Neutral Citation Number: [2022] EWHC 1736 (Admin)

Case No: CO/3526/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/07/2022

Before :

LORD JUSTICE BEAN
MR JUSTICE SWEETING

- -

Between :

REGINA	
On the application of	
JOB FOLAYEMI DUROJAIYE	**Claimant**
- and -	
THE CROWN COURT AT CROYDON	**Defendant**
-and-	
THE CHIEF CONSTABLE OF KENT POLICE	**Interested Party**

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Duncan Jones (instructed by **JMW Solicitors LLP**) for the **Claimant**
Natasha Hausdorff (instructed by **Legal Services at Kent Police**) for the **Interested Party**
The Defendant did not appear and was not represented

Hearing date: 21 June 2022

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Approved Judgment

Lord Justice Bean :

1. This is an application for judicial review of a search and seizure warrant granted under the Proceeds of Crime Act 2002 on the grounds that there was material non-disclosure by the police in applying for the warrant.

2. In the early hours of 12 March 2021 Border Force officers stopped a black Bentley car at the inbound control point of the Channel Tunnel on the French side. The Claimant, Mr Durojaiye, was the driver; he had a passenger, Richard Amole. The Claimant was asked about the reasons for his travel and said he needed to collect some precious metals in Frankfurt. He was asked whether he had any cash or equivalent over the value of £1000 and replied "no".

3. The vehicle was searched. It contained 18 boxes of precious metals to the value of about £200,000. In interview the Claimant confirmed that the value of the precious metals (which comprised bullion and coin in both gold and silver) was about £200,000 and said he had bought it from "European Precious Metal Trading" in Frankfurt. He said that approximately 70% of the purchase price was from his own assets, 15% by his mother, and 15% by his brother. He said he had borrowed some of the money against his current assets, such as "asset-backed-loans against crypto currency". He was asked whether any of the precious metals represented the proceeds of winnings at gambling and said that some of it originated from betting on football via William Hill, Paddy Power and Ladbrokes.

4. He was asked about his employment. He said that he was a financial consultant for Sterling Financials Ltd, a company registered in London. He was the sole director of the company. He said he had earned £28,000 last year, plus £9000 in in dividends and close to £100,000 this year, paid monthly by BACS. He was asked what bank accounts he held. He specified one personal account and one business account, each at HSBC, and signed customer authority forms for these accounts to permit the police to make enquiries with the Bank. He was asked whether he was in receipt of state benefits. He said that each month he received £1000 in Universal Credit. He also received child benefit as the single parent of a young son.

5. Unsurprisingly, officers were not satisfied that the origin of funds used to purchase the precious metals to the value of £200,000 was not criminal. The Claimant and Mr Amole were arrested on suspicion of money-laundering offences.

6. Later, in interview, he said that he was the owner of two other companies besides Sterling Financials Ltd. One of these was "currently idle". The other was intended to produce T-shirts: he had invested approximately £2700 into it but it had not made any sales.

7. Mr Durojaiye said he had been trading with metals and cryptocurrency for the past two years. He said he had loans against metals with a company called Unbolted Ltd amounting to about £80,000 and further loans against cryptocurrency with other companies. He said that some of his income originated from gambling, investments, and loans. He was no longer claiming Universal Credit as his salary was considerably higher than it previously had been.

8. Police research into Sterling Financials Ltd disclosed that up to date accounts had been filed showing assets and cash in the bank of £38,639. Shareholder funds were stated at £1,838. An HSBC account in the name of the company had deposits from Paypal accounts totalling £129,118.

9. Further enquiries with HMRC showed that in the tax year 2019/20 the Claimant earned £8000 PAYE from Sterling Financials with an additional dividend of £20,000. In 2020-21 he earned £9000 PAYE from Sterling Financials. No other income was declared.

10. A review of the Claimant's bank accounts showed that he had approximately 50 accounts of which the police were aware, ranging from bank and credit cards accounts to cryptocurrency accounts. Nothing stood out to the police investigators as making a large profit; rather the contrary. A review of his bank accounts showed transfers to a cryptocurrency platform, Kraken Payward Ltd, in excess of £362,600 with no transfers back to his accounts. He appeared to have borrowed a total of £223,330 for the purpose of cryptocurrency transactions. During the pandemic he had claimed £11,500 via the Job Retention Scheme for the same period as he was claiming Universal Credit, despite the fact that there was no evidence of Sterling Financials employing anyone else.

11. The stopping of the Bentley with £200,000-worth of precious metals in the boot had thus led the police to a much wider investigation of the Claimant's financial affairs. The view was taken that there was a prima facie case that the Claimant may have been involved in money laundering.

