remained no explicit expression of proportionality in the confiscation regime.

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10 *Waya* (n 8 above) [4].
11 POCA, s 6(5).
12 Under the HRA, s 19.
13 *Jahn v Germany* (2006) 42 EHRR 1084, [93].
14 [2002] UKHL 1.
15 *Waya* (n 8 above) [2].
16 Ibid.
17 [2008] UKHL 28, [42].

This brings us to *Waya*, where the Supreme Court recognised that, in order to avoid infringing A1P1, each confiscation order had to be proportionate to the legislative objective of stripping the profits of crime. In this, section 6(5) of the POCA was read as subject to the qualification that the court could make a confiscation order for the recoverable amount 'except insofar as such an order would be disproportionate and thus a breach of Article 1, Protocol 1'.[18] On the facts of *Waya*, a proportionate confiscation order was therefore not one which focused on the value of Mr Waya's fraudulently obtained mortgage (he had misrepresented his earnings), but rather one which focused on the benefit obtained, the increase in the value of the property acquired through the loan.[19]

Prior to this qualification, disproportionate confiscation orders were prevented by reliance on the court's jurisdiction to avert an abuse of process. For instance, in *R v Shabir*,[20] the defendant's benefit was calculated as £464, but the Crown nevertheless sought a grossly disproportionate £400,000 confiscation order as a result of the circumstances in which he obtained the money. These proceedings were rightly stayed for an abuse of process. While the Court in *Waya* accepted that this decision was plainly correct,[21] it believed that the better analysis was one based on proportionality, as this more adequately appreciated the special relationship between the POCA and ECHR. After *Waya*, the POCA was amended to include an explicit reference to proportionality, with section 6(5) now providing that the court must make a confiscation order for the recoverable amount 'to the extent that it would not be disproportionate to require the defendant to pay the recoverable amount'.[22]

Perhaps of equal importance was *Waya*'s recognition that a defendant could potentially restore the benefit gained through their criminal conduct in ways other than monetary repayment – certain acts could be analogous to restoration.[23] An example of this was a defendant who, by deception, induced someone to trade with them, but otherwise gave full value for the lawful goods or services obtained. While such individuals clearly deserved punishment (some form of criminal sentence), the question of whether a confiscation order was proportionate was entirely distinct and required no small degree of circumspection.[24] Nonetheless, it is imperative to note that *Waya*

18 *Waya* (n 8 above) [16].
19 Ibid [41], [79].
20 [2008] EWCA Crim 1809.
21 *Waya* (n 8 above) [18].
22 Inserted by the Serious Crime Act 2015, sch 4, para 19.
23 *Waya* (n 8 above) [34].
24 Ibid.

explicitly left the door open concerning the proper application of proportionality (and causation) to confiscation proceedings involving CV fraud, deeming that such questions were best answered in an appeal where they directly arose.[25]

Given the dearth of case law on this issue in the decade that followed, *Andrewes* was precisely that appeal. The Supreme Court seized this opportunity to reframe *Waya* whilst revisiting certain aspects of the proportionality regime which had caused practical difficulties. Crucially, it was noted that the Court of Appeal was mistaken in drawing a distinction between the notion of proportionality in section 6(5) of the POCA and that in A1P1 of the ECHR.[26] Here the Supreme Court reaffirmed the traditional *Waya* analysis by recognising that the section 6(5) POCA proviso *already* embraced the ECHR notion of proportionality and had to be read in a manner which gave effect to A1P1.

The relationship between these two provisions was explained more recently in *Bank Mellat v HM Treasury (No 2)*,[27] a leading case on the notion of Strasbourg proportionality in United Kingdom domestic law, which laid down a four-part proportionality test. Using this analysis, the court explained how the confiscation regime already satisfies the first three tenets of ECHR proportionality: it harbours the legitimate aim of disgorging the profits of crime; it is a rational means of doing so; and the goal cannot be achieved less intrusively. The sole issue was the fourth step, which asks whether the measure is a proportionate means of achieving the legitimate aim. In the court's view, this was precisely what the proviso in section 6(5) already asked – namely whether the confiscation of the relevant sum was a proportionate means of removing the profits of crime. Thus, it is clear that this distinction (if there ever was such) is no longer in existence; and the two tests are, at least in this context, now coterminous. While this issue did not appear to manifestly influence the Court of Appeal's decision, given it did not regard confiscation to be in any sense proportionate, the clarification is nevertheless welcome because it streamlines the theory of proportionality underlying the regime, and thus expedites confiscation proceedings in the Crown Court.

Turning to the submissions before the Supreme Court, neither party's approach found favour with the bench. The 'take all' approach argued by the Crown was disproportionate because such indiscriminate confiscation did not recognise or reflect a deduction for the value of the services legally provided by Mr Andrewes. In this vein, the Supreme Court agreed with the Court of Appeal that such recovery

25 Ibid.

26 *Andrewes* (n 1 above) [38].

