13 November 2020, App No. 39371/20). In contrast to the arguments made on behalf of the applicants in *Sharma*, the applicants in *Duarte Agostinho* submit that climate change *currently* poses a risk to their lives and health, and this will only worsen with time. Separately, an association of senior women has filed a complaint before the ECtHR similarly arguing that the Swiss authorities have violated the positive obligations it owes them under Articles 2 and 8 of the ECHR by failing adequately to address climate change (*Verein KlimaSeniorinnen Schweiz and Ors v Switzerland*, App No. 53600/20). As with the applicants in *Duarte Agostinho*, and in contrast to the applicants in *Sharma*, the elderly complainants in *Verein KlimaSeniorinnen Schweiz* argue that they have already suffered harm because of climate change.

While the likely outcome of both sets of complaints before the ECtHR is, at this stage, anyone's guess, several aspects of the proceedings in *Sharma* may be of relevance. First, as noted, the applicants in the complaints before the ECtHR have argued that they have *already* suffered damage and their complaints are against the state as a whole, as distinct from a specific minister exercising a limited statutory power whose possible breach is related to an indeterminate harm at an indeterminate time. Issues of proximity and harm are, therefore, unlikely to be as significant in the ECtHR proceedings as they were in *Sharma*. Nevertheless, questions regarding foreseeability and control over the harm will no doubt assume importance before the ECtHR, particularly given that climate change is a global issue.

While the law of negligence may not be the answer for individuals seeking to compel states to act to address the current climate crisis and to prevent future catastrophe, human rights law is increasingly invoked by litigants to fill some of that lacuna in protection. Only time will tell whether the ECHR, as interpreted by the ECtHR, provides such protection. As for the law of negligence, concepts such as "sufficient closeness and directness" and indeterminacy "may have reached their shelf life, particularly where one is dealing with acts or omissions that have wide-scale consequences that transcend confined temporal boundaries and geographic ranges, and where more than direct mechanistic causal pathways are involved" (at [754]).

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STATUTORY INTERPRETATION: NATURAL MEANING AND CONTEXT

THE Proceeds of Crime Act 2002 provides for confiscation orders to deprive offenders of their proceeds of crime. To maximise the assets

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available for confiscation, restraint orders may be made against suspects before charge or conviction preventing them from disposing of any of their assets, whether or not proceeds of crime. Section 42(3) of the 2002 Act permits restraint orders to allow certain payments, including reasonable legal expenses. Subsections (4) and (5), however, prevent payments being permitted for legal expenses which "relate to" the offences with which people are charged or for which they are being investigated and from which there is reasonable cause to suspect that they have benefited. Suspects may, however, seek legal aid, and, if they are not eligible for legal aid, proceedings against them might have to be indefinitely stayed to avoid violating the right to a fair hearing under ECHR art. 6.1 and section 6 of the Human Rights Act 1998.

Legal expenses incurred not only in the criminal prosecution but also in relation to restraint and confiscation orders, and even judicial review proceedings arising from them, "relate to" the offences: *In re S (Restraint Order: Release of Assets)* [2004] EWCA Crim 1338, [2005] 1 W.L.R. 1338 (C.A.). By contrast, most civil proceedings are unrelated to any offence. But what if the suspect is pursuing or defending civil proceedings arising out of the same circumstances as the alleged offence? In *R. v Luckhurst* [2022] UKSC 23, [2022] 1 W.L.R. 3818, the defendant accused of offences of fraud and theft was also defendant in civil proceedings for damages for fraud brought by alleged victims of the crimes. He sought an amendment to the restraint order made against him in order to allow him to pay legal fees of £3,000 incurred in the civil proceedings. The first-instance judge accepted the prosecution's submission that the civil proceedings "relate[d] to" the offences with which he was charged, and accordingly refused the amendment. The Court of Appeal ([2020] EWCA Crim 1579, [2021] 1 W.L.R. 1807) varied the order of the first-instance judge, holding that the civil proceedings did not "relate to" the offences for five reasons. First, the prosecution's argument put "a strained and unnatural gloss on the language of the statute" (at [44]). Second, a blanket prohibition on expending money on civil proceedings relating to the same subject matter as the criminal proceedings could sometimes (though not in this case) operate to frustrate the purpose of the legislation (to maximise the funds available to satisfy a confiscation order) by preventing recovery of additional money which would be available for that purpose (at [45]). Third, the facts founding liability in civil proceedings would usually be somewhat different from those forming the basis of criminal proceedings because criteria for liability would be different. The prosecution's argument that more than a minimal factual overlap would suffice to prevent payment of legal expenses "would be unjust" when the person might never be charged with any offence and wished to pursue or defend proceedings only peripherally related to the criminal investigation. Cases would be fact-sensitive, and the best way of dealing with them would be to allow judicial discretion,

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not a bright-line rule (at [46]). Fourth, relevant case law did not support the prosecution's argument. Fifthly, a later amendment to the Act inserted section 245C relating to civil recovery proceedings for which the rules on allowing payment of legal expenses for "related" litigation were more generous than the interpretation of "related to" which the prosecution advanced for the purpose of section 41.