12. Sections 352 to 355 of the Proceeds of Crime Act 2002 ("POCA") provide for search and seizure warrants. A judge may, on an application made by an appropriate officer issue a search and seizure warrant if satisfied that either of the requirements for the issuing of the warrant is fulfilled. One of the requirements (s 352(6)) is that s 353 is satisfied in relation to the warrant. Section 353 provides that an application may be made if there are reasonable grounds for suspecting that the person specified in the application for the warrant has committed a money laundering offence (s 353(2)(c)).

13. There are two alternative sets of further conditions which must be fulfilled. The second set of conditions, as applied to a money laundering investigation, is as follows: (s 353(5)(a)) that there are reasonable grounds for believing that there is material on the premises specified in the application for the warrant and (s 353(8)) that this relates to the person specified in the application or the question of whether he has committed a money-laundering offence; and that it is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the warrant is sought; (s 353(5)(b)) that there are reasonable grounds for believing that it is in the public interest for material to be obtained, having regard to the benefit likely to accrue to the investigation if the material is obtained; and (s 353(9)(c)) that the investigation might be seriously prejudiced unless an appropriate person arriving at the premises is able to secure immediate entry to them. The last point is the important one in the present case.

14. The reason why the police applied for a search and seizure warrant in the present case was that all or most of the material which they were seeking was likely to be in digital form on computers held either where the Claimant lived (at his parents' home) or at the business address of one of his companies. If the prosecution obtained and served a production order there was a serious risk that relevant digital material would be deleted before the order was complied with.

15. The application for the warrant was lodged with the Crown Court at Croydon on 7 July 2021. The original request was that it should be considered on the papers and a warrant issued which the police proposed to execute on 28 July 2021. However, this plan was disrupted. The Claimant had been engaged in email correspondence with the police some of which was regarded as abusive and threatening, to the extent of amounting to an offence of harassment. It was proposed to arrest him on a charge of harassment. In the view of the officers investigating the alleged money laundering, such an arrest could well have triggered an attempt (either by the Claimant if he was granted bail, or by others on his behalf) to delete incriminating digital material, not only relating to the harassment but to the Claimant's financial affairs.

16. The court office was therefore asked to place the application before any available circuit judge on an urgent basis. The application was made on the usual form and ran to 12 pages plus the draft warrants attached. It gave some details, as summarised above, of the Claimant's highly complex financial affairs. The form stated that the estimated reading time was 45 minutes.

17. Such applications can be dealt with on paper without a hearing but in this case Her Honour Judge Charles, after considering the written application, directed that an officer was to attend before her to answer questions. DC Freeman, who had drafted the written application, was unavailable and accordingly PSE Frost attended before the judge. She gave sworn evidence and was asked, for example, why the case had become a matter of urgency. The judge asked which provisions of the 2002 Act applied and was told. She asked some questions about the form. She also asked "is there anything I need to be updated about?" and was told that nothing had changed. She granted an order.

18. The form has a section for the judge's decision including the words "on the basis of the information contained in this application….. I am satisfied that the requirements of POCA section 352… are met and I issue a warrant accordingly." Although the form goes on to state "my reasons include these: *the judge should give a brief indication of his or her conclusions in relation to any notable features of the application*", the judge did not give reasons beyond writing "I have heard PSE Frost on oath today".

19. In my view a judge granting a warrant of this kind should give brief reasons why he or she is granting a search and seizure warrant: it is, as Mr Duncan Jones rightly submits, a particularly drastic form of order, more so than a production order. However, the failure to give reasons is not fatal to the validity of the warrant provided that in the event of a challenge this court can draw an obvious inference as to what the judge's reason must have been: see the judgment of this court in *R (Newcastle United Football Club Ltd) v HMRC* [2017] 4 WLR 187 at [55]. In this case the obvious inference is that the judge accepted the argument that if only a production order was made there was a real risk that digital material would be deleted before the police had the opportunity of seizing the Claimant's laptops or other equipment.

20. Mr Jones realistically does not dispute that, on the basis of the information contained in the warrant application placed before the judge, she could reasonably take the view that a search and seizure warrant should be issued. The main basis of this application for judicial review, for which Hill J gave permission, is that there was material non-disclosure by the police of matters which might reasonably have led the judge to a different conclusion.

