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IN THE HIGH COURT OF JUSTICE

No. CJA/21/2018

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2019] EWHC 1737 (Admin)

Royal Courts of Justice

Tuesday, 18 June 2019

Before:

MR JUSTICE MOSTYN

BETWEEN:

RE: G

Applicant

**ANONYMISATION APPLIES**

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MR A. DI FRANCESCO (instructed by Lewis Nedas) appeared on behalf of the Applicant.

MS J. WHITBY (instructed by Crown Prosecution Service) appeared on behalf of the Respondent.

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**J U D G M E N T**

MR JUSTICE MOSTYN:

- 1 The applicant applies for a certificate of inadequacy pursuant to s.83 of the Criminal Justice Act 1988 following the imposition of a confiscation order upon her in the sum of £849,300 on 5 June 2006 pursuant to s.71 of the same Act. That confiscation order was made following criminal proceedings that concluded in March 2005 with convictions against her pursuant to findings of guilt by a jury in relation to two offences and pleas in relation to two further offences in relation to serious immigration offences for which she was sentenced to a total of eight years in prison.
- 2 The offences that were committed were particularly unpleasant. They related to false marriages in India where the women were on the evidence in many instances highly vulnerable and the subject of indefensible exploitation. It was for that reason that the sentence that was imposed was substantial and the confiscation order, again, was likewise in a substantial amount. With the accrual of interest at the rate of about £150 a day, the sum that is now standing due under the confiscation order is £1,352,911.10. At present, the applicant pays £20 a month towards the debt. This sum was fixed in enforcement proceedings by the Magistrates' Court and derives from social security benefits that are paid for her and her seriously impaired son.
- 3 Following the conviction and the making of the order, a restraint order was made in respect of her assets, which was reciprocally enforced I gather in India in relation to two bank accounts with, respectively, the State Bank of Bikaner & Jaipur in Chandigarh and IDBI Bank in Chandigarh. However, those accounts were never believed to contain more than the equivalent of about £7,000. The receiver had no success in realising the sums in those accounts and in, I think, about 2015 the Crown consented to discharge of the receivership order and the restraint order. Moreover, the magistrates have accepted that, in view of the passage of time, it would be an abuse for the applicant to be penalised by imprisonment for failure to have discharged the sum due under the confiscation order. So the order, whilst accruing interest exponentially, as I have explained, has a sort of mere abstract or symbolic quantity to it only, subject only to the drop in the ocean that is paid by the applicant of £20 a month, as I have described.
- 4 Yet, the Crown opposes the application for the Certificate of Inadequacy arguing that the applicant has failed to discharge the burden that is cast upon her of demonstrating that she does not have adequate means to discharge all or part of it. Under s.83 of the 1988 Act the burden is on the applicant to satisfy me to the normal civil standard of the balance of likelihood that the realisable property is inadequate for the payment of any amount remaining to be recovered under the confiscation order and, if I am so satisfied, then I must issue a certificate to that effect and give my reasons for so doing.
- 5 Although the statute does not explicitly cast the burden on the applicant, the normal principle of she who asserts must prove applies and that is why there can be no question but that the applicant has to demonstrate on the evidence that it is more likely than not that she does not have the means to pay all or any material part of the sum due. It has been said in some of the cases in this area that, given that the applicant is ex hypothesi a criminal whose credibility has obviously been impeached that the burden of proof will only be discharged to the necessary standard if he or she produces clear and cogent evidence, but I think it is dangerous to adopt that approach too literally, because one must always guard, when these juristic qualifications are expressed, against a tacit elevation of the standard of proof from the balance of probability. I emphasise that the burden is on the applicant to demonstrate by the adduction of relevant admissible evidence that it is more likely than not that she does not have the means to discharge the sum due or any part of it.

- 6 The confiscation order, which I have already indicated was in the sum of £849,300, was based on calculation of visible sums within these shores. They were computed and then subtracted from a figure that had been calculated for overall benefit from the criminality to leave a figure of £503,000, which was attributed to assets hidden in India in bank accounts, as I said earlier. The direct evidence suggested there was only about £7,000 and agricultural land and property, in respect of which there was virtually no evidence beyond a passing remark of ownership of such assets made by the applicant during her criminal trial in early 2005. The properties and land have never been identified. Their formal title has never been identified and their realisability has never been identified.
- 7 This court has done enough cases for it to be able to take notice that if the assets in India, if they actually did exist, would likely to be held under the arrangement of the Hindu Undivided Family and so would be well-nigh impossible to realise without the cooperation of other members of the family, which would be doubly difficult in this case in circumstances where the parents of the applicant have both died comparatively recently. I am satisfied that the attempts made by the applicant to identify the sums in the bank accounts, as evidenced by the letters in tab 11 of the bundle with which I have been supplied, were reasonable and proportionate and she could not have been expected to have done more than that to have identified the assets in bank accounts. In relation to the land and property, in this regard, she is almost being asked to prove a negative and, whilst she may be the author of her own misfortune by having apparently confirmed her ownership of these assets during her trial, as I have mentioned, nothing that has happened since demonstrates that in the real world these assets actually exist.
- 8 I am therefore satisfied, on the balance of probabilities, that is to say I am satisfied that it is more likely than not, at the present time and on the present state of the evidence, that the applicant does not have the means to discharge any part of the sum due under the confiscation order. I further go on to find and I extend my finding that she cannot reasonably be expected to pay £20 a month from her benefits towards this sum. It is, as I have said earlier, a drop in the ocean and this court can take notice of the fact that benefits are provided to meet essential subsistence needs and those needs do not extend to the discharge of a confiscation order in the sum well in excess of £1.3 million.
- 9 I record in this judgment the concession made by Mr Di Francesco on behalf of the applicant that were she to be the beneficiary of adventitious windfall by winning the lottery or an inheritance from some relative, then the finding that I make today, which will be expressed in the certificate of inadequacy, will not bite so as to prevent appropriation of those funds towards the sum due under the confiscation order. The Certificate of Inadequacy does not extinguish the confiscation order. It is simply a statement, on the present evidence, of what the applicant can realise to put towards it. Similarly, were it to transpire that the finding that I made today that the applicant cannot access any funds in India to put towards the confiscation order, were that to be demonstrated to have been a false finding, then it is accepted by Mr De Francesco that the Certificate would not operate to prevent appropriation of those funds towards the sum due. I state that clearly in the judgment, but, subject to that proviso, I grant the application.
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**CERTIFICATE**

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Official Court Reporters and Audio Transcribers  
5 New Street Square, London EC4A 3BF  
Tel: 020 7831 5627 Fax: 020 7831 7737  
admin@opus2.digital*

This transcript has been approved by the Judge