**[2024] EWCA Crim 1395:**
**IN THE COURT OF APPEAL**
**(CRIMINAL DIVISION)**
**ON APPEAL FROM THE CROWN COURT AT SALISBURY**
**HIS HONOUR JUDGE PARKES**
**CASE NO 202301130 A4**

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 15 November 2024

**Before:**

**LORD JUSTICE HOLGATE**
**MR JUSTICE GRIFFITHS**
**HER HONOUR JUDGE DE BERTODANO**

**Between:**

**PETER ROGER DANIELS** — **Applicant**

**- and –**

**THE KING** — **Respondent**

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**Jim Olphert** (instructed by JMW solicitors) for the applicant
**Timothy Moores** (instructed by the Crown Prosecution Service) for the respondent

Hearing date: 31 October 2024

# J U D G M E N T

**HER HONOUR JUDGE DE BERTODANO**:

1. The single judge has referred this application for leave to appeal against sentence to the Full Court. The substantive sentence has already been considered and altered by the Court of Appeal. The proposed appeal is limited to a challenge to a deprivation order made under section 143 of the Powers of Criminal Courts (Sentencing) Act 2000, made by HHJ Parkes QC upon conviction and sentence at Salisbury Crown Court on 7 February 2019.

## Facts

2. This is a case where the applicant was convicted of very serious sexual offences. He had used his hobby as a photographer, and the trust that the children's families placed in him, to enable him to commit the offences. They included numerous rapes of very young children. Many interactions with the child victims were filmed. There were several indecent images counts relating to this, and to other material on his devices.

## The making of the deprivation order

3. At the sentencing hearing on 7 February 2019 there were, in total, three references to the issue.

> (1)
>
> Prosecution Counsel: In terms of consequential orders, we ask please for an order under Section 143 of the Powers of Criminal Courts Act for forfeiture of the seized computers, hard drives and cameras. The police will undertake to make efforts to return if the Defendant can formally write to them and identify where it can be found, he's got various historical material recorded on the computers, we understand." (Transcript p 39)
>
> (2)
>
> Defence Counsel: And that there can be no objection to the forfeiture and destruction of those devices which have on them these images.
>
> His Honour Judge Parkes: Yes.
>
> Defence Counsel: And we shall be entering discussions with the Prosecution --
>
> His Honour Judge Parkes: Yes.
>
> Defence Counsel: For the retrieval of proper historical material." (Transcript p 54)

(3)

> His Honour Judge Parkes: "Secondly, to order forfeiture and destruction of all the computers, hard drives and cameras involved" (Transcript p 68)

4. A deprivation order (incorrectly described as a forfeiture order) was drawn up on the following day, 8 February. It recorded that:

> "On 07/02/2019 the Court ordered that computers, hard drives and cameras shall be forfeited and destroyed under S143 Powers of Criminal Courts (Sentencing) Act 2000."

5. There were a total of 149 items which were seized by the police. There has been considerable correspondence between legal representatives for the applicant and the police as to what items could be returned to the applicant. A large number of items were returned. The police were asked to identify various lawful material on other devices, and they attempted to do so.

6. By late 2020 it was clear that discussions as to what else should be returned to the applicant had broken down. The case was listed before Winchester Crown Court in May 2021 in an attempt to get clarity, but the judge at that hearing decided that she had no jurisdiction to do anything further in terms of varying or overturning a properly made order.

**The Application**

7. The applicant claims that there are items in this case, which have no link to the offending, and therefore should not be subject of the deprivation order.

8. The applicant says that he is "not seeking a complete quashing of the order nor the return of the items which are plainly within s.143."

9. What he asks is that "the order should be quashed and remade, pursuant to section 11(3)(b) of the Criminal Appeals Act 1968. Any order should reflect the clear evidence that items presently falling within the scope of the order do not meet the test under the legislation."

10. The applicant has not provided the court with a draft order.

11. At the hearing, the applicant and the prosecution agreed that the list dated 30 October 2024 headed "Schedule of Contested Items" correctly identifies the seven items which remain the subject of disagreement between the parties. Of these, the first two are hard drives containing what the parties describe as "illegal material". By this they mean material which brings the item within sub-paras. (a) or (b) of s.143(1). The third is a "creative computer tower" which may or may not contain illegal material. The fourth is an LG computer tower also containing illegal material. The final three items are videos, CDs and DVDs.