27 [2013] UKSC 39, [20], [74].

would constitute a 'double penalty',[28] and thus double punishment, something explicitly recognised to be 'disproportionate and wrong'.[29] On the other hand, Mr Andrewes' 'take nothing' approach was equally unsatisfactory: in the absence of any confiscation order, he would effectively be permitted to retain benefit from his fraud, an affront to the regime's very purpose.

Therefore, faced with two 'extreme' approaches, one too harsh and the other too lenient, the Supreme Court turned to a 'principled middle way' in seeking to confiscate only the 'profit' of the fraud. Just what this meant was explained through the lens of *R v Sale*.[30] In this case, the defendant Mr Sale was the sole director and shareholder of a company which obtained valuable contracts with Network Rail by bribing one of its managers. Of the £1.9 million turnover deriving from these contracts, the court assessed the profit (before tax) as being £200,000. While Mr Sale, like Mr Andrewes, had given full value for the benefit obtained, because the contracts had been performed legally, efficiently and at market price, the court nevertheless reasoned that the previous confiscation order (the entire turnover of £1.9 million) should be replaced by one which confiscated only the £200,000 profit, thereby removing the 'benefit' of Mr Sale's crime.[31]

For Mr Andrewes, his 'profit' was determined as the difference between his pre-fraud earnings of £54,361 in 2004 and his fraudulently obtained higher earnings of £75,000 from 2004 onwards. This difference equated to a 38 per cent increase in net earnings. Applying this increase to his full net earnings of £643,602.91 amounted to a sum of £244,569 – the true 'profit' gained from his fraudulent course of employment. To simplify matters, the court noted that this was not a complex accounting exercise, and while some evidential reasoning remained necessary, the issue was to be approached in a broad-brush manner to simplify the administration of justice in Crown Court confiscation hearings.[32] This broad-brush approach is best evidenced through the manner in which the court simply added Mr Andrewes' further higher earnings from his two subsequent appointments without compounding the percentage benefit,[33] which would have amounted to a greater 'benefit' figure. Nonetheless, since the profit figure vastly exceeded the recoverable amount of £96,737.24 it was plainly proportionate to confiscate that

28 *Andrewes* (n 1 above) [42].
29 *Waya* (n 8 above) [28]–[29], [33].
30 [2013] EWCA Crim 1306.
31 *Andrewes* (n 1 above) [31].
32 Ibid [48].
33 Ibid [51].

amount and thus Recorder Meeke QC's confiscation order was duly restored, albeit supported by very different reasoning.[34]

THE NEW HALFWAY HOUSE

CV fraudsters beware: *Andrewes* signifies that even the provision of full value for the benefit obtained will not necessarily spare them from a confiscation order, no matter the quality of their work or ultimate value to their employer. Put simply, if an individual commits CV fraud, it will be proportionate to confiscate the difference between their pre-fraud earnings and the higher earnings obtained following their fraud. This new test is commendable as it re-tethers the confiscation regime to its legislative purpose – removing the *profits* of crime. The Court of Appeal seemingly focused on the wrong question in asking whether any order would be proportionate, notwithstanding the amount. In failing to remove the benefits of Mr Andrewes' crime, despite recognising that he had 'relevantly benefitted' from his criminal conduct, the Court of Appeal perhaps lost sight of the underlying objective of the POCA[35] and placed too much weight on the provision of full value for the wages received, an oftentimes unquantifiable calculation.

The confirmation that the provision of full value does not automatically bar a confiscation order represents some derogation from precedent. A few months prior to *Andrewes*, the Court of Appeal in *R v Asplin* analysed the precedents and concluded that 'if full value has been given for the benefit received, it will be disproportionate to make a confiscation order'.[36] While it was conceded that the provision of anything less than full value – such as 'significant value' – would render a confiscation order proportionate,[37] it appears that the courts in these cases had become unduly distracted with notions of full value and restoration. While the 'full value' consideration is indubitably important because a confiscation order against a defendant who has restored some of the benefit obtained should reflect this to remain proportionate, it ought not to be the preeminent consideration.

Attaching too much significance to the provision of full value could permit the defendant to retain significant criminal benefit. The question is now whether the defendant has disgorged the 'true' benefit of their crime; cases which pre-date *Andrewes*, to the extent that they informed

34 Ibid [52], [57].

35 *Waya* (n 8 above), [27].

36 [2021] EWCA Crim 1313 [33]. Precedents considered included *May* (n 17 above); *R v Morgan* [2008] EWCA Crim 1323; *R v Sale* [2013] EWCA Crim 1306. The Court of Appeal judgment in *R v Andrewes* [2020] EWCA Crim 1055 was also considered at this juncture.

