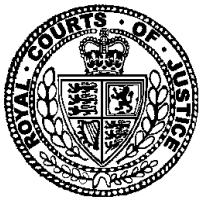

Neutral Citation Number: [2022] EWHC 1056 (Admin)

Case No: CO/2001/2021

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 May 2022

**Before** :

**MR JUSTICE JOHNSON**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **CECIL STEVEN HEILLIGGER** | **Claimant** |
| **- and -** | |
| **(1) WESTMINSTER MAGISTRATES' COURT**<br>**(2) COMMISSIONER OF POLICE OF THE METROPOLIS** | **Defendants** |

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Alun Jones QC (instructed by Hollingsworth Edwards) for the Claimant
Nicholas Yeo and Ryan Dowding (instructed by Metropolitan Police Service) for the Second Defendant

Hearing date: 27 April 2022

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# Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 10am on 6 May 2022.

**Mr Justice Johnson :**

1. The claimant seeks judicial review of the issue of a search warrant by the first defendant, its execution by the second defendant's officers, and the retention of property, including a substantial quantity of cash. He seeks a declaration as to the unlawful conduct of the second defendant's officers, an order for the return of the property seized, and damages for trespass.

2. The second defendant now accepts that the search warrant failed to comply with statutory requirements, that it was therefore invalid, and that the search and seizure of property were unlawful (although the second defendant does not accept the full extent of the claimant's case). The second defendant resists an order for the immediate return of property and wishes to make an application to the Crown Court under section 59 of the Criminal Justice and Police Act 2001 which would, if successful, permit the continued retention of the property.

## The background

3. In March 2021 the claimant was living in London. He was being investigated by the authorities in Sint Maarten on suspicion of involvement in (amongst other matters) four murders, money laundering and participation in a criminal organisation. It is said that encrypted data that has been analysed during the investigation shows that the claimant "coordinates assassinations."

4. The authorities in Sint Maarteen sought the claimant's extradition and made a request to the United Kingdom for mutual assistance. The Secretary of State made a direction under section 13 of the Crime (International Co-operation) Act 2003 that the police should apply for a search warrant of the claimant's home. In addition, a warrant for the claimant's arrest was obtained under section 71 of the Extradition Act 2003.

5. The police duly applied for a search warrant under section 8 of the Police and Criminal Evidence Act 1984, read with section 16 of the 2003 Act. On 9 March 2021, the search warrant was issued. On its face it grants authority to search for:

> "(A) Cash;
>
> (B) Documents relating to and concerning real estate properties or goods linked to the offending Heilligger which is relevant to the offence under investigation;
>
> (C) Electronic devices on which data may be stored including telephones, computers and USB sticks;
>
> (D) All administration/paperwork dating from 2015 till now concerning the allegations against Heilligger;
>
> (E) Objects/goods that can be linked to the criminal organization the No Limit Soldiers or the Army;
>
> (F) All administration/paperwork concerning the traveling of Heilligger;

> (G) All administration/paperwork in connection with countries of which we know members of the NLS reside like Dubai, Brazil, Dominic Republic and of possible properties in those countries."

6. The warrant was executed at 5am on 19 March 2021. Three officers attended at the claimant's home. Entry was forced, and damage was caused to the door. The claimant was arrested under the arrest warrant. A search was conducted which lasted just over 2 hours. The police seized twenty-five items of property, including mobile phones, an ipad, a computer, a small amount of cannabis, and approximately £62,000 in cash ("the cash"). They left two pieces of paper with the claimant's partner who was at the premises with him. The first is a copy of the first page of the warrant. The second is a copy of the second (and final) page of the warrant. The second page is signed by the District Judge who issued the warrant, certifying that it is a true copy of the original warrant. The two pages were not stapled or otherwise attached to each other.

7. On 22 March 2021 there was email correspondence in which the Sint Maarten authorities asked for the cash to be paid into a bank account and then transferred later with the court's approval together with the seized goods. The cash was duly paid into a bank account. That meant that the cash itself was no longer available as evidence for the investigation. The claimant was not told about this until later (see paragraph 10 below).

8. On 29 June 2021 the second defendant filed an acknowledgement of service. It was conceded that the warrant should be quashed because it failed sufficiently to identify the articles to be sought, in that it did not explain the allegations referred to in paragraphs (B) and (D), or list the relevant countries in (G) (see paragraph 5 above). It was acknowledged that this meant that the search and seizure were also unlawful. It was said that the second defendant would issue an application under section 59 of the Criminal Justice and Police Act 2001 to seek to retain the material. This was not done.

