

## Delayed confiscation and the right to a fair hearing (*Neophytou v UK*)

1. Proposals to curtail the right to jury trials show how acute the delays in the criminal courts have become. Even without juries, confiscation proceedings suffer similar delay. The recent *Neophytou v UK* judgment from the European Court of Human Rights (ECtHR) cast a disapproving eye on that delay. It is, however, doubtful that it will change the existing pragmatic approach to delayed confiscation as set out by the Supreme Court in *Haden*.<sup>1</sup> [2024] EWCA Crim 344.
2. *Neophytou* arose from a father and son being convicted on 16<sup>th</sup> September 2016 for conspiring to manage a brothel.<sup>2</sup> The subsequent confiscation hearing on 10<sup>th</sup> August 2018 was adjourned. The adjourned hearings were themselves adjourned three times during 2019. The most frequent problem was lack of court time but also included mistakes by experts, inadequate listings, and unavailability of counsel.
3. The Crown Court (which had itself criticised the delays) made a confiscation order of almost £3.2m in January 2020. The applicants appealed partly on the basis that the delays had caused unfairness to their confiscation proceedings. The Court of Appeal considered this point “*unarguable*” as “*the delays were not such as to prejudice the applicants*”. The full court denied permission to appeal in February 2021.
4. The applicants complained to the ECtHR. They argued that the exceptional delay between conviction and the refusal of their appeal breached Article 6 (right to a fair hearing). The Government contended that the applicants: (1) had never argued against the postponement of the two-year permitted period for confiscation proceedings; and (2) had suffered no prejudice from the delay in any event.
5. The ECtHR, however, found there had been prejudice. While acknowledging some fault on both sides, it criticised the “*respondent State...[who] would appear to have been solely responsible for the unavailability of court days and the judge having insufficient reading days, which delayed his ruling for six months*”. The outcome was, however, little more than a statement of principle that the “*unreasonably long*” delays had violated

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<sup>1</sup> *Haden* [2024] EWCA Crim 344.

<sup>2</sup> *Neophytou v UK* (28805/21)

Article 6. The ECtHR did not order damages because “*the applicants did not submit a claim for just satisfaction.*”

6. The *Neophytou* judgment is striking in itself and perhaps embarrassing for the respondent. The fact that a confiscation matter took over three years to conclude is worthy of criticism. At the same time, the delays in *Neophytou* resemble those affecting many other confiscation proceedings. The response of the ECtHR was understandable but seems at odds with the pragmatism of domestic jurisprudence, particularly *Haden*.
7. *Haden* recognised that courts should strive to complete confiscation proceedings timeously but proceedings should not be quashed due to technical errors, such as delay. Proceedings are driven by “*a statutory duty to act in the public interest*” and the two-year limit is not there “*to protect the interests of the offender*”. Rather, it is intended “*to ensure that the court gives appropriate priority to the fulfilment of its duty to act in accordance with section 6.*”
8. The reasoning of *Haden* is arguably at odds with *Neophytou*. On the one hand, the ECtHR is right that undue delay violates the Article 6 rights of the individual. By the time one reaches confiscation proceedings, however, the interests of the individual (now a convicted offender) are likely to lag far behind the strong public interest in recouping the proceeds of crime.

9. The Supreme Court was clear on the issue of delay and extending the permitted period:

*Standing back from all the authorities, it is clear in our judgment that the intention of Parliament was that a broad approach should be taken to what constitutes “exceptional circumstances”. Indeed, in the approach to section 14 generally, Parliament’s intention must be taken to be to ensure that confiscation proceedings go ahead and are effective without technical problems of timing and timetabling acting as a bar to recovery. Adherence to the timetable is an obligation, as we shall re-emphasise later in this judgment, but the approach to strict failures to comply should reflect that intention of Parliament.*

10. The difficulty with *Neophytou* is that the public interest in effective confiscation is so strong as to be overwhelming. Proceedings must not be derailed by purely procedural

arguments around delay because, if so, the unacceptable consequence would be the offender retaining the benefit of their crime. As the Supreme Court put it:

*For a judge to say to the prosecution "You have behaved so badly that I am going to punish you by depriving the public of assets to which they are entitled and leaving them with the criminal who now has them" is not an obviously effective approach. The management of procedure is not a disciplinary exercise. It is perhaps significant in this context that there is no statutory requirement for the prosecution to show that it has acted with all due expedition or diligence if the permitted period is to be extended.*

11. Though striking, the declaration of an Article 6 breach offers no actual solutions besides, presumably, nominal damages by way of just satisfaction. Delays are critical but cannot undermine (let alone trump) the public interest in recouping the proceeds of crime, barring exceptional circumstances. In this jurisdiction, the definition of what counts as 'exceptional circumstances' will continue to be broad in a way that errs on the side of permitting extensions, notwithstanding the disapproval of the ECtHR.