37 Ibid [50].

decisions on full value and proportionality in making a confiscation order, must now be treated with a great degree of circumspection in future cases where the defendant has made restoration, or performed acts regarded as analogous to restoration.

Importantly, the Supreme Court also provided guidance on the issue of where the services provided are illegal *per se*, such as practising medicine without a licence. This distinction is paramount. The Supreme Court dedicated much of its judgment to an analysis of previous cases on this issue, chief of which was *R v King*,[38] where the Court of Appeal actually removed the turnover figure as opposed to the profit because the entire business enterprise was founded on illegality, rather than merely being tainted by it. *Andrewes* endorsed this approach, holding that illegal services have no value the law should recognise,[39] and therefore confiscation to that end will not constitute double disgorgement as the provision of illegal labour cannot 'restore' value. The pertinent consideration is whether the provision of services is a criminal offence; a legal bar to appointment is not sufficient to render a confiscation order for the full turnover or earnings proportionate.[40]

Overall, the Supreme Court's reaffirmation is immensely instructive. Two years prior to *Andrewes*, the Law Commission had noted how 'the absence of an overt statement' as to the purpose of the POCA regime meant that its central objective in disgorging the proceeds of crime had been marred by other ancillary objectives, thereby confounding the regime, and unfairly impacting upon the assessment of proportionality in other comparable cases.[41] While the defendant will undoubtedly view the regime as deterrent and penal in effect,[42] the essence of the legislation nevertheless rests squarely on the notion of disgorging the proceeds of crime. *Andrewes*, therefore, arguably represents the 'overt statement' the Law Commission desired, but its clarificatory effect is perhaps limited to cases of CV fraud, and where services provided were lawful.

THE MISSING LINK: CAUSATION

The question of causation remains unresolved. Given that the appeal focused on proportionality – causation having been conceded – the Supreme Court was not afforded scope to discuss this in detail. Thus, the short conclusion is that the approach applied by the Court of Appeal

38 [2014] EWCA Crim 621.

39 *Andrewes* (n 1 above) [42].

40 Ibid [54].

41 Law Commission, *Confiscation of the Proceeds of Crime after Conviction* (Consultation Paper No 249 2020) [5.36]–[5.37].

42 *R v Harvey* [2015] UKSC 73, [55].

in *Andrewes* must stand. In this context, causation is satisfied if (i) 'but for' the dishonest statements the defendant would not have secured employment; and (ii) the false representations continued throughout the employment.[43] While the focus on simple 'but for' causation corresponds with the broad-brush approach endorsed by the Supreme Court,[44] the inadequate consideration afforded to legal causation or 'remoteness' leaves it unclear precisely when the benefit obtained will be too remote from the relevant criminal conduct. This is particularly problematic given that *Waya* acknowledges that cases of employment obtained by deception may raise 'difficult questions of causation … quite apart from any argument based upon disproportion'.[45]

Should it be concluded that property is obtained 'as the result of or in connection with' an offence where the defendant's lawful conduct far surpasses the illegal conduct in operative effect? Neill LJ considered this question in *R v King and Stockwell*: 'the question in each case is: was the deception an operative cause of the obtaining of the property?.[46] A test of operative cause would give legal causation its due place, considering the contribution the unlawful act made to the benefit obtained versus other factors which may render benefit too remote. Inverse analogy might be drawn to the doctrine of *novus actus interveniens*, in that the defendant's own lawful actions detract from the consequences of the unlawful actions.[47] Lord Bingham's analogy in *R v May* is illustrative:

> If (say) a defendant applies £10,000 of tainted money as a down-payment on a £250,000 house, legitimately borrowing the remainder, it cannot plausibly be said that he has obtained the house as a result of or in connection with the commission of his offence.[48]

Applying this reasoning, a defendant's lawful contributing conduct throughout the employment *could* result in the fraud ceasing to be legally operative, rendering the benefit too remote. This rationale is consistent with POCA section 8(2)(a), which provides that the court 'must take account of conduct occurring up to the time it makes its decision' in determining whether the defendant has benefited from the criminal conduct. Such reasoning is also not novel: in the unreported

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43 *Andrewes* (n 1 above) [26].

44 Ibid [48].

45 *Waya* (n 8 above) [34].

46 [1987] QB 547, 553.

47 Take, for example, the employee whose employer decides to give him a promotion and pay rise for exceptional performance: although such income would not be received 'but for' the fraud, its receipt is conceptually even further removed than base salary.

48 *May* (n 17 above) [26].

case of *R v Lewis*,[49] the court held the defendant was paid because of the services she rendered during her employment as a teacher, not because of her false representation that she had a teacher's licence. The Court of Appeal likewise recognised in some employment cases that false representations might cease to have operative effect,[50] but there is unfortunately no clarification as to when this might occur.