9. The detailed grounds were due by 1 October 2021. On 30 September 2021 the second defendant applied for an extension of time until 29 October 2021 on the ground that pressure of work had meant that it was not possible to complete the detailed grounds in time. The application was opposed by the claimant but granted by the court.

10. On 7 October 2021 the second defendant's officers had a conference with counsel. On 8 October 2021 a request was made by the second defendant to "urgently contact Sint Maarten to establish whether they still wished to apply for the cash pursuant to an external order… they would need to urgently commence the process… [so that] an application [could] be made to restrain the property in this jurisdiction." On 11 October 2021, Mr Daniel Futter, a lawyer employed by and acting for the Metropolitan Police Service, wrote to the claimant's solicitor and acknowledged that the cash was not being held lawfully because "it had mistakenly been banked by the MPS." It was explained that the options were being urgently explored with Sint Maarten and that he would revert the following week. The claimant's solicitor responded by saying that the money should be restored to the claimant and requesting that the second defendant notify him of any request from Sint Maarten for the transfer of the money. On 19 and 25 October 2021 Mr Futter was provided with correspondence between the UK Central Authority and the authorities in Sint Maarten. That correspondence showed that the authorities in Sint Maarten wanted the money to be transferred to them, that they had been told that they would need to make a request for restraint, and that they had said that they would

do so following the extradition proceedings. On 25 October 2021 Mr Futter was provided with advice from counsel in which it was said that only a "short period of grace [was] potentially available to the MPS when holding cash unlawfully to determine what, if any, steps should be taken next." On 29 October 2021 detailed grounds were filed on behalf of the second defendant.

11. On 29 October 2021, 8 December 2021 and 19 January 2022 counsel emailed Mr Futter chasing for updates and urgent instructions. On each occasion there was no response. Mr Futter left the Metropolitan Police Service on 25 March 2022. At that point, the case was transferred to a senior solicitor within the Metropolitan Police Service, Asma Karam-Aslam. Urgent advice from counsel was sought and provided about the steps that needed to be taken as a matter of priority. Ms Karam-Aslam says (in a witness statement made shortly before the hearing) that discussions are now being undertaken with the authorities in Sint Maarten to ensure that the matter is resolved without any further delay.

12. In her statement, Ms Karam-Aslam says that the "inaction" of the second defendant's in-house lawyer was a result "of a general overload of work… with limited resources." She explains that there has been a significant increase in work and that this has coincided with experienced members of staff leaving the organisation. The volume of work being undertaken by Mr Futter resulted in this case being overlooked, and the "relevant advice" not being provided to the client.

13. Extradition proceedings regarding the Claimant are ongoing. On 9 December 2021 the Secretary of State ordered the Claimant's extradition. An appeal against that order is outstanding.

## The grounds of challenge and response

14. The claimant advances three grounds of challenge.

15. First, the claimant says that the entry, search, and seizure of property was unlawful because there was a breach of section 15(6)(b) of the 1984 Act, in that the warrant did not set out its ambit in a sufficiently clear and precise way.

16. Second, the claimant says that there were breaches of sections 15(8) and 16(5)(c) of the 1984 Act because the copy of the warrant that was left at the premises was not clearly certified as a true copy (only the second page was signed, not the first page) and the two pages were not attached to each other.

17. Third, the claimant says that the police have unlawfully retained the cash that was taken from the property at the time of the execution of the warrants.

18. The first defendant has not taken any part in these proceedings.

19. In pre-action correspondence, the solicitor for the second defendant expressed the "firm belief" that the proposed claim for judicial review was "hopelessly misconceived" and asserted that there was "no prospect of even permission being granted" and warned that an application for costs would be made.

20. In the event, once the claim was issued, the second defendant conceded ground 1, but contested grounds 2 and 3.

21. On 29 October 2021 the second defendant filed detailed grounds for contesting the claim. Grounds 1 and 3 were now conceded (it was indicated in correspondence earlier that month that ground 3 would be conceded – see paragraph 10 above). Mr Futter filed a witness statement explaining that it was the second defendant's intention to lodge an application to retain the items seized under section 59 of the 2001 Act. As explained above, that was not done. Mr Futter also said that the second defendant was endeavouring to ensure that the enquiries with Sint Maarten were resolved, and the Claimant notified, "forthwith." Again, however, as explained above, this was not done.

22. In the detailed grounds, the second defendant contested ground 2 of the claim, contending that a certified true copy of the warrant had been left with the occupier of the premises, in compliance with sections 15(8) and 16(5)(c) of the 1984 Act.

