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Confiscation orders, confusion and a lament for the past: the case of Bernadette Hilton: *R v Hilton* [2020] UKSC 29

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The last few years have witnessed some memorable cases in the Supreme Court, dealing with such momentous issues as Brexit,[1] the right of the Prime Minister to prorogue Parliament,[2] and the detention of Gerry Adams under the 1972 internment legislation.[3] However, even the most trivial and seemingly humdrum of cases can end up in that august tribunal. When Bernadette Hilton was convicted of benefit fraud in September 2015, she cannot have imagined that her case would end up four years later in the highest court in the land.[4] Yet, though the case might have appeared routine in nature, it raises a number of fundamental and wide-ranging issues with regard to the making of confiscation orders, the sentencing regime generally and the relationship between the legal academy and the professions.

The facts of the case are relatively simple, but the legal issues to which it gave rise were anything but.[5] The defendant was convicted before the magistrates' court in Belfast of making false statements in order to obtain income support, contrary to section 105A of the Social Security Administration (NI) Act 1992. She was then committed to the Crown Court with a view to the making of a confiscation order under section 156 of the Proceeds of Crime Act 2002 (POCA), which corresponds to section 6 of that Act in relation to England and Wales.[6] Though the provisions regarding this are extremely complex,[7] the basic rule is that the court has to calculate the extent of the benefit

1 *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
2 *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41.
3 *R v Adams* [2020] UKSC 19.
4 *R v Hilton* [2020] UKSC 29, [2020] 1 WLR 2945.
5 The facts are taken from paras [1]–[3] of the judgment.
6 Pt 1 of the Act deals with England and Wales and pt IV of this deals with Northern Ireland. Since the issues in the case apply equally to England and Wales, the corresponding English section will also be given in the relevant footnote.
7 See, generally, Archbold Criminal Pleading Evidence and Practice (2021 edn) chapter 5B.

gained by the defendant from the relevant criminal conduct,[8] and then to make a confiscation order in respect of that sum.[9] However, in many cases the defendant may not have the means to pay the full sum,[10] and here the court must make an order up to the limit of his or her available assets.[11] And this is precisely what happened in the case of Ms Hilton. The extent of the benefit was assessed at £16,517.59, but the defendant did not have the resources to pay this in full. So the court went on to calculate her available assets and came up with a figure of £10,263.50, based on the value of a house held by the defendant jointly with her former partner, less a sum still owing in respect of an outstanding mortgage. So far, so good.

However, this is where things began to get complicated. The defendant appealed against the making of the order,[12] and while this was being prepared someone drew her attention (or rather that of her counsel) to section 160A[13] of the 2002 Act, which had been inserted by virtue of section 24 of the Serious Crime Act 2015 and had come into force at the beginning of June that year. The key provisions of section 160A were (and are) as follows:

> (1) Where it appears to a court making a confiscation order that—
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> (a) there is property held by the defendant that is likely to be realised or otherwise used to satisfy the order, and
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> (b) a person other than the defendant holds, or may hold, an interest in the property,
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> the court may, if it thinks it appropriate to do so, determine the extent (at the time the confiscation order is made) of the defendant's interest in the property.
>
> (2) The court must not exercise the power conferred by subsection (1) unless it gives to anyone who the court thinks is or may be a person holding an interest in the property a reasonable opportunity to make representations to it.

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8 POCA, s 156(4) (s 6(4) for England and Wales). Normally, the court will look in this connection at the conduct relating to the offence of which the defendant stands convicted; this is called his or her 'particular' criminal conduct (s 156(4)(c) (s 6(4)(c)). But in cases where the defendant is found to have a 'criminal lifestyle', the court can also take into consideration his or her 'general' criminal conduct, which has a much wider focus (s 156(4)(b) (s 6(4)(b)). However, there was no question of a criminal lifestyle in the present case.

9 POCA, s 157(1) (s 7(1) in England and Wales).

10 The burden of proof here is on the defendant: POCA, s 157(2) (s 7(2) in England and Wales).

11 This is called 'the available amount': POCA, s 157(2)(a) (s 7(2)(a) in England and Wales). S 159(1) (s 9(1)) sets out the formula by which this is to be calculated.

12 *R v Hilton* (n 4 above) para [3].