21. The Statement of Facts and Grounds in support of the claim argues that:

> "Specifically, the police failed to mention that:
>
> > 41.1 The Claimant had engaged directly with police through his solicitors with continuing correspondence beginning on 22 April 2021.
> >
> > 41.2 Prior to instructing JMW, the Claimant voluntarily provided written authority for financial institutions to release bank account statements to the Police. On 12 May 2021, DC Freeman emailed JMW confirming "I am in the process of reviewing extensive bank statements." It is understood therefore that the Police used the written authority provided by the Claimant to obtain the bank statements referred to.
> >
> > 41.3 On 5 July 2021 the Claimant, through his solicitors, provided the warrant applicant with written representations and detailed supporting evidence on the origin and intended use of the precious metals seized on 12 March 2021.
> >
> > 41.4 Setting aside any alleged abusive messages, there had been other correspondence and engagement by the Claimant, both through his solicitors and directly with PSE Frost, in respect of the seized precious metals, including voluntarily providing the PIN code for a mobile device as requested.
> >
> > 41.5 The Claimant was on notice since at least 19 May 2021 that the police may seek production orders in respect of bank accounts and the police made no effort to obtain production orders in respect of the relevant addresses. In relation to production orders, PSE Frost's evidence was vague:
> >
> > > "I don't think it's [inaudible] gone down that road because we've identified the material that we're seeking. I think – I don't think we don't know what we're seeking if I'm honest. Yes, the notes have been cropped off the application that's been seen to the court… because that's what I've got here".
> >
> > 41.6 The Claimant was contesting asset detention proceedings in the Magistrates' Court and had provided evidence in those proceedings.
> >
> > 41.7 Other than a summary of the account given by the Claimant in interview, the warrant application failed to give any detail of the explanations and evidence provided by the Claimant since his arrest."

22. Mr Jones summarises this by saying that the application gave a misleading picture of an entirely obstructive suspect, whereas the Claimant had in fact given the police a

significant degree of cooperation, for example, by giving authority for access to some bank accounts and by disclosing the correct PIN for his mobile phone.

23. It can in many cases be a material non-disclosure on an application for a search and seizure warrant under POCA, or a search order in the civil jurisdiction, to portray the prospective defendant as being obstructive, if he has in fact been genuinely cooperative: see in the context of civil search orders the important case of *Columbia Picture Industries Inc v Robinson* [1987] Ch 38. But in this case such cooperation as the Claimant did give was limited and spasmodic. He had originally told the police about two bank accounts; then eight; in fact he had about 50 accounts of various kinds. On 16 April 2021 he had told the investigators "…Don't bother coming to me asking me to sign more forms, or asking to go through anything else in my personal life. I won't sign nothing and I think we both know the court won't grant you any more time than you have been initially given." On 15 May 2021 he emailed DC Freeman stating that he had only signed eight customer authority forms and suggesting that she had forged his signature. He said that the court would have to grant production orders and his solicitor would check that DC Freeman had followed the correct procedures. It is true that the Claimant's solicitors, who had by then been instructed, took a more emollient line in correspondence, but it is not surprising that the police should have viewed the Claimant as not entirely candid.

24. On 5 July 2021 JMW Solicitors LLP, on behalf of the Claimant, sent the police a letter of four pages in length with 29 appendices. It began by saying that they were instructed in the ongoing detention proceedings with regard to the gold and silver bullion seized at the border on 12 March 2021. After setting out the history in detail it was noted that at a hearing at Sevenoaks Magistrates Court on 9 June 2021 (at which the Claimant had represented himself) the court had granted only a three month extension of the detention of the seized assets.

25. The letter went on to state that "the funds used to purchase the coins came from a mixture of asset-backed loans, profits from trading in cryptocurrency, trade commodity stocks, a coin-based account, and from sports betting". Invoices and collection notes were included in the appendices. The total purchase price, they wrote, was "believed to be" £147,718.69 and €102,790.70. They also indicated that the Claimant had made previous purchases of gold and silver bullion between July and November 2020 in the total sum of £52,880.83 and €703.20.

26. The solicitors' letter went on to give information about a series of loans which they said had provided the capital for the purchase of the bullion which was seized. After setting out the complex details, including a loan secured against a "gold-backed crypto currency" by the name of PAX Gold, they said that in total their client had raised capital from loans between 14 December 2020 and 10 March 2021 amounting to £110,931 which was "used in part to be the assets collected and subsequently seized" and that approximately £89,289.42 was raised from third parties.

27. DC Freeman, in a witness statement made on 17 May 2022 for the purposes of the hearing in this court, states that she read the contents of the letter and appendices once and "did not believe that this material would undermine the application of the warrants for the criminal investigation, therefore I did not refer to the existence of the document within the POCA warrant application". She continued:-

> "I found that there were 91 pages in total. Given the nature of all previous correspondence I had received regarding the Claimant I initially suspected that this would follow in the same fashion of all previous materials wherein an extensive amount of contact [sic] would be sent through, which still did not contain specific, tangible and verifiable information to confirm the Claimant's claims that the assets had been purchased using legitimate funds."