## The statutory framework

23. Section 8 of the 1984 Act provides a power for a justice of the peace to issue a search warrant if (amongst other matters) there are reasonable grounds for believing that an indictable offence has been committed and that there is material on the premises to be searched which is likely to be of substantial value to the investigation.

24. Section 16 of the 2001 Act extends the ambit of section 8 of the 1984 Act by providing that it applies to offences under the law of a country outside the United Kingdom that would, in England and Wales, constitute an indictable offence. An application for such a warrant may only be made in limited circumstances, which include where a direction has been given under section 13. That section applies where a request for assistance has been made by a prosecuting authority in a country outside the United Kingdom. It allows, in such a case, for a direction to be given that a search warrant be applied for under section 16. That is what happened in this case.

25. Sections 15(1) of the 1984 Act states "an entry on or search of premises under a warrant is unlawful unless it complies with [sections 15 and 16]." Section 15(6)(b) states "a warrant… shall identify, so far as is practicable, the articles… to be sought." Section 15(7) and (8) requires that two copies are made which "shall be clearly certified as copies."

26. Section 16(5)(c) states that a copy of the warrant must be supplied to the occupier of the premises (where, as here, the occupier is present at the time of the execution of the warrant).

27. Section 22 provides a power for the police to retain property that has been lawfully seized:

> "**22 Retention**
>
> (1) …anything which has been seized by a constable… may be retained so long as is necessary in all the circumstances.

(2) Without prejudice to the generality of subsection (1) above—

(a) anything seized for the purposes of a criminal investigation may be retained, except as provided by subsection (4) below—

(i) for use as evidence at a trial for an offence; or

…"

28. Section 59(6) of the Criminal Justice and Police Act 2001 allows an application to be made to authorise the continued retention of property that has been unlawfully seized. Section 59 states:

"**59 Application to the appropriate judicial authority**

(1) This section applies where anything has been seized in exercise, or purported exercise, of a relevant power of seizure.

(2) Any person with a relevant interest in the seized property may apply to the appropriate judicial authority, on one or more of the grounds mentioned in subsection (3), for the return of the whole or a part of the seized property.

(3) Those grounds are—

(a) that there was no power to make the seizure;

…

(5) The appropriate judicial authority—

(a) on an application under subsection (2),

(b) on an application made by the person for the time being having possession of anything in consequence of its seizure under a relevant power of seizure…

may give such directions as the authority thinks fit as to the examination, retention, separation or return of the whole or any part of the seized property.

(6) On any application under this section, the appropriate judicial authority may authorise the retention of any property which—

(a) has been seized in exercise, or purported exercise, of a relevant power of seizure, and

(b) would otherwise fall to be returned,

> if that authority is satisfied that the retention of the property is justified on grounds falling within subsection (7).
>
> (7) Those grounds are that (if the property were returned) it would immediately become appropriate—
>
> (a) to issue, on the application of the person who is in possession of the property at the time of the application under this section, a warrant in pursuance of which, or of the exercise of which, it would be lawful to seize the property; or
>
> …
>
> (10) The relevant powers of seizure for the purposes of this section are—
>
> …
>
> (b) each of the powers of seizure specified in Parts 1 and 2 of Schedule 1; and
>
> …
>
> (11) References in this section to a person with a relevant interest in seized property are references to—
>
> (a) the person from whom it was seized;
>
> (b) any person with an interest in the property; or
>
> (c) any person, not falling within paragraph (a) or (b), who had custody or control of the property immediately before the seizure.
>
> …"

29. The appropriate judicial authority for the purposes of section 59(2) is the Crown Court – section 64(1)(a). The powers of seizure for the purposes of section 59(1) are listed in schedule 1 to the 2001 Act (see section 59(10)) and include the power of seizure pursuant to a warrant issued (as here) under section 8 of the 1984 Act.

## Discussion

*Ground 1: Ambit of warrant*

30. The second defendant has rightly conceded this ground. The warrant did not identify "so far as is practicable" the articles that were sought. In three separate respects, it is not possible to identify from the warrant precisely what items were being sought. Thus:

(1) Item B is "Documents relating to and concerning real estate properties or goods linked to the offending Heilligger which is relevant to the offence under investigation." This is almost meaningless without knowledge of the alleged offending which was under investigation, but that offending is not explained in the warrant.