12. The applicant submits that with regard to the hard drives containing illegal material, a new order should allow an expert to be instructed by the applicant to remove the legal material, in the manner that was allowed, before the order in question came into force, in *R v Tan* [2023] EWCA Crim 1104; [2024] 1 Cr. App. R. (S.) 2 at paras 9-10.

13. It is accepted that the application is made over three years out of time. The current legal representatives took over the case in 2021. It is said that efforts have been made to constructively resolve the matter. Time was taken seeking advice regarding the proper route of appeal, or whether fresh proceedings could be brought in other courts. Transcripts were obtained. The new representatives acted with expedition. The applicant submits that this late application should be allowed.

14. It is accepted on behalf of the applicant that the order of 8 February 2019 must be read, because of its reference to section 143, as authorizing the deprivation of the "Computers, hard drives and cameras" (as stated in the order) which had been seized from him by the police and fell within sub-paras.(a) and/or (b) of s.143(1). The applicant accepted in the Crown Court that the order could properly be made under s. 143. It is accepted that the order did not have to have a list attached to it. The judge was not supplied with any list and there was no challenge to the inclusion of any particular item covered by his order. The judge was told that the parties would enter into what can only be described as an administrative process to identify any items or material that the police would agree to release. But this process was not to take place before the order was either made or came into effect.

**The Law**

15. The order was made pursuant to section 143 of the Powers of Criminal Courts (Sentencing) Act 2000. The legislation has since been revoked and replaced with equivalent provisions in the Sentencing Act 2020 (see now Chapter 4 of Part 7).

16. Section 143 Powers of the Criminal Courts (Sentencing) Act 2000 provided as follows:-

> **143 Powers to deprive offender of property used etc. for purposes of crime.**
>
> (1) Where a person is convicted of an offence and the court by or before which he is convicted is satisfied that any property which has been lawfully seized from him, or which was in his possession or under his control at the time when he was apprehended for the offence or when a summons in respect of it was issued—

(a) has been used for the purpose of committing, or facilitating the commission of, any offence, or

(b) was intended by him to be used for that purpose,

the court may (subject to subsection (5) below) make an order under this section in respect of that property.

(2) Where a person is convicted of an offence and the offence, or an offence which the court has taken into consideration in determining his sentence, consists of unlawful possession of property which—

(a) has been lawfully seized from him, or

(b) was in his possession or under his control at the time when he was apprehended for the offence of which he has been convicted or when a summons in respect of that offence was issued,

the court may (subject to subsection (5) below) make an order under this section in respect of that property.

(3) An order under this section shall operate to deprive the offender of his rights, if any, in the property to which it relates, and the property shall (if not already in their possession) be taken into the possession of the police.

(4) Any power conferred on a court by subsection (1) or (2) above may be exercised—

(a) whether or not the court also deals with the offender in any other way in respect of the offence of which he has been convicted; and

(b) without regard to any restrictions on forfeiture in any enactment contained in an Act passed before 29th July 1988.

(5) In considering whether to make an order under this section in respect of any property, a court shall have regard—

(a) to the value of the property; and

(b) to the likely financial and other effects on the offender of the making of the order (taken together with any other order that the court contemplates making).”

17. In the case of *R v Wright-Hadley (Stephen)* [2022] EWCA Crim 446 Carr LJ (as she then was) set out the following principles:

“18. As to substance:

> i) A deprivation order will only be available if the requirements in section 153(3) are met, namely that the property has been used for the purpose of committing, or facilitating the commission of, any offence, or was intended by the offender to be used for that purpose;
>
> ii) If available, when considering whether or not to make a deprivation order, a court must have regard to the factors identified in section 155(1), namely the value of the property and the likely financial and other effects of making the Order;
>
> iii) Proportionality is a relevant and important factor. The effect of a deprivation order should be considered as part of the total penalty imposed;
>
> iv) Deprivation orders should not be made unless they are simple and there are no complicating factors such as the existence of innocent co-owners.
>
> 19. As to procedure:
>
> i) It is for the prosecution to justify an application for a deprivation order. The burden lies on the prosecution to satisfy the court to the criminal standard of proof that such an Order is available;
>
> ii) There needs to be a sufficient evidential basis for a deprivation order to be sought and made, so that full and proper investigation of the basis for the Order can take place;
>
> iii) The court must make a proper enquiry into the circumstances of the property which is the subject of the application for deprivation and, where necessary, make a formal finding. Where appropriate this may take the form of a Newton hearing;
>
> iv) The prosecution and defence should be invited to make submissions as to the appropriateness of the proposed order."

18. In that case, the appellant made representations to the sentencing judge at the time of sentence that some items on the list provided by the police should not be made the subject of an order. There were 20 devices, and the prosecution submitted to the judge that it would not be cost effective to examine them, and the judge agreed, saying that he could not be satisfied that they were hard drives which contained no indecent images. The Court of Appeal found that this approach was "turning the test […] on its head. […] He should instead have asked himself whether he was sure that the hard drives had been used or were intended to be used for the purpose of committing an offence."

19. The present case is different in that no issue was raised before the judge made his order, although he heard from both prosecution and defence. The

judge cannot therefore be criticised for not enquiring into matters which the parties did not suggest to him required resolution. The submissions of counsel did not suggest that "discussions with the Prosecution for the retrieval of proper historical material" referred to by defence counsel should take place before the making of the order. Those discussions were a matter for agreement, if possible, between those who took part in them, after the order was made and came into effect.

20. In the case of *R v Tan (Desmond)* [2024] EWCA Crim 1104 the appellant submitted that the deprivation order should have been limited to the material on the devices rather than the devices and their contents as a whole. He submitted in the alternative that there should be a period before the order took effect during which the lawful material could be removed from the devices by an expert instructed by the defence.

21. Giving the judgment of the court, Jay J said at paras 9-10 as follows:

> "9. We cannot accept Mr Temple's submission that the deprivation order should be limited to the unlawful material on the devices. In principle that gives rise to conceptual difficulties. In any event, an order in these terms could require the public to bear the cost of removing the lawful material. It is therefore appropriate to consider Mr Temple's alternative submission which has far greater attraction. He, in the context of that alternative submission, does not contest the making of a deprivation order provided that a period of time is available during the course of which the relevant lawful material may be extracted. In all the circumstances of this case, we are satisfied that it would be fair and proportionate to make such a deprivation order bearing in mind a number of factors including the appellant's circumstances and the leniency of the suspended sentence order. A mechanism does exist to ensure that material of sentimental value, either to the appellant or his family can be removed.
>
> 10. It is not necessary to consider whether the appropriate application is under the 1897 Act or by the appellant himself because these issues are avoided by Mr Temple's pragmatic solution, namely that there be an interregnum before the deprivation order takes effect. During oral argument, a period of 3 months was proposed. An expert, which has already been identified, would have the opportunity to attend at the relevant premises, remove from the machines the lawful items, and then, for good order, prepare a relevant schedule which would be signed off by the police, to avoid any future difficulty. We understand that a memorandum of understanding has been prepared by the parties which would ensure this process proceeds smoothly. In the circumstances of this case, we would invite counsel to prepare a draft of the appropriate order by 4.00 pm on Monday next, and the Court will then consider its terms

> to ensure that no practical difficulties arise and during the period of 3 months that we have referred to."

22. The judge in the present case was not asked to adopt a "pragmatic solution" of this nature. He was invited to make his order in advance of any future discussions, which he did. The outcome of those discussions was therefore not a matter for the judge, or for this court on appeal from the judge.

**Discussion**

23. Orders of this sort are made on a daily basis in courts up and down the country. They are generally made with the agreement of the defence. Although this case involved a large quantity of material, it did not have any legal complexities with regard to ownership of the property. No authority was cited to us that there was any other aspect of complexity which would have made it inappropriate for the Crown Court to have made the order under s.143.