13 Corresponding to s 10A for England and Wales.

This provision had not been cited to the Crown Court at the time the order was made,[14] but the defendant argued that it was fatal to the validity of the order. In particular, she highlighted section 160A(2) in this connection.[15] As we have seen, the decision of the Crown Court as to the available sum was based on the value of a house held by the defendant jointly with her former partner, which was moreover still subject to an outstanding mortgage. Yet, neither the partner nor the mortgagee had even been aware of the proceedings, still less had they been given any opportunity to make representations at the time when the confiscation order was made.

The defendant's contentions in this respect were upheld by a unanimous Court of Appeal.[16] The Crown Court judge, they concluded, had clearly made a determination under section 160A(1), but had overlooked section 160A(2).[17] In the words of Deeny J:[18]

> [T]he language used by Parliament would suggest that it was intended that this be a mandatory provision and the court having exercised its power under sub-section 1 ought to have done that. In any event the provision is a sensible one in case there had been some development since the title to the property had been commenced which was not reflected on the title to the property and by which one of the other persons with an interest the property, in this case the estranged husband and the lender, might be able to persuade the court that this appellant did not have a 50% interest in the property but conceivably a larger or a smaller interest either of which would affect the order to be made by the court. The omission to do that we consider is fatal to the decision of the judge.

Subsequently, a further appeal was brought by the Director of Public Prosecutions, the following point of law being certified by the Court of Appeal:

> 1. Where property is held by the defendant and another person, in what circumstances is the court making a confiscation order required by section 160A of the Proceeds of Crime Act 2002, in determining the available amount, to give that other person reasonable opportunity to make representations to it at the time the order is made?
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> 2. If section 160A does so require, does a failure to give that other such an opportunity render the confiscation order invalid?

Now, one would have thought at first sight that the answer to this question was obvious – indeed so obvious that it hardly merited the attention of the Court of Appeal, let alone the Supreme Court. After all,

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14 *R v Hilton* (n 4 above) para [6].
15 Corresponding to s 10A(2) for England and Wales.
16 *R v Hilton* (n 4 above) paras [5]–[6].
17 Ss 10A(1) and 10A(2) for England and Wales.
18 *R v Hilton* [2017] NICA 73 para [7].

is not one of the most fundamental principles of natural justice *audi alteram partem*, one implication of which is that no person's rights – whether or not they are actually party to the case – should be affected without giving them an opportunity to be heard? Moreover, section 160A(3)[19] goes on to say that any determination made under the section shall be 'conclusive' in relation to any question as to the extent of the defendant's interest in the property that arises in connection with the realisation of the property, or the transfer of an interest in the property with a view to satisfying the confiscation order, or any action or proceedings taken for the purposes of any such realisation or transfer! Yet, the appeal was allowed unanimously by the Supreme Court in the present case, and the original confiscation order upheld. How can this be?

The answer is that the Crown Court had been quite right to ignore section 160A here, and that both the defendant and the Court of Appeal had misunderstood that provision. To understand this involves a fairly detailed analysis of the legislative history of the provision in question. This was duly undertaken by the late Lord Kerr of Tonaghmore, who handed down the definitive judgment in the case.

The key to the whole matter, as Lord Kerr pointed out, was the distinction between two stages of the confiscation regime under the 2002 Act, one being the *making* of the order and the other its *enforcement*. Prior to the introduction of section 160A in 2015, the picture was clear. The making of the order was governed by sections 156–163[20] and, as we have seen, involved the court in calculating the relevant benefit, and then making an order that the defendant pay that sum, or the available amount if less. This was intended, as Lord Kerr pointed out, to be a fairly straightforward if not automatic process. In particular, there was no question of third parties having to be consulted. Why was this? The answer is because the making of the order did not affect such parties in any way. All it did was to create a statutory debt payable by the defendant to the court. In the words of *Millington and Sutherland Williams*, a leading practitioner text,[21] a confiscation order was no more than 'an in personam order against the convicted defendant'. It was not 'an in rem order against specific items of property'.

In most cases, no doubt, the intention was that the order would duly be paid by the defendant and that no more would be heard of it. However, if this were not done, then the 2002 Act provided a

19 S 10A(3) for England and Wales.

20 Ss 6–13 for England and Wales.

21 *Millington and Sutherland Williams on the Proceeds of Crime* 8th edn (Oxford University Press 2018) 16.53.

machinery for enforcement of the order. In particular, section 198[22] allowed for the appointment of a receiver to deal with and, if necessary, realise the defendant's assets. Unlike the making of the original order, this, of course, might very well affect the interests of third parties, and section 199(8)[23] of the Act catered for this by providing that the court should not confer or exercise these powers without giving persons holding interests in the property a reasonable opportunity to make representations to it.

