

appropriately extended licence period, thereby reducing the risk to the public which a finding of dangerousness indicated that he would continue to pose.

It was also submitted that the sentencing judge failed to give any or any adequate explanation as to why he had discounted an extended sentence as an appropriate disposal.

Held, granting leave to appeal,

(1) This was a disturbing case, but it was also an extremely difficult sentencing exercise because of the applicant's age and background. The offences were committed in the victim's own home late at night. A sharp weapon was taken upstairs which the sentencing judge was satisfied would have been used by the applicant, if required, although he was hoping to find his target asleep.

(2) When a substantive sexual offence has been committed, the main consideration for the court will be the offender's conduct as a whole, including their intention. This case had been treated as a case of planned sexual assault which did not necessarily involve penetration. The applicant was aged only 19 when he committed the offences. He had a troubled personal history. An indefinite custodial sentence for someone of that age should be avoided if at all possible.

(3) The real difficulty faced by the sentencing judge when considering whether an extended sentence would suffice to meet the risk that the applicant posed was that the applicant gave no explanation for what caused him to act as he did, and in particular what it was that drove him to go back to the house on the following night. This meant that the probation officer and the psychiatrist had very little information to enable them to ascribe his offending to a lack of maturity or to calculate the risk that he might pose in the future. That in turn

meant that the sentencing judge had little or no information about the steps that the Probation Service could take to address the risks posed to the public by the applicant following his release. It was understandable that a sentencer in that position might have taken the view that, despite the applicant's young age and lack of relevant past offending, it would be preferable for the Parole Board to consider and assess those risks at the appropriate time, particularly if the minimum period of sentence to be served was relatively short, as it was in the present case.

(4) At the time that this sentence was passed, the court could not have predicted the practical problems which subsequently beset prisoners subject to indefinite sentences, and inhibited or even precluded them from demonstrating to the satisfaction of the Parole Board that they were safe to be released on licence, leading to their spending far more time in custody than the minimum sentence pronounced by the court.

(5) It is regrettable that these problems have arisen, but they cannot justify a finding that the indefinite sentence was wrong in principle or manifestly excessive at the time when it was passed. The question for the court is whether the sentence was wrong in principle or manifestly excessive for this offending, given the information presented at the time.

(6) The court concluded that there was sufficient merit in the submissions advanced to warrant the appeal being heard in full and granted the necessary extension of time and leave to appeal. The court did not go on to deal with the substance of the appeal because further information was required to determine the full appeal (this information is set out at [32] to [36] and relates to circumstances since the applicant was sentenced, and proposals for future risk management).

Feature

R. (World Uyghur Congress) v NCA

Jamas Hodivala KC and Preetika Mathur¹

Summary

*R. (World Uyghur Congress) v National Crime Agency*² is a landmark Court of Appeal decision with significant implications for money laundering and corporate crime. The court held that goods manufactured using forced labour in supply chains are capable of amounting to "criminal benefit" or "recoverable property" for the purpose of the Proceeds of Crime Act 2002. Given that the International Labour Report 2024 concluded that annual profits from forced labour in industry amounted to \$35 billion globally, this is a highly relevant modern issue.³ This article examines the High Court and Court of Appeal decisions, and also considers the wider implications at a time when Environmental, Social and Governance (ESG) issues are becoming increasingly relevant for corporate criminal lawyers.

¹ Jamas Hodivala KC, Matrix Chambers; Preetika Mathur, 36 Group.

² *R. (World Uyghur Congress) v National Crime Agency* [2024] EWCA Civ 715; [2024] 1 W.L.R. 4532.

³ ILO, *Profits and poverty: The economics of forced labour* (2024), p.16.

What was the case about?

A non-governmental organisation (NGO), the World Uyghur Congress, aims to promote the collective rights and interests of Uyghurs, a Turkic ethnic group who are mostly Muslim and primarily live in the Xinjiang Uyghur Autonomous Region (the XUAR) region of China. 30% of the world's cotton comes from China and 85% of China's cotton is grown or processed in the XUAR.⁴ There is now a growing body of evidence that serious human rights abuses are occurring in the XUAR, including the widespread exploitation of Uyghur forced labour in the cotton industry.⁵

⁴ *R. (World Uyghur Congress) v Secretary of State for the Home Department* [2023] EWHC 88 (Admin); [2023] 1 W.L.R. 1950 at [6].