(2) Item (D) is "All administration/paperwork dating from 2015 till now concerning the allegations against Heilligger." It is clear that this relates to administration or paperwork dating from 2015. It is also clear that it is only such administration or paperwork that concerns the allegations against the claimant. However, those allegations are not explained in the warrant. So, it is not possible to tell from the warrant what is being sought.

(3) Item G is "All administration/paperwork in connection with countries of which we know members of the NLS reside like Dubai, Brazil, Dominic Republic and of possible properties in those countries." It can be inferred that "NLS" is a reference to the "No Limit Soldiers" group that is referenced in item E. It is, however, impossible to know which countries, beyond those specified, are relevant. That is because the warrant does not explain which countries are relevant (beyond those specified). It is, moreover, not clear who the "we" refers to, or what knowledge those persons have as to the residence of the NLS.

31. It follows that there has been a breach of section 15(6) of the 1984 Act. It further follows, by reason of section 15(1) of the 1984 Act, that the entry on to the claimant's premises, and the search of those premises was unlawful.

*Ground 2: Leaving copy of warrant with the occupier*

32. It is not necessary for the claimant to succeed on ground 2 in order to establish that the search and seizure were unlawful. That is because the claim succeeds anyway under ground 1. Nevertheless, Mr Jones QC relied on ground 2 in order to establish the extent of the police's illegality which, he said, was relevant to the arguments that arise in relation to relief.

33. The two pages left at the premises comprise a complete copy of the warrant, signed by the District Judge, certified as a copy on page 2 and headed "occupier's copy" on page one. That complies with sections 15(8) and 16(5)(c) of the 1984 Act.

34. I accept the submission of Mr Jones QC that it would have been better if the first page had been signed or initialled by the District Judge, and if the two pages had been attached to each other. That would have avoided or reduced the risk of confusion or mistake. It appears that, initially, there was a genuine mistake on the part of those advising the claimant: the letter before action indicates that it was thought that only the second page of the warrant had been left at the premises. It is, however, now agreed that both pages were left.

35. The authorities support Mr Jones' submission. In *R v Chief Constable of Lancashire Police ex parte Parker* [1993] QB 577 Nolan LJ said, at 586F-H:

> "Before leaving this part of the case we would refer to the… situation which would arise if a warrant consisted (as it normally does) of a number of pages, and if one or more of those pages became accidentally detached before the warrant was produced to the occupier of the premises to be searched. That, of course, is not the present case, and it can best be dealt with when it arises, but we can hardly imagine that an accidental temporary detachment, promptly remedied if there were a stapler to hand,

> would be regarded as invalidating the warrant, provided always that all of the pages were held by the officer in charge of the search. The possibility of accidental detachment however, coupled with the difficulties which have arisen in the present case, lead us to suggest that something more than the signature of the judge and the court stamp on one page of the document would be desirable as a means of authenticating the whole. The judge might, for example, initial the other pages. In the case of a three-page warrant the pages might be numbered 1 to 3, etc. We are reluctant to suggest what might seem to be excessive and time-consuming precautions, but the recent experience of this court has strikingly illustrated the consequences for the police of failures to observe the strict statutory procedure which Parliament has laid down."

36. In *R(Bhatti) v Croydon Magistrates' Court* [2010] EWHC 522 (Admin) the addresses that were authorised to be searched under a warrant were set out in a schedule to the warrant. The schedule was not left at the premises. The Divisional Court held that this amounted to a breach of section 16(5)(c). Elias LJ said, at [20]:

> "The schedule is a crucial and integral part of the warrant, in that it identifies the premises which the police are authorised to enter. It is repeating the confusion that Nolan LJ referred to in the *Parker* case to treat the schedule as something distinct from the warrant, which Mr Begg's submissions effectively do. Moreover, it is apparently the practice… for both parts of the warrant to be signed by the issuing justice or district judge. As the court noted in *Parker*, this is not legally required but it was recommended in that case that it should be done, and we are told that it commonly is."

37. I reject the more ambitious submission of Mr Jones that there is a breach of section 16(5), or a warrant's authority is otherwise invalidated, where all pages of the warrant are not signed or initialled by the District Judge. Nothing in the statutory framework requires that this is done. The authorities explain why it is desirable that it be done, whilst recognising that is not a legal requirement ("would be desirable"; "not legally required"). Similarly, nothing in the statutory framework requires that all pages of a warrant are attached to each other. Again, as the authorities show, it is desirable that this is done but it is not a legal requirement.

38. Accordingly, I dismiss the challenge brought under ground 2.

*Ground 3: Seizure and retention of cash*

39. For the reasons given under ground 1, the warrant does not provide a justification for the seizure of the cash. The second defendant has not identified any other power to seize or retain the cash, or to pay it into the bank account. The second defendant therefore also concedes ground 3 of the claim.