28. In *Re Stanford International Bank Ltd* [2011] Ch 33 Hughes LJ said that where police or prosecution make an application to the court *ex parte* the applicant must "put on his defence hat and ask himself what, when representing the defendant or a third party with a relevant interest, he would be saying to the judge." This important principle corresponds to the duty of candour imposed on an applicant in civil cases for what used to be called *ex parte* relief established as long ago as 1917 in *R v Kensington Income Tax Commissioners ex parte Princess Edmond de Polignac* [1917] 1 KB 486 and reaffirmed, for example, in *Brinks-MAT v Elcombe* [1988] 3 All ER 188.

29. Mr Jones submits that where there has been material non-disclosure the resultant order should be set aside unless it is plain that it could have made no difference. I agree with the formulation of Chamberlain J in *R (Jordan) v Chief Constable of Merseyside* [2020] EWHC 2408 (Admin):- the question is, "might the information that should have been given to the [judge or] magistrate reasonably have led him or her to refuse to issue the warrant?"

30. In my view the letter of 5 July 2021 from JMW Solicitors should have been placed before the judge (though not the 29 appendices, with their oppressive mass of detail, since they were fairly summarised in the covering letter). Where a recent communication has been received from a suspect's solicitors setting out his case, that should be placed before the judge who is being asked to issue a warrant, even if it is accompanied by a rebuttal from the police or prosecutor. But I accept that the decision to omit the letter was not one taken in bad faith; and it was not suggested before us that it had been.

31. If someone seeks to enter the country with £200,000 worth of bullion in the boot of a car he can expect to be the object of suspicion of money laundering. If the individual gives authority to the police to obtain statements in relation first to two, then to eight bank accounts but turns out to have at least 50 accounts of various kinds; makes very large payments into a cryptocurrency account; obtains large loans secured against "gold backed crypto currency accounts"; is the sole director and employee of a financial services company which receives sums totalling over £100,000 in credits through Paypal accounts; and all the while is claiming Universal Credit and Coronavirus Job Retention Scheme payments, he must expect the suspicion to increase. The complex web of the Claimant's transactions appeared more and more tangled as the correspondence continued.

32. I do not consider that disclosure of the letter might reasonably have led Judge Charles to refuse to issue a warrant. If anything it may have strengthened, rather than weakened, the police's case.

33. I should mention one further matter. In the papers as originally presented to us passages not only in the warrant application but also in the transcript of the hearing and even part of the page containing the judge's decision were redacted. Later Ms Hausdorff, after taking instructions, supplied the court and Mr Jones with unredacted copies, so it was unnecessary for us to make any ruling. But there was a failure to follow proper procedure. In *R (Golfrate Property Management Ltd) v Southwark Crown Court* [2014] EWHC 840 (Admin) Lord Thomas of Cwmgiedd CJ said:

> "We wish to make it clear that if the party obtaining the warrant wishes to redact any part of the Information or any part of the transcript of the hearing before the judge, an immediate application must be made by that party to the court on proper grounds supported by evidence from the Chief Constable or Commissioner of Police (or a very senior officer personally authorised by the Chief Constable or Commissioner) so that the court can consider whether the redactions should be permitted on PII or other grounds. The claim to withhold material on such an intrusive a process as a search and seizure warrant is one of very considerable importance as, if permitted, it infringes an otherwise applicable principle of justice that a party is entitled to know the grounds on which an application against him has been made. It is therefore essential that the claim to withhold is only made on the basis of the personal decision of the Chief Constable or Commissioner.
>
> It is impermissible, as happened in this case, for the party obtaining a warrant on a without notice basis to refuse to disclose the material placed before the judge to the party against whom the warrant has been obtained. It can only be withheld if the court sanctions the withholding of that material on public interest grounds."

34. The redacted passages reveal that on 8 July 2021 the police had applied for a disclosure order which had been granted on that date by Her Honour Judge Robinson. Judge Charles was therefore aware of that application when deciding to issue the search and seizure warrant. Mr Jones argues that the police were in breach of their duty of candour in not serving all the relevant material before the hearing in this court, and submits that, as a consequence, all the material considered in the disclosure application must now be made available to this court before we reach a decision on this judicial review.

35. I would not accede to that request. We are reviewing the lawfulness not of the disclosure order made by Judge Robinson, but of the search and seizure warrant issued by Judge Charles. No objection was raised on behalf of the Claimant at or before the oral hearing in this court to the use of redacted documents. Although, as I have pointed out, the police should have made a PII application in accordance with *Golfrate*, that is a different point from the duty of candour, which requires the applicant for an order without notice to disclose to the court anything which might weaken his case. Nothing in the previously redacted material which we have now seen falls within that category.

36. I would dismiss the application for judicial review.

Mr Justice Sweeting:

37. I agree.