So where did section 160A[24] come into the picture? This, as we have seen, was not in the original Act at all, but was introduced some 13 years later by the Serious Crime Act 2015. The reason for its introduction, as Lord Kerr explained, was to provide an abbreviated procedure combining the confiscation and enforcement stages in simple cases where there could be no sensible debate about how the confiscation order should be enforced, and where there was therefore no point in going through the whole gamut of the two-stage process. But in other cases, where the issues were clearly not so simple, both stages would continue to apply, and here any representations made by third parties would have to wait until the second stage, as in times past.

So, how did this work out in terms of the language used by section 160A? The answer was that the requirements in section 160A(2) only came into play in cases where the court exercised 'the power conferred by subsection (1)'. But in the present case the Crown Court had done no such thing. Yes, it had worked out the 'available amount' using the formula under section 159,[25] but that was not the same as making a determination under section 160A. Since the court had never exercised the power conferred by section 160A(1), section 160A(2) had no application to the case.

In sum, the position with regard to confiscation orders, as envisaged by the Supreme Court, seems to be as follows. In most cases, section 160A[26] will have no application, and the normal two-stage process will continue to be followed. In these cases the making of the order under section 156[27] will only take effect *in personam*, and therefore the rights of third parties need not be considered unless and until proceedings have to be taken for the order to be enforced under section 199.[28] However, some cases may be sufficiently straightforward for the court to apply the streamlined procedure under section 160A; where this is

22 S 50 for England and Wales.
23 S 51(8) for England and Wales.
24 S 10A for England and Wales.
25 S 9 for England and Wales.
26 S 10A for England and Wales.
27 S 6 for England and Wales.
28 S 51 for England and Wales.

done, the order will take effect not only *in personam* but *in rem*, and therefore others with an interest in the property will have to come on board at the outset.

In so far as the Supreme Court has provided clarity on this issue, the decision is to be welcomed. However, as indicated above, there are broader issues at stake. It might seem odd that the key provision here – section 160A[29] of the 2002 Act – was totally overlooked by the court at first instance and was then misapplied by the Court of Appeal. However, it has been notoriously difficult for the courts and the professions to keep up with legislative changes in the area of sentencing. Back in 2015, Andrew Ashworth referred to the 'complexity and relentless frequency' of much recent sentencing legislation[30] and followed David Thomas in highlighting 'the omissions and confusion resulting from late amendments, defective drafting, legislation by incorporation, staggered commencement dates and ill-conceived transitional provisions'.[31] What made this even worse in the case of sentencing was the need for the courts, in the light of article 7 of the European Convention on Human Rights, to keep in mind not only the current law but the law that was in place at the time when the offence was committed. No wonder that they have sometimes got the law wrong, though hopefully the new Sentencing Code will improve matters from now on, at least as far as England and Wales is concerned.[32]

This, of course, is where the academic profession comes in. Had section 160A been introduced prior to 2012, it would most certainly have been picked up and explained by the *Bulletin of Northern Ireland Law*, a digest of current legal developments in Northern Ireland which in its own words allowed for 'easy browsing and searching and offered links to the full text of selected legislation and written judgments and other reference material'.[33] Alas, this excellent resource is no more, having ceased publication nine years ago with the demise of the 'Servicing the Legal System' (SLS) project set up by Queen's and the professions in 1981. This was a retrograde step, to say the least. One of the greatest strengths of the Queen's Law School in the past lay in its close relationship with the professions and in the academic support provided through SLS and other channels. Of course, one cannot say

29 S 10A for England and Wales.

30 Andrew Ashworth, *Sentencing and Criminal Justice* 6th edn (Cambridge University Press 2016) 1.5.1.

31 Ibid; David A Thomas, 'Sentencing legislation – the case for consolidation' [1997] Criminal Law Review 406.

32 See now the provisions of the Sentencing Act 2020. These, however, do not contain the provisions relating to confiscation orders, which continue to be governed by the POCA.

33 Bulletin of Northern Ireland Law, University of Ulster Library.

that the problems arising in the case under discussion would have been prevented had the *Bulletin* and SLS still been in existence, but certainly there would have been more chance of the crucial point being picked up.

There is no point in regretting the good old days, but certainly there is an argument for more co-operation between the Law School and the professions, and the case of *Hilton* provides good support for it.