⁵ UK Parliament Business Energy and Industrial Strategy Committee, *Uyghur Forced Labour in Xinjiang and UK value chains* (2021), pp.3 and 5. See also: Uyghur Human Rights Project, *LOI Submission to the UN Committee on Economic, Social and Cultural Rights (66th Pre-Sessional Working Group)* (December 2020), pp.4–9; H. Davidson, "Clues to scale of Xinjiang labour operation emerge as China defends camps" (18 September 2020), *theguardian.com*; Vicky Xiuzhong Xu, Danielle Cave, Dr James Leibold, Kelsey Munro, Nathan Ruser, *Uyghurs for Sale* (February 2020), pp.4 and 12; *R. (World Uyghur Congress) v Secretary of State for the Home Department* [2023] EWHC 88 (Admin) at [93].

Relying on a wealth of such evidence, the World Uyghur Congress sought to persuade three enforcement agencies, including the National Crime Agency (NCA), to prohibit the importation into the UK of cotton garments and to seize such garments when entering the country on the basis that the goods had been made in contravention of the Foreign Prison-made Goods Act 1897. The NGO also sought to persuade the agencies to open investigations under Pt 5 of the Proceeds of Crime Act 2002 (a “civil recovery” investigation) and/or under Pt 7 (a “criminal” investigation) into identified companies that were importing into the UK garments made from cotton suspected to derive from the XUAR.

The NCA declined to do either on the basis that:

- (1) It was necessary to identify a specific consignment of goods as criminal property before commencing any investigation into whether a money laundering offence had been committed or whether property was recoverable, and although there was general evidence of criminality no evidence had been provided to show that a specific consignment of goods entering the UK had been manufactured using forced labour;
- (2) The NCA’s apparent view was that s.329 of the Proceeds of Crime Act 2002 (acquisition, use or possession of criminal property) was the apposite offence when investigating supply chains, but the payment of “adequate consideration” under s.329(2)(c) by any person in the supply chain served to cleanse property thereafter of its criminal status. The relevant criminal property would then be the money in the hands of the criminal seller, not the goods in the hands of the purchaser.

The World Uyghur Congress disagreed with the NCA’s reasons for refusing to open either a criminal or a civil recovery investigation and issued judicial review proceedings.

The High Court decision

The World Uyghur Congress argued that the NCA had misdirected itself in law when refusing to open any investigation. The defendants conceded that offences contrary to s.1 of the Modern Slavery Act 2015 and/or s.51 of the International Criminal Court Act 2001 are capable of constituting “criminal conduct” for the purpose of s.340 of the Proceeds of Crime Act 2002. At first instance⁶ Dove J agreed with the defendants that s.340 requires specific identification of the alleged criminal conduct and the resultant property, consistently with the Supreme Court’s approach in *GH*.⁷ In particular, the Proceeds of Crime Act 2002 does not apply where there is suspected offending to which it was not possible to attribute specific property. Dove J also agreed with the NCA that there was no evidence that garments had been made using cotton derived from foreign prisons. Although recognising the difficulties in obtaining evidence from China, there was no evidence at all that garments had been made in such conditions and it was insufficient to rely on statistical probabilities that goods had been made in such conditions.

Dove J also agreed with the NCA that payment of “adequate consideration” cleansed the goods of their criminal status for

⁶ *R. (World Uyghur Congress) v Secretary of State for the Home Department* [2023] EWHC 88 (Admin).

⁷ *GH* [2015] UKSC 24; [2015] 1 W.L.R. 2126.

the purpose of s.329 of the Proceeds of Crime Act 2002, apparently relying on the case of *Afolabi*.⁸ Dove J confined his consideration of the legal principles to the “acquisition” offence under s.329(1)(a) on the basis that the claimant challenged the importation of the goods to the UK (rather than their subsequent use or possession by businesses in the UK), and the defendants considered s.329(1)(a) to be the “apposite offence in relation to a supply chain” case.⁹ The way arguments were developed meant that Dove J didn’t fully consider the “use” offence under s.329(1)(b) or the “possession” offence in s.329(1)(c). In *Haque*¹⁰ Davis LJ considered that each of the offences under s.329(1)(a), (b) and (c) was a separate offence. All three of these offences require the prosecution to prove that adequate consideration was *not* paid, but the approach to adequacy varies depending on whether the offence relates to “acquiring”, “using” or “possessing” the criminal property.

