# The Kleptocratic Turn in the UK's Sanctions Regime

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On 21 November 2024, the Rt Honourable David Lamy MP, Foreign Secretary, announced asset-freeze and travel ban sanctions against three alleged kleptocrats. These designations include Isabel Dos Santos, the daughter of Angola's former president, who is alleged to have systematically abused her position at Angolan state oil firm Sonangol and Angolan telecoms company Unitel SA and misappropriated more than £350 million. Her designation follows her unsuccessful challenge of a £580 million worldwide freezing order in *Unitel S.A. v Isabel Dos Santos* [2024] EWCA Civ 1109. Fifty persons have been sanctioned under the UK's Global Anti-Corruption Sanctions Regulations 2021 (the "2021 Regulations") to date. The 2021 Regulations were made under s.1 of the Sanctions and Anti-Money Laundering Act 2018 ("SAMLA") and are intended to prevent and combat serious corruption. It has been reported that Kleptocrats, their families and associates have long used the City of London to launder their ill-gotten gains (Sharman, 2017). Some have successfully whitewashed their reputations as respectable entrepreneurs and philanthropists using professional networks of bankers, real estate brokers, accountants, lawyers, wealth managers, and public relations agents (Sharman et al., 2018). The Foreign Secretary's campaign against corruption and illicit finance, therefore, brings into sharp focus the scope and extra-territorial reach of the UK's sanctions regime and the lessons sanctions practitioners may draw from the case law on designation challenges under the Russia (Sanctions) (EU Exit) Regulations 2019 (the "2019 Regulations").

## Extra-Territorial Reach of the 2021 Regulations

Regulation 5(1) empowers the Secretary of State to designate persons for the imposition of asset-freeze (regulations 11 to 15) and immigration (regulation 17) sanctions. The 2021 Regulations are intended to have extraterritorial effect and target individuals or entities profiting from bribery and misappropriation of state funds overseas. Under s. 21 of SAMLA, the sanctions regimes established by regulations under s.1 are restricted to conduct in the UK or its territorial waters and conduct in foreign jurisdictions by UK persons (nature or legal). However, the 2021 Regulations have a particular extraterritorial focus, especially in terms of the definition of corruption- being bribery and misappropriation of property under regulation 4(2). Bribery extends not only to the bribery of foreign public officials but to requests for and acceptance of financial or other advantages by those officials (regulation 4(3)). Misappropriation is also defined in relation to foreign public officials' misuse of their public offices to improperly divert, grant or allocate funds, economic resources, or pecuniary advantage for their benefit or the benefit of another person (regulation 4(3)). As regards potential professional enablers, it is a criminal offence to circumvent the asset-freeze regulations (11-15) and to contravene the prohibitions in the 2021 Regulations (regulation 16), whether the conduct occurs wholly or partly within the UK.

**Power to Designate**

In making designation decisions under regulation 5, the Secretary of State or "an appropriate minister" must satisfy two requirements. Firstly, they must have reasonable grounds to suspect that the person is an "involved person" (regulation 6(1)(a)). An "involved person" means a person who is or has been involved in serious corruption, legal entities owned or controlled directly or indirectly (within the meaning of regulation 7) by such persons, associates and persons who act on behalf of or at the direction of a person who is or has been involved in serious corruption (regulation 6(2)). Persons involved in serious corruption include persons who profit financially or obtain any other benefit from serious corruption (6(3)(c)). Secondly, they must consider that the designation of that person is appropriate having regard to the purposes stated in regulation 4 and the likely significant effects of the designation on that person (as they appear to the Secretary of State to be based on the information that the Secretary of State has) (regulation 6(1)(b)). This requirement, although retained in the 2021 Regulations, was removed as a requirement for regulations made under SAMLA, by section 58(3) of the Economic Crime (Transparency and Enforcement) Act 2022 (which amended s.11(2)(b) of the SAMLA). The applicable case law on sanctions challenges under the 2019 Russia Regulations is instructive in the context of the 2021 Regulations since they are similar.