24. This was a case in which it was clear from the facts and the nature of the offences that there was an evidential basis on which an order could be made depriving the applicant of "computers, hard drives and cameras" which had been lawfully seized. The requirements set out in in section 143 were clearly met by a large number of items, namely that they had been used for the purpose of committing, or facilitating the commission of, any offence, or were intended by the offender to be used for that purpose.

25. There was no suggestion by the defence at the sentencing hearing that the effect of the order was disproportionate, or that any kind of formal finding was required into the circumstances of the property. The prosecution and defence were able to make submissions as to the appropriateness of the proposed order. It is clear from the transcript that both agreed that it was appropriate. The judge was told that there was no issue between the parties about the making of the order or its terms. It was not suggested that the order would be outwith the powers conferred by section 143. In those circumstances, there is no arguable basis for challenging the order.

26. No suggestion was made to the sentencing judge that there should be a period of grace to allow a defence expert to extract material from the devices. The judge was told by the prosecution at the sentencing hearing that the police would undertake to make efforts to return historical material if the defendant could formally write to them and identify where it could be found. The defence confirmed they would be entering discussions with the prosecution for the retrieval of proper historical material.

27. That is exactly what has happened. As a result, of the 149 items seized in this case, a large number have been returned to the defence. The defence has provided the police with search terms, and efforts have been made by the police to find and return to the applicant lawful material from the devices which contain material which falls under section 143. The applicant now complains that these efforts have not always yielded satisfactory results.

28. The real complaint is that the applicant is unhappy with the process which was undertaken by the police. Effectively, and in accordance with the schedule provided yesterday, he complains that:
    i. insufficient lawful material has been extracted from three items which fall within the scope of the order; and
    ii. four items have been retained which do not fall within the scope of the order.

29. A complaint about the police failing to identify and return lawful material on items which fall within the scope of the order is not a matter for this court. There is no requirement that the police try to extract and return this material from devices on which there is unlawful material. Para 9 of *R v Tan* which we have quoted, rejected the submission that the deprivation order should be limited to the unlawful material on the devices. Extraction from the devices was not something to which the applicant was entitled by the terms of the order which he did not oppose, or otherwise by section 143.

30. In this case, the police agreed to some extraction and return after the order. They were not required to do so by the terms of the order. The police have explained in several letters why the information provided by the applicant has not enabled them to identify any further "legal" material. They have also explained why it would be a disproportionate use of public resources for them to take the matter any further and why it would be inappropriate for an independent expert instructed by the applicant to have access to the items in this case. The fact that the applicant is not content with the outcome of this administrative process does not provide a reason for this court to quash a properly made order. If time for a defence expert to examine the devices was required, an application could have been made at the sentence hearing, as it was in *R v Tan*, and it could then have been considered by the sentencing judge. If no request was made at the time of sentence, it cannot provide a ground of appeal.

31. A separate issue as to whether the police have retained items falling outside the terms of the order is not a matter for this court. It is agreed that any remedy which may exist would lie in the civil courts. In any event, this court has not been given any evidence which could enable it to resolve any such issue, even if it were appropriate for it to do so.

32. Items 5 – 7 are different because they are not "Computers, hard drives and cameras". They are CD disks, DVDs and recorded tapes and CDRoms. Mr Moores accepted on behalf of the prosecution that unless the order were to be amended by adding some additional wording to cover these items, they would fall outside the terms of the order as it stands. He also accepted that if the application for leave to appeal is successful, s, 11(3) of the Criminal Appeal Act 1968 would preclude the making of the amendment he suggested. However, whether the police are obliged to give them back is a different issue. They are reluctant to do so because they contain images of victims. That might be a good and lawful reason, having regard to the victims' rights, for not giving them back to the applicant on his request after

a lawful seizure. That would be a matter for full argument in another court, but the applicant may well face difficulties in succeeding in a civil claim in those circumstances.

33. It follows that we find no merit in these grounds of appeal. In any event, we can see no grounds for allowing the applicant the very lengthy extension of time he asks for. It was apparent at least by the time of the hearing at Winchester Crown Court in June 2021 that a deadlock had been reached. The applicant's grounds of appeal present no explanation let alone justification for the lengthy delay thereafter.

34. For all these reasons, the applications for an extension of time and for leave to appeal against sentence in this case are refused.