For the “acquisition” offence considered by Dove J, the adequacy of the consideration is determined by reference to s.329(3)(a): the value of the consideration must be “significantly less than the value of the property”. There is no indication in the judgment how the defendants assessed this issue, merely that it was an evidential hurdle the defendants were entitled to take into consideration when deciding not to further investigate offences at that time. Following *Hogan v DPP*¹¹ (an “acquisition” case), the adequacy of consideration is an objective question of fact, separate from the defendant’s state of mind, which should be determined by examining all the relevant circumstances.

The Court of Appeal decision

The World Uyghur Congress appealed, focusing on two issues: (1) it is not necessary for the NCA to identify a specific product as criminal property before opening an investigation into whether a money laundering offence has been committed; and (2) the payment by someone in a supply chain of “adequate consideration” does not operate to cleanse the property of its criminal status, so as to preclude its recovery from anyone who subsequently acquires it, or the recovery of the proceeds of its onward sale. An NGO, Spotlight on Corruption, was also given permission to intervene in the appeal as a result of its concern that the High Court’s judgment would discourage the NCA, the police and other authorities, from commencing investigations into allegations of corruption, particularly where it occurred overseas, in the absence of concrete evidence of criminality.

By the time of the appeal, the NCA conceded the legal principles advanced by the World Uyghur Congress, and that its decision would be unlawful if it had been made on the contended legal bases. The issue therefore became one of analysing the effective reasons for the NCA’s decision, with the NCA arguing a forensic point that the legal errors were so obvious it was highly unlikely they had infected its decision-making. However, in a unanimous judgment, Dove J’s deci-

⁸ *Afolabi* [2009] EWCA Crim 2879; [2010] Lloyd’s Rep. F.C. 314.

⁹ *R. (World Uyghur Congress) v Secretary of State for the Home Department* [2023] EWHC 88 (Admin) at [69].

¹⁰ *Haque* [2019] EWCA Crim 1028; [2020] 1 W.L.R. 2239.

¹¹ *Hogan v DPP* [2007] EWHC 978 (Admin); [2007] 1 W.L.R. 2944.

sion was overturned and the NCA's refusal to conduct any money laundering investigation was quashed. The issue was remitted for the NCA to reconsider, in light of the court's clarification of the legal principles.

The court agreed with the NCA's concession that products derived from forced labour occurring anywhere in the world can amount to "criminal property" for the purpose of a money laundering offence in Pt 7 of the Proceeds of Crime Act 2002, or amount to "recoverable property" for the purpose of civil recovery under Pt 5 of the Act. We consider the significant ramifications of this legal principle later in this article.

The judgment analysed the elements of the offence of money laundering, restating the principle that the same property can be "criminal property" in the hands of A but not in the hands of B, depending on their level of knowledge or suspicion that the relevant property is or represents a person's benefit from criminal conduct. The exemption from liability contained in s.329(2)(c), namely the provision of adequate consideration, is therefore personal to the individual concerned. Further, the court emphasised the distinction between the exemption from liability in s.329(2)(c), where for the purpose of Pt 7 of the Act the property retains its criminal status if transferred to another, and the effect on the criminal status of the property pursuant to s.308 of the Act when purchased by a bona fide purchaser for value without notice. In the latter case, the property forever ceases to be "recoverable property" for the purpose of Pt 5 of the Act. The Court of Appeal emphasised that a person who suspected that the property was obtained by unlawful conduct would not be able to rely on s.308 of the Act in civil recovery proceedings:

"Therefore section 329(2)(c) is not about bona fide purchasers, and it has no impact on the status of the property."¹²

The Court of Appeal also clarified the effect of *Hogan*: if criminal property is acquired for adequate consideration, then no offence is committed under s.329(1) of the Act. This confirms what has always been the position, namely that the "adequate consideration" exemption only applies to the offence of "acquiring", "using" or "possessing" criminal property, contrary to s.329 of the Act. The exemption has no relevance to offences contrary to ss.327 or 328 of the Act. As the court remarked pithily, if it did there would be no need for the provision of a defence to a money laundering charge where a Suspicious Activity Report is submitted prior to certain conduct being undertaken.