## Relief

40. The claimant does not seek an order quashing the warrant. He seeks a declaration that the search and seizure were unlawful. The second defendant does not oppose a declaration in those terms.

41. The claimant also seeks an order for payment of a sum equivalent to the cash and any accrued interest. The cash cannot be the subject of an order under section 59 of the 2001 Act because the second defendant no longer retains it – it was paid into a bank account. The second defendant does not therefore oppose the relief sought in this respect (whilst leaving open the possibility that any monies paid to the claimant might then be the subject of some form of lawful restraint).

42. The claimant further seeks the return of the seized property. The second defendant accepts that there is no lawful basis for the retention of the property, but resists an order for its immediate return. The second defendant wishes to make an application under section 59 of the 2001 Act to permit the continued retention of the property. The second defendant therefore seeks an order that will not require the return of the property so long as an application under section 59 is made.

43. Relief in public law proceedings is discretionary. That is so both in relation to the question of whether to grant a remedy, and as to the nature and ambit of any remedy granted. The exercise of the discretion is fact sensitive. Where, as here, it is shown that property has been unlawfully seized then it will normally be appropriate to order the return of the property. There are, however, cases where it would not be appropriate to order the return of property.

44. One of the items of property seized was a quantity of cannabis. Plainly, the claimant is not entitled to the return of the cannabis. The claimant is not entitled to possess cannabis. If it were returned to him then he would immediately be committing a criminal offence contrary to section 5 of the Misuse of Drugs Act 1971. The "*Bowmakers* exception" therefore applies – see *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 *per* du Parcq LJ at 72 ("there is one obvious exception, namely, that class of cases in which the goods claimed are of such a kind that it is unlawful to deal in them at all, as for example, extreme books") and *Webb v Chief Constable of Merseyside* [2000] QB 427 *per* May LJ at 443G-H and 444G-H, and Pill LJ at 449B-G.

45. None of the other property comes within the scope of the *Bowmakers* exception. However, the second defendant wishes to make an application under section 59 of the 2001 Act. Mr Yeo submits that any order for the return of the property should be subject to the outcome of such an application, so long as it is made within a short period of time.

46. Mr Jones accepts that "in a purely domestic case" there is power to regularise an unlawful seizure of property by exercising the section 59 jurisdiction. He says (by reference to the power of retention under section 22(2)(a)(i) of the 1984 Act) that retention under section 59 of the 2001 is envisaged as being for the purpose of an investigation in contemplation of a trial on indictment or a summary trial, and for use in evidence at such a trial. Accordingly, he submits it is not available in a "foreign case" where there is no question of a (domestic) summary trial or trial on indictment.

47. Mr Jones very fairly drew my attention to the decisions in *R (van der Pijl) v Crown Court at Kingston* [2012] EWHC 3745 (Admin) (*per* Wilkie J at [38]) and *R (van der Pijl) v Secretary of State for the Home Department* [2014] EWHC 281 (Admin) (*per* Green J at [98]) where section 59 was applied in a foreign case. Mr Jones says that *van der Pijl* does not address the argument that he advances in this case and that (irrespective of the fact that the decisions in *van der Pijl* were first instance decisions of the High Court) the point is therefore open to him.

48. The answer to Mr Jones' argument is clear from the terms of the 2001 Act itself. Nothing within the 2001 Act restricts the ambit of section 59 to domestic cases or indicates that its sole purpose is to enable evidence to be retained for a domestic investigation and prosecution. Mr Jones' argument relies on the interplay between the 2001 Act and the power of retention under section 22(2)(a)(i) of the 1984 Act which permits the retention of property for use as evidence at a trial where it has been lawfully seized for the purpose of a criminal investigation. There is, however, no reason why section 22(2)(a)(i) of the 1984 Act should limit the ambit of section 59 of the 2001 Act. The test for permitting continued retention is clear from the wording of section 59 itself – see section 59(7)(a). Moreover, section 22(2)(a)(i) is simply one purpose for which lawfully seized property may be retained. It is not the only purpose. Section 22(1) is more expansive, permitting retention "for so long as is necessary in all the circumstances". The more limited purpose identified in section 22(2)(a)(i) is expressly "[w]ithout prejudice to the generality" of the broader power in section 22(1).