The foregoing is not to suggest legal causation should be used as a bulwark against confiscation orders by rendering the benefit entirely remote from the criminal conduct; rather, it might operate in tandem with proportionality to create a balanced regime that strips only the profits of crime, and nothing further.

FUTURE APPLICATION

A number of different factual scenarios demonstrate the practical difficulties in employing the *Andrewes* formulation in future cases. Firstly and most obviously, how would the principled middle way apply if an individual falsified their CV to obtain their first employment? According to the *Andrewes* algorithm, criminal benefit equals the difference between the lower pre-fraud earnings and the higher earnings obtained in connection with fraud. In such a case where previous earnings equal zero, the difference and thus criminal benefit would be the full net earnings, despite restoration of value by the defendant. Yet *Andrewes* reaffirms the confiscation order ought to 'reflect a deduction for the value of the services rendered', else it would constitute 'double disgorgement' and would be disproportionate.[51]

Likewise, it is unclear how a proportionate confiscation order is to be determined where an individual falsifies their CV to obtain a job which pays *less* than their previous position. Such circumstances could arise if an individual has lost their job in a highly specialised industry and must act quickly to secure employment elsewhere, or where an individual commits fraud by non-disclosure after having lost a better-paying position for some reprehensible reason they wish to hide. Here the pre-fraud earnings could be much higher than those obtained post-fraud, meaning that the defendant has not 'benefited' from their fraud per the *Andrewes* algorithm. Notwithstanding, following the *Andrewes* conclusion on causation, such individuals' earnings would constitute benefit obtained in connection with criminal conduct, thus potentially warranting some confiscation.

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49 (Somerset Assizes, January 1922); see *Russell on Crime* 12th edn (Sweet & Maxwell 1964) vol 2, 1186.

50 *Andrewes* (n 1 above) [75].

51 Ibid [41].

Accordingly, the 'principled middle way' may have a narrow application. In our limited proffered examples, the equation would require significant alteration or revision; for example, the court might (arbitrarily) adopt the national average salary to serve as a lower figure if the individual has no prior comparable earnings. For those cases which fall entirely outside the remit of the *Andrewes* algebra – such as those where the higher and lower values are inverted – the court may need to revert to the drawing board, or at least undertake major modification of the equation, to ensure proportionality.

Furthermore, the court did not answer its own question as to how the middle way would work where the defendant is paid an upfront sum for lawful services and there has not yet been restoration.[52] In these circumstances, the grounds for disgorgement might lie in the forestated causation theory because payment has been received immediately after the fraudulent act, without lawful work intervening as a prerequisite to receipt of wages. However, if the defendant has commenced work after the 'golden handshake', the confiscation order may again require a deduction to reflect restoration provided to ensure proportionality. Once more, this falls outside the *Andrewes* algorithm; the court might instead consider what percentage or proportion of the services promised has been completed and constitutes restoration.

Thus, although the Supreme Court helpfully clarified the general principles to adopt when determining a proportionate confiscation order in cases of CV fraud, the 'principled middle way' will only work where there is evidence of quantifiable lower earnings and higher earnings, and where there is a legal market for services provided.[53] As *Waya* foresaw, 'prosecuting authorities may need to reflect long and hard before deciding on confiscation proceedings',[54] as without clear evidence of antecedents as regards previous legal earnings, confiscation proceedings might quickly prove futile. Additionally, in many cases the criminal benefit will vastly exceed the recoverable amount, in practice negating the need for precise or complex accounting exercises, given that section 6(5) of POCA instructs the court to address the proportionality of confiscating the recoverable amount rather than the benefit obtained.[55]

CONCLUSION

The principled middle way adopted by the Supreme Court, at least *prima facie*, deals well with the requirement of proportionality. In striving to

52 Ibid [55].
53 Ibid [53].
54 *Waya* (n 8 above) [19].
55 *Andrewes* (n 1 above) [50].

confiscate only the profits of the fraud, the ruling refocuses attention on the confiscation regime's true purpose – stripping the profits of crime. It is a judgment to be respected for (i) its clarification of proportionality in cases of CV fraud; (ii) its confirmation of the coterminous relationship between Strasbourg and POCA proportionality; and (iii) its clarification of proportionality in cases where the services provided are illegal. That said, this approach is not a panacea; its straightforward application is limited to specific timelines of CV fraud, potentially leaving avenues of future appeal open where the facts deviate from the *Andrewes* matrix. Likewise, whilst the need to avoid complicating the administration of justice in Crown Court confiscation proceedings is certainly valid, the absence of a reasoned conclusion on causation is unfortunate, given the theoretical and potential practical uses this line of reasoning possesses.