Commentary

In our view, the case represents one of the most significant corporate criminal judgments in recent times. Not only does the Court of Appeal confirm that goods sold in the course of ordinary global trade can themselves amount to "criminal property" or "recoverable property" for the purpose of money laundering, but it arguably balances the corporate due-diligence model currently found in ESG legislation around the world against some of the more bureaucratic aspects and consequences of this agenda. The judgment potentially impacts both individual and corporate criminal and regulatory liability for money laundering, corporate money laundering risk-as-

sessments, the requirement for Suspicious Activity Reports, and other compliance measures.

However, there remain some significant outstanding issues. Neither the High Court nor the Court of Appeal grappled with how the "market value" of goods manufactured using modern slavery should be assessed for the purpose of assessing the adequacy of consideration. Should that assessment be conducted by reference to evidence from alternative manufacturers which did not use forced labour, which may involve evidence of manufacturing costs in an entirely different jurisdiction with different civil and economic issues? Or some other way?

Further, because Dove J only considered a claim concerning "acquiring" criminal property contrary to s.329(1)(a), the High Court neither fully considered the offences contrary to s.329(1)(b) ("use" of criminal property) or (c) ("possession" of criminal property), nor the different approach to calculation of adequate consideration in these different scenarios, only stating:

"It would not only be necessary to show that a consignment was criminal property, but also that, considering the question objectively, the consignment had been purchased for significantly less than its value or by some other measure for consideration which was not adequate."¹³

As the court identified in *Hogan*, the inadequacy of consideration might be very relevant to proving the requisite suspicion, as (we would suggest) might other red flags such as geo-political risks and reference to specific reports such as those produced by the US Bureau of International Labor Affairs identifying goods manufactured around the world using forced and child labour. The gravamen of a business selling goods known or suspected to have been manufactured using forced labour is surely the "transfer" of such goods to a customer in return for payment or possibly the "use" of cheaper garments in order to increase profit-margins for the business, rather than simply its "acquiring" of those garments. The adequacy of consideration is irrelevant to an offence of "transferring" criminal property contrary to s.327, and for an offence of "using" goods is determined by s.329(3)(b), namely by reference to the disparity between the value of the consideration provided by the purchaser for the goods and the value of the use or possession of the property to the purchaser. If relevant, how might a jury approach the adequacy of consideration when garments are known or suspected to have been manufactured using slave labour, thereby unlawfully reducing costs and increasing profits?

Equally, s.329(3)(c) stipulates that the provision by a person of goods or services which he or she knows or suspects may help another to carry out criminal conduct is not to be treated as consideration. Whilst a company's purchase of goods from a supplier known or suspected to have used forced labour in their manufacture may self-evidently raise a suspicion that those funds will help another to carry out criminal conduct, it seems unlikely that payment would amount to the "provision of goods or services" excluded from lawful consideration by the operation of s.329(3)(c). But what of the bank responsible for providing banking services to a company it suspects is using forced labour to manufacture goods? Would the provision

¹² *R. (World Uyghur Congress) v National Crime Agency* [2024] EWCA Civ 715 at [35].

¹³ *R. (World Uyghur Congress) v Secretary of State for the Home Department* [2023] EWHC 88 (Admin) at [85].

of banking facilities in such circumstances ever be capable of amounting to lawful consideration for the purpose of s.329(3)(c)? What about a bank accepting loan repayments or bond dividends from a company it suspects is using forced labour in its supply chains? These significant questions remain unresolved by the Court of Appeal but are of current relevance: SHERPA, a French NGO, has filed with French prosecutors a money laundering complaint against five banks for laundering the funds of beef companies alleged to be involved in illegal deforestation in Brazil.