49. Moreover, one of the powers of seizure that may underlie a section 59 application is seizure pursuant to sections 17 or 22 of the 2003 Act (which concern seizure of evidence that is relevant to an overseas investigation or offence) – see section 59(1) read with section 59(10)(b) and paragraph 73C of schedule 1 of the 2001 Act. It is therefore plain from the statutory scheme that section 59 applies to foreign cases as well as domestic cases.

50. Parliament has therefore provided a statutory route that would enable the second defendant to seek an order permitting the continued retention of the property. That is "an important factor to be taken into account when [the Administrative Court] is asked to order [property] to be returned without such a procedure." It "is a powerful reason for restraint" – see *R (Chatwani) v National Crime Agency* [2015] EWHC 1283 (Admin) *per* Hickinbottom J [136]. Thus, where the police wish to make a section 59 application it will often not be appropriate to make an order for the immediate return of the property. This is part of the discretionary exercise that is involved in determining the appropriate remedy in judicial review proceedings. But everything depends on the facts of the individual case.

51. Where the Metropolitan Police misled both the High Court and the Crown Court and was in breach of its duty of candour (albeit without a finding of bad faith), an order for the immediate return of the property was made, thereby preventing an application under section 59 – see *R (Kouyoumjian) v Hammersmith Magistrates' Court* [2014] EWHC 4029 (Admin). The same approach was taken in *Chatwani*. Hickinbottom J considered (at [140]) whether "the conduct of the NCA [was] such that it should be relieved of any benefit of the unlawful searches?" and "concluded that it was". That was because the police (albeit not in bad faith) "acted with patent and egregious disregard for, or indifference to, the constitutional safeguards within the statutory scheme within which they were operating" and because the court considered that a Crown Court judge could

not properly grant a section 59 application on the facts of that case (see *per* Hickinbottom J at [141]). That was sufficient to justify making an order for the immediate return of the property, even though that precluded recourse to a section 59 application – see *per* Davis LJ at [151]:

> "…in the present case the conduct of the NCA both in the manner of obtaining and in the manner of executing the warrants was sufficiently egregious, albeit falling short of bad faith, as to justify depriving it of any advantage or benefit whatsoever derived from such warrants. Justice so requires. And if such a decision operates to have something of a deterrent effect hereafter on ill-prepared or ill-executed applications, and to modify any mindset of police or investigating authorities that they can always expect to be permitted to fall back on section 59 of the 2001 Act, then so much the better."

52. Conversely, where the errors on the part of the police are relatively minor, the court has declined to make an order for the immediate return of the property, so as to enable the making of a section 59 application – see *van der Pijl* and also *R (Anand) v HM Revenue and Customs* [2012] EWHC 2989 (Admin).

53. In *Chatwani* Hickinbottom J (at [139]) derived the following propositions from the earlier authorities:

> "i) In the normal course, where material has been obtained as a result of an unlawful search and the agency seizing it wishes to retain it, the appropriate procedure is for the agency to make an application to the Crown Court under section 59. For the purposes of that application, the agency will have the benefit of considering the seized documents, and making submissions with that benefit.
>
> ii) On a section 59 application, the court will be astute to examine the circumstances surrounding the illegal seizure. Any suggestion of bad faith, or even that the agency has adopted a less than rigorous and scrupulous approach to drawing up and executing the initial warrant, will weigh heavily against the exercise of the court's discretion in favour of authorising retention (*R (El-Kurd) v Winchester Crown Court* [2011] EWHC 1853 (Admin) at [65] *per* Stadlen J). The circumstances may have been such that it will be open to the Crown Court to refuse the application as a whole.
>
> iii) The Administrative Court will exercise restraint in ordering the return of such documents. Parliament has assigned responsibility for determining issues of retention to the Crown Court; and the Crown Court will have the advantage of being able to consider the documents seized, which this court will not.
>
> iv) However, there may be circumstances in which it is appropriate to deny the agency of all benefit of the illegal search,

> irrespective of the nature and content of the documents seized. Those circumstances are likely to focus on the agency's own conduct. If it has acted in bad faith, that is likely to be a compelling reason for not allowing it to retain any benefit from the exercise. However, bad faith is not a prerequisite: the agency's conduct in obtaining and/or executing the warrant (or their subsequent conduct, as in *Kouyoumjian*) may drive this court to give the subjects of the warrants relief to deny the agency of all benefit of the unlawful search. I stress that the circumstances in which the court is likely to make such a finding will be rare."