The prosecution's appeal to the Supreme Court was dismissed. Lord Burrows J.S.C., delivering the only judgment, reminded us that, in identifying the meaning of statutory words, the context and purpose of the provision are important (see Lord Hodge D.P.S.C. in *R. (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2022] 2 W.L.R. 343, at [28]–[29]). He thought that, on their natural meaning in context, no lawyer, judge or litigant would say that expenses of civil proceedings could "relate to" a criminal offence; the natural meaning "follows axiomatically from the fundamental division between civil law and criminal law" (at [24]). Any criterion for expenses "related to" a criminal offence which took in expenses in civil proceedings would be "artificial and problematic". The prosecution had argued that payment of legal expenses for civil proceedings would be "related to" an offence if the civil claim was founded on the same or similar allegations, alleged facts and/or evidence as those of the alleged offences, subject to a *de minimis* exception. This sought to read words into the statute, and raised difficult problems of its own, such as deciding when facts or allegations are "similar" if not the same and what is the scope of the *de minimis* exception. For example, if a suspect is defending civil proceedings for causing injury to a bystander by driving negligently in the course of a burglary, proceeds of which are the basis of the possible confiscation order, how would the prosecution's proposed test apply (at [26])?

Lord Burrows's "natural meaning" was influenced by the perspective of participants in the process of litigation. An outsider might have said that, in the above example, the civil proceedings can naturally be said to "relate to" the criminal offence because the civil cause of action arose out of the criminal enterprise. The statute does not ask, however, whether the cause of action is "related to" the offence, but whether the expenses incurred in the civil proceedings are "related to" the offence. That is a more technical, procedural question, justifying the primacy given to the perspective of lawyers, litigants and judges.

Should the purpose of the legislation as a whole, namely to maximise confiscation of proceeds of crime, have led to a looser interpretation of "related to"? Lord Burrows thought not: the legislation allowed some payments, including in respect of legal expenses, to be made, balancing the right of access to court against the purpose of maximising the confiscation of benefits of crime. The term "relate to" was a way of striking the balance

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in the interests of fairness; the natural meaning was at least as good a way of achieving that balance as the prosecution's proposed test. His Lordship buttressed his view by reference to extraneous materials. A 2000 report by the Performance and Innovation Unit of the Cabinet Office, *Recovering the Proceeds of Crime*, had pointed out that excessive sums were being spent on legal fees to defend criminal proceedings resulting in the assets available to meet a confiscation order being depleted, and the Explanatory Notes to what became section 41 of the 2002 Act had made it clear that the clause was concerned with sums spent on the offences charged, which would be ruled out in exchange for making available legal aid for the proceedings. These documents' silence regarding expenditure on civil proceedings was taken to imply that the Government had not been concerned to prevent reasonable expenditure on civil proceedings (at [30]–[33]).

Lord Burrows therefore agreed with the first, second and third reasons given by the Court of Appeal, above. On the other hand, he was less convinced than the Court of Appeal that the case law was helpful either way, and he preferred not to rely on their fifth reason, the comparison of section 41 with the language of the later amendment in section 245C. In this he was correct. Whilst in principle there is no reason why a later amendment to one part of an Act should not affect the meaning to be attributed to another unamended part of the Act, as acts should be read as a whole, and later amendments sometimes change the focus or policy objectives from those of the original Act, the relevance of section 245C to the restraint order regime is less clear. It is part of provisions for a civil action to recover property which is or represents property obtained by unlawful conduct, whether civil or criminal (recovery orders), and for freezing orders in support of that. It does not depend on the respondent having benefited from crime or on any crime having been committed. There is little reason to interpret the original 2002 provisions regarding restraint orders in criminal proceedings in the light of the policy of the 2005 provisions concerning civil proceedings.

The case demonstrates that "natural meaning" of legislation can be somewhat artificial, deriving from an axiomatic legal (rather than natural) distinction between civil and criminal law; that it is permissible to reinforce one's view of the "natural meaning" by reference to silences in extraneous materials; and that the draconian character of powers such as those in the 2002 Act do not necessarily lead to allowing the prosecution to stretch statutory language to make them even more draconian.

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