Corporates and their senior managers currently face a rapidly changing legal landscape regarding their own activities and misconduct in supply chains. The principles considered in the Court of Appeal's judgment apply to any property obtained directly or indirectly as a result of, or in connection with, "criminal conduct" within the meaning of s.340 of the Proceeds of Crime Act 2002. This very broad definition could include minerals mined overseas in connection with conduct that would amount to various environmental offences if it occurred in the UK (e.g. s.33 of the Environmental Protection Act 1990 or reg.38 of the Environmental Permitting (England and Wales) Regulations 2016¹⁴); clothing manufactured using forced labour (e.g. ss.1 and 2 of the Modern Slavery Act 2015) or child labour (s.18 of the Children and Young Persons Act 1933) and timber or timber products derived from illegal deforestation (e.g. s.17 of the Forestry Act 1967 or reg.4 of the Timber and Timber Products (Placing on the Market) Regulations 2013¹⁵).

As the Court of Appeal emphasised, the criminal status of property under the Proceeds of Crime Act 2002 partly depends on an individual's state of mind. Property is not "criminal property" unless a person knows or suspects it has been obtained as a result of, or in connection with, criminal conduct. So might avoiding inquiry into supply chain misconduct minimise the risk of obtaining the requisite knowledge or suspicion for the purpose of money laundering? Aside from the reputational issues that may follow from such myopism, there are two legal problems with such an approach.

First, it was held in *NCA v Odewale*¹⁶ that, for the purpose of civil recovery proceedings, a person has actual notice of facts and circumstances where they have deliberately turned a blind eye. Equally, an individual will be fixed with constructive notice of facts and circumstances that would have been discovered by the taking of proper steps if a reasonable and honest person would, objectively judged, have been put on inquiry. Deliberately avoiding inquiry into supply chains would therefore not obviate the risk of civil recovery proceedings or an Account Freezing or Forfeiture Order in respect of recoverable property.

Secondly, a raft of domestic and international legislation now requires companies to conduct due diligence regarding their activities and supply chains. The Timber and Timber Products (Placing on the Market) Regulations 2013 prohibit the placing on the UK market of illegally harvested timber and timber products, and require supply chain due diligence. Sec-

tion 414CA of the Companies Act 2006 now requires large companies to include non-financial information in their reports, including information regarding environmental and social issues relating to their business operations. Section 54 of the Modern Slavery Act 2015 requires certain companies to publish a slavery and human trafficking statement setting out the steps taken to ensure slavery and human trafficking is not taking place in its own business or any of its supply chains. At the EU level, legislation has been passed that impacts upon UK companies doing business in the EU, or other companies within the supply chain of such a company. For example, the EU Corporate Sustainability Reporting Directive¹⁷ requires in-scope companies to report on sustainability matters in accordance with due diligence requirements, the EU Corporate Sustainability and Due Diligence Directive¹⁸ requires Member States to enact legislation requiring non-financial reporting on similar topics, the EU Forced Labour Regulation¹⁹ prohibits the placing on the EU market of goods made using forced labour, the EU Deforestation Regulation²⁰ prohibits the placing on the EU market of goods made from, fed with, or comprising certain forest-risk commodities, the EU Batteries Regulation²¹ will require batteries to be accompanied by an environmental declaration regarding their manufacture, and so on.²² Further afield, the US has enacted legislation such as the Uyghur Forced Labour Prevention Act,²³ which requires those importing goods to demonstrate that they have not been made using Uyghur forced labour. Many UK companies and their boards therefore have a substantially reduced scope to ignore supply chain due diligence.

To add to the legal complications, Parliament has now replaced the antiquated laws governing corporate criminal liability for a number of economic crimes. Section 196 of the Economic Crime and Corporate Transparency Act 2023 replaced the "directing will and mind" test, traceable back to *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*,²⁴ for certain economic crimes listed in Sch.12 to that Act, which includes money laundering offences. By virtue of s.196, a company (including a foreign company) will be guilty of a money laundering offence when committed in the UK by one of its senior managers acting within the actual or apparent scope of his or her authority. The Court of Appeal's judgment clarifies the risk of individual and corporate liability for money laundering offences associated with criminality in supply chains.

The practical question in all of this is whether companies and their senior managers will face investigation and prosecution for money laundering as a result of criminality in supply chains. Whilst Suspicious Activity Reports may seem an obvious answer to the issues raised, the NCA's online reporting portal does not easily facilitate reporting of suspected criminality in supply chains, mean-

¹⁷ Directive 2022/2464.

¹⁸ Directive 2024/1760.

¹⁹ Regulation 2024/3015.

²⁰ Regulation 2023/1115.

²¹ Regulation 2023/1542.