54. In the present case, there was a debate between the parties as to the appropriate test to be applied when deciding whether to order the immediate return of property. Mr Jones relied on *El-Kurd* (see *Chatwani* at [139(ii)] quoted at paragraph 53 above) and submitted that where the police had been less than scrupulous in the application for the warrant then such an order should be made. Mr Yeo pointed out that *El-Kurd* was concerned with an application under section 59 itself and contended that the test for the Administrative Court was that set out in *Chatwani* at [140] and [151].

55. I do not consider that either *El-Kurd* (at [65]) or *Chatwani* (at [140] and [151]) set out a comprehensive test that is appropriate for all cases. Mr Yeo is right that the observations in *El-Kurd* at [65] were concerned with an application under section 59. However, if a section 59 application is bound to fail there would be no reason to deny the claimant the immediate return of the property. So, there is a link between the test for granting a section 59 application and the question of whether a party should be precluded from making a section 59 application. Conversely, the court in *Chatwani* (at [140] and [151]) was considering what relief to grant on the particular facts of that case, where the focus was on the conduct of the NCA which was the body that had obtained and exercised the search warrant and was also the body undertaking the underlying investigation.

56. The principal factors that are, in my judgment, relevant in the present case are rather broader than in either *Chatwani* or *El-Kurd*. They are:

(1) The starting point, which is that Parliament has enacted the section 59 jurisdiction. An order for the immediate return of the property denies the police recourse to that jurisdiction. Ordinarily, therefore, an order for the immediate return of property should not be made where the police intend to make a section 59 application. That jurisdiction caters for cases where property has been unlawfully seized. So the fact that the police have acted unlawfully in seizing property is not, in itself, a reason to prevent the police from making a section 59 application.

(2) The police errors that led to the warrant not complying with a basic and well-known statutory requirement. The approach to the application for the warrant was less than scrupulous. It was somewhat slapdash. This is a factor that weighs against the exercise of the section 59 power (see *El Kurd* at [65]) and, likewise, weighs in favour of ordering the immediate return of the property (see paragraph 55 above).

(3) The police's delay in making an application under section 59. An application could have been made at any point. It is now more than a year since the property was

seized and the second defendant has recognised since June 2021 that it was necessary to make such an application. There is no good reason for the delay. Even now, an application has not been made. Moreover, Mr Jones points out that there are significant backlogs in the Crown Court and that there may be further delays before a section 59 application can be heard. That is a further significant factor in favour of ordering the immediate return of the property.

(4) There is no suggestion of bad faith or breach of the duty of full and frank disclosure or duty of candour. There are no suggested disclosure failings. The problems were (on the account of the Metropolitan Police, which is not challenged) largely due to lack of resources and pressure of work. The police conduct lies somewhere between the egregious fault in *Chatwani* / *Kouyoumjian* and the more minor errors in *van der Pijl / Amand* (albeit, in my judgment, closer to the latter – more akin to error than egregious default).

(5) There is no suggestion of significant fault on the part of the authorities in Sint Maarten. Mr Jones relies on what he says is a principle that the court should not draw a distinction between a litigant and its representatives. He suggests that the errors and defaults on the part of the Metropolitan Police should be imputed to Sint Maarten, or at least that the authorities in Sint Maarten should bear the consequences. However, the Metropolitan Police are not the representatives of Sint Maarten – the statutory system is such that the authorities in Sint Maarten have no choice but to rely on the Metropolitan Police to act diligently in the pursuit of a search warrant application and execution. Moreover, the principle which Mr Jones identifies is not immutable – see, for example, *Public Prosecutors Office of the Athens Court of Appeal v O'Connor* [2022] UKSC 4 [2022] 1 WLR 903. Here, the weight that is to be attached to the Metropolitan Police's errors should take this context into account. The impact of those errors on the court's discretion is reduced, but not extinguished, by that context.

(6) The fact that the claimant has been in custody. It is not suggested that he has suffered any detriment by not having access to the seized property, or that a delay in its return will cause him any relevant loss. The extradition proceedings are ongoing. Their resolution is unlikely to be imminent. The police delays in dealing with the property and making a section 59 application have not, so far, delayed the extradition or any proceedings in Sint Maarten.

(7) The seriousness of the underlying investigation, involving as it does 4 alleged murders, money laundering and wider organised criminal criminality. The interests of justice and public safety and security strongly militate in favour of the investigating authorities having available to them all relevant material.

57. Mr Jones relied on a further factor, namely that legal aid would not be available to the claimant to resist a section 59 application. I do not consider that this is a significant factor. It is a feature of the legal framework that applies to all section 59 cases. It does not disturb the starting point identified at paragraph 56(1) above. The fact that the claimant will not be able to secure legal aid to respond to an application is not, in itself, a powerful reason to deprive the police the opportunity to make the application.