**Designation Challenges**

Designation decisions can seem arbitrary and unfair, particularly if designated persons have not been investigated, never mind found guilty of corruption offences at the conclusion of a fair trial either in the UK or their foreign jurisdictions. There is legitimate concern that designation decisions should not become a politically convenient remedy for the perceived lack of success of the law enforcement agencies. At all events, the use of sanctions to clamp down on kleptocracy will likely result in a number of designation challenges before the English Courts. The imposition of sanctions will infringe, to some extent, the designated person's property rights under Article 1 Protocol 1, and their family life under Article 8. Their proportionality will have to be weighed against the legitimate objectives of sanctions. SAMLA and the 2021 Regulations include procedural protections to allow designated persons to challenge their listings in the courts following ministerial review of designation decisions under s.23 SAMLA. In the leading UK-Russia sanctions case of *Boris Mints & Ors v PJSC National Bank Trust & Anor* [2023] EWCA Civ 1132, the Court of Appeal confirmed that the right of access to the court is a fundamental common law right based on the principle of legality and absent any clear and unambiguous curtailment of the right in SAMLA no such restriction can be implied [178]. The judicial review mechanism in s.38 of SAMLA guarantees the minimum threshold of access to the courts required to render the scheme compatible with Articles 6 and 8 of the Convention, *R (Youssef) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2022] 1 WLR 2454 [68-102] per Garnham J.

Under s.38(4) SAMLA, in determining whether the designation decision should be set aside, the court must apply the principles applicable to an application for judicial review. Thus, the Secretary of State's designation decision must comply with the "*Padfield* principle": that a statutory discretion must be exercised to promote the policy and objectives of the statute conferring the discretion: *Padfield v Minister of Agriculture, Fisheries & Food* [1968] AC 997, 1030. Once a person meets the designation criteria, then the *Padfield* criterion is *prima facie* satisfied: *Shvidler v Secretary of State for Foreign, Commonwealth, and Development Affairs* [2023] EWHC 2121 (Admin). However, the Secretary of State must still have reasonable grounds to believe that the designated person is an "involved person": *Shvidler* [92]. This might not be of much consolation for designated persons under the 2021 Regulations because the *Padfield* principle prioritises the purpose of the legislation over any individualised considerations. The purposes of the 2021 Regulations are to combat and prevent serious corruption and will invariably involve foreign policy and national security considerations.

That said, in the context of sanctions challenges, the scope for judicial scrutiny of the underlying decision, its rationale and proportionality under the Human Rights Act 1998 goes beyond the ordinarily assessed rationality of the decision in judicial review challenges, *Dalston Projects Limited v Secretary of State for Transport* and *Eugene Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs* [2024] EWCA Civ 172. Nonetheless, the Court must accord a significant degree of deference to the Secretary of State's designation decision, when conducting their proportionality assessment, given the complex and sensitive foreign policy and national security issues that are engaged, (*Dalston* and *Shvidler*). As per Garnham J in *Shvidler* the "court does not assume the role of primary decision maker on issues that turn on the exercise of judgment or the determination of policy, limiting itself instead to asking whether the decision was one properly open to the executive" [87], approved in (*Dalston* and *Shvidler*).

**Conclusion**

As per Lord Justice Singh in *Dalston* and *Shvidler*, "sanctions often have to be severe and open-ended if they are to be effective" [210]. While there is yet to be a successful challenge to a designation decision before English Courts under the UK's sanctions regime, the severe impact of sanctions on designated persons will likely result in applications being made to the courts in order to challenge such decisions. This is particularly the case as the UK provides a robust judicial review mechanism to ensure that persons designated as kleptocrats and subject to sanctions have access to courts to seek redress from sanctions and hold the Government to account.

**References**

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UK's Global Anti-Corruption Sanctions Regulations 2021

Russia (Sanctions) (EU Exit) Regulations 2019

Sanctions and Anti-Money Laundering Act 2018

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