²² At the time of writing, the EU Commission has published proposed amendments to the Corporate Sustainability Reporting Directive (Directive 2022/2464) and the Corporate Sustainability and Due Diligence Directive (Directive 2024/1760) in order to reduce the bureaucratic burden on businesses. These amendments will now be considered by the EU Parliament and Council for review.

²³ Public Law No. 117-78.

²⁴ *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] A.C. 705, HL.

¹⁴ Environmental Permitting (England and Wales) Regulations 2016 (SI 2016/1154).

¹⁵ Timber and Timber Products (Placing on the Market) Regulations 2013 (SI 2013/233).

¹⁶ *NCA v Odewale* [2020] EWHC 1609 (Admin).

ing that at best submission of a Suspicious Activity Report is likely to result in a delay in businesses being able to release imported goods whose manufacture has involved suspected criminality. At worst, the information could conceivably result in the NCA refusing consent to the release of goods.

Domestic NGOs are currently endeavouring to use the Proceeds of Crime Act 2002 as a means by which to hold companies, boards and their senior managers accountable for criminality in their supply chains. Dossiers of material evidencing supply chain criminality similar to a sophisticated whistleblower complaint, sometimes including witness statements and expert reports (referred to as a “GLAN Notice” after the NGO that first used them), have been served by NGOs on several different compa-

nies’ senior management both in the UK and overseas, thereby potentially fixing individuals with the requisite *mens rea* for individual and corporate liability for money laundering offences committed in the UK.

Finally, investors and shareholders are becoming increasingly concerned by ESG issues. Even if prosecution currently seems a distant concern, the boards of publicly listed companies face litigation for negligence resulting in a fall in share price. Detecting and addressing criminality in supply chains is becoming a significant legal and reputational issue.

Until there is formal guidance from the NCA on how companies should address criminality in their supply chains, the Court of Appeal decision remains the latest word on these complex issues.

Book Review

A Practical Guide to Probation Breaches and Other Applications, by Mark Thomas (Law Brief Publishing, 2024), pp.459, £69.99, ISBN: 978-1-916698-46-8

Lyndon Harris¹

This text is the first text solely dedicated to probation breaches and related topics, and provides detailed practical guidance on the law and practice of this often over-looked area. Released in late 2024, it is up-to-date to August 2024.

The book is divided into three parts. Part I contains introductory material, guiding the reader through the law concerning community and suspended sentence orders. It also explains the purpose of the probation service, when they will become involved in criminal proceedings and, broadly, the responsibilities of the responsible officer. This provides a clear introduction to this area of law, setting out very clearly matters which are important in order to advise clients as to the basics of a community based order and practical implications of such orders.

Part II is the heart of the book. It concerns breach proceedings and clearly sets out both the fairly complex procedural provisions (which differ between the magistrates’ courts and the Crown Court) and provides invaluable practical tips and commentary. For instance, the section dealing with the multitude of information which can be provided in advance of a breach hearing is enormously helpful when considering the preparation necessary in advance of a hearing, whether you are advising or appearing for the Probation Service or for the offender, or whether you are the judge. The guidance of-

ferred clearly stems from the great experience of the author and raises both practical (tactical) issues, as well as ethical ones. The description of the law is clear and fully referenced which can often be the downfall of practical handbook sized legal texts. This section, dealing with a complex area, is set out very clearly, which is of great assistance for the busy practitioner. In addition to the clear exposition of the law, there is a dedicated chapter on the practicalities of a contested hearing, with further, useful, practical hints and tips for preparing for and conducting such hearings.

Part III guides judges and practitioners through the various applications that can be made in relation to community based orders, addressing with similar clarity the complex provisions that form the basis of the post-sentence regime. More recently, the increase in orders which can be subject to review adds another layer of complexity. This section separates out the various orders which makes it virtually impossible to make such an error.

Finally, there is a “quick reference” and common errors appendix. This provides a handy bullet point list of the key elements of the technical aspects of community based orders. This easy to navigate list of the details of the legislation is perhaps one of the most useful parts of the text.

This text is comprehensive and highly practical, whether for use in chambers when preparing for sentencing or probation hearings, or to carry to court to have to hand when tricky and technical issues arise. It is a solid addition to one’s library.

¹ Barrister, 6KBW.