58. Balancing those factors that I consider are significant, I have concluded that an order for the return of the property should be made, but that such an order should not take

effect if, within a short period of time (14 days) the police make an application under section 59. The Parliamentary choice to enact section 59, the public interest in Sint Maarten having all relevant material for this serious criminal investigation, the lack of fault on the part of Sint Maarten and the relative lack of (relevant) prejudice to the claimant all mean that is the just outcome. That is so notwithstanding what I accept is a far less than scrupulous approach by the Metropolitan Police.

## Damages for trespass to land and goods

59. The flaws in the warrant mean that it cannot provide a legal justification for the entry by police officers into his home, the search of the property, and the seizure of his goods. The second defendant does not seek to rely on any other justification for that conduct. The second defendant therefore now admits liability for trespass.

60. Section 31(4) Senior Courts Act 1981 states:

> "On an application for judicial review the High Court may award to the applicant damages… if—
>
> (a) the application includes a claim for such an award arising from any matter to which the application relates; and
>
> (b) the court is satisfied that such an award would have been made if the claim had been made in an action begun by the applicant at the time of making the application."

61. The Claimant set out the details of the remedy he sought in his claim form. This included "Damages for trespass to land and goods". This arises out of the matters to which the claim for judicial review relates (namely the defects in the search warrant, and the execution of the warrant). Section 31(4)(a) is therefore satisfied. If the claimant had brought a claim for trespass under part 7 of the Civil Procedure Rules, then an award of damages would have been made. Section 31(4)(b) is therefore satisfied.

62. The claimant did not quantify the claim in his statements of case or skeleton argument. In the course of oral argument, I asked Mr Jones QC to indicate the sum that was sought. His response (without elaboration) was "£5,000". Mr Yeo responded that such a sum was "not unreasonable", again without further elaboration.

63. The claimant does not suggest he has suffered any financial loss as a result of the trespass. He has been in custody since the time of the search and so any loss of use of the goods that were seized is rather theoretical. Nevertheless, he is entitled to be compensated for the intrusion into his property and the consequential disruption and inconvenience he endured.

64. In *Fisher v Chief Constable of Cumbria Constabulary* (unreported, Court of Appeal transcript 29 July 1997) police officers had searched a fish and chip shop pursuant to a warrant, but, in breach of section 16(7) of the 1984 Act, had not left a copy of the warrant at the premises. The search was therefore unlawful (see section 15(1) of the 1984 Act). Roch LJ (with whom Lord Woolf MR and Otton LJ agreed) considered that the "proper bracket for general damages for the trespass to the plaintiffs' premises" was

£500 - £1,500. Allowing for inflation, that bracket would now be around £1,000 - £3,000.

65. Here, the warrant itself was defective. The trespass was to the claimant's home rather than to commercial premises. It took place at 5am and lasted for just over 2 hours. Three police officers were present. Damage was caused to the door. The claimant is entitled to be compensated not just for the unlawful entry into and search of his property but also the unlawful taking of his property. In all the circumstances, I am content to award the sum sought by Mr Jones QC, which was not positively opposed by Mr Yeo, of £5,000.

## Costs

66. I heard argument on costs at the conclusion of the hearing, contingent on the different possible outcomes. Mr Yeo submitted that if (as is the case) he succeeded in resisting an order for the immediate return of the property, then a costs order should be made in the second defendant's favour. I do not agree. The claimant has successfully established his claim. Although the second defendant ultimately conceded the substance of the claim (having initially said that the claim was misconceived), and has succeeded in the section 59 argument, the fact remains that the second defendant is continuing to act unlawfully by retaining the property. The second defendant could, at any stage, have paid back the cash (with accrued interest), paid damages (or made an effective offer) for the trespass, and made an application under section 59 to permit the continued retention of the property. None of those things were done. There has been culpable delay for which the lawyer now acting for the second defendant has apologised. The claimant is, broadly, the successful party in the claim. Even if the second defendant is to be regarded as being partially successful (on the section 59 point) I do not consider that it would be fair or just to make an issue-based costs order – the second defendant's conduct of the litigation is such that it would be unjust to deprive the claimant of any of his costs.

## Outcome

67. The claim succeeds. The claimant is entitled to a declaration that the search and seizure of property were unlawful, an order for the immediate repayment of the cash and accrued interest, damages of £5,000 and (unless an application under section 59 of the 2001 Act is made within 14 days) an order for the return of the property, and costs.