No interest and no goodwill—the struggle to challenge sanctions designations (Dana Astra v FCDO)

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Corporate Crime analysis: The claimant company (Dana Astra) brought a challenge, pursuant to section 38(1) of the Sanctions and Money Laundering Act 2018 (SAMLA 2018), against the decision of the Secretary of State to designate it for the purposes of the asset freeze sanctions under the Republic of Belarus (Sanctions) (EU Exit) Regulations 2019 (the 2019 Regulations). This case provides, for the first time, a judicial determination of the territorial scope of Article 1 of Protocol 1 of the European Convention on Human Rights (A1P1 ECHR) in the context of sanctions decisions pursuant to regulations made under SAMLA 2018. The court held that where a foreign person with no property nor presence in the UK is designated, that designation is not an exercise of UK jurisdiction sufficient to engage the ECHR, even where the designation may affect the person's 'interests'. The decision also provides valuable lessons on the operation of the regime in practice more generally, particularly in the context of proportionality challenges. Written by Rachel Barnes KC, Nicholas Yeo KC and Charlotte Branfield, barristers at Three Raymond Buildings.

Dana Astra IOOO v Secretary of State for Foreign, Commonwealth and Development Affairs [2025] EWHC 289 (Admin).

What was the background?

The Secretary of State for Foreign, Commonwealth and Development Affairs (the FCDO) designated Dana, a significant real estate and construction company operating in Belarus, as an 'involved person', under the 2019 Regulations, SI 2019/600 made under SAMLA 2018, s 1. Of note, Dana was not domiciled in the UK, and did not have any property, assets, or commercial interests in the jurisdiction.

The FCDO decided it had reasonable grounds to suspect that Dana was an involved person under Regulation 6 of the 2019 Regulations, SI 2019/600 as it: (1) had been involved in the repression of civil society or democratic opposition in Belarus, or other actions, policies or activities which undermine democracy or the rule of law in Belarus, namely as a sponsor of the Belarusian National Olympic Committee (the BNOC); and (2) it has been involved in obtaining a benefit from or supporting the Government of Belarus through carrying on business in the Belarusian construction sector which is a sector of strategic significance to the Government of Belarus.

Dana challenged the designation under SAMLA 2018, s 38, on the basis that:

- the designation was an exercise of the UK's jurisdiction under Article 1 ECHR: as such, (i) its A1P1 ECHR rights have been interfered with, and (ii) there is a lack of a rational connection between the aims of the 2019 Regulations, SI 2019/600 and Dana's designation as a means of

pursuing those aims, which (iii) constitute a disproportionate interference with Dana's A1P1 rights, and

- it was irrational on conventional public law principles for the FCDO to maintain the designation

What did the court decide?

The Court dismissed Dana's claim in its entirety. In doing so, it held that:

- the decision of the UK to sanction Dana was not an exercise of UK jurisdiction over Dana for the purposes of Article 1 ECHR because it does not have property in the UK; sanctions did not fall within an exceptional category of extraterritorial jurisdiction
- marketable goodwill is a possession protected by A1P1 ECHR (where jurisdiction arises), but the hope or promise of a future income stream is not
- had the ECHR applied, the decision to designate Dana would not constitute a disproportionate interference with its Convention rights. In reaching this conclusion, the court (i) found that having not challenged its designation as an "involved person", Dana could not then argue it had not benefitted from the regime and its argument under proportionality that there was no rational connection between the objectives of the sanctions and its designation was significantly weakened; (ii) rejected the submission that the Secretary of State had exercised his discretion to designate arbitrarily: whilst evidence of arbitrary differential treatment may render a sanctions decision disproportionate, but to be successful, the claimant must put forwarded detailed and substantial evidence demonstrating this, which Dana had not done; and (iv) whilst retrospectivity is 'hard wired' into the sanctions regime, its aim is not punishment within the meaning of article 7 ECHR
- the decision to designate Dana had been a rational one

What are the practical implications of this case?

Jurisdictional scope of A1P1 of the ECHR in the context of sanctions

The court ultimately held that the sanctions were, in any event, proportionate on the court's own application of the *Bank Mellat* test (at para [88]) (see *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 39). However, it is the court's approach to the prior question of the jurisdictional scope of A1P1 which may be of the greatest interest.

The court held that, for the ECHR to apply, the UK must have some form of control over the designated person or their assets. Absent 'something' in the UK on which the asset freeze bites, it is not sufficient simply to argue that the UK's decision is capable of affecting (i) an entity or person situated abroad, or (ii) their interests abroad. This follows from the fact that Article 1 of the ECHR provides that the High Contracting Parties 'shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention' (at para [46]).

Accordingly, the general rule is that for a State Party to be held responsible for acts or omissions attributable to it, there must be an exercise of jurisdiction by that State. The court reasoned that there was 'nothing special or unique about sanctions to justify creation of a new exception' (at para [54]). It did

so in reliance on recent decisions of the European Court of Human Rights (ECtHR), in *Agostinho v Portugal and others* [GC], App No. 39371/20, 9 April 2024, and *MN and Others v Belgium* [GC], Application No 3599/18, 5 May 2020.

Agostinho dealt with a State's obligations for climate change. In that case, the ECtHR held that it had consistently rejected the notion that extraterritorial jurisdiction can apply merely because a state takes a decision 'which has an impact on the situation of a person abroad', else it would create 'a critical lack of foreseeability' and allow cases from 'anyone adversely affected by climate change wherever in the world he or she might feel its effects', turning 'the Convention into a global climate-change treaty' (§§184, 205-208).

In *MN*, the ECtHR held that a State Party's decision on an immigration application was not sufficient to bring the individual making the application under its jurisdiction 'otherwise [it] would amount to enshrining a near-universal application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they find themselves, and therefore to create an unlimited obligation on the Contracting States …' (§123).

Those cases arose from different contexts; while all deal with the State's response to some event, the level of control the State has is different, ie responding to climate change versus deciding to designate a specific person. It remains to be seen whether the decision to apply these cases in a sanctions context (where the sanctions have to at least be rationally connected to the statutory objective to be proportionate) will stand on appeal. Dana's application for permission to appeal on the jurisdiction point was granted on 2 May 2025.

Goodwill and possessions

The alternative argument as to why the jurisdiction of the ECHR is engaged was that the designation of Dana had adverse impact on its business and reputation, not just abroad but also in the UK, and this 'business goodwill' was protected under A1P1 ECHR because it was an existing 'possession'.

Both parties relied on *Breyer Group plc v Department of Energy & Climate Change* [2015] EWCA Civ 408. That case considered whether unsigned contracts were or were not part of the capitalised value of a business and therefore 'marketable goodwill', deemed by the ECtHR as a 'possession' and protected under A1P1 ECHR. The Court of Appeal held that unsigned contracts were simply an expectation of future income and so were not a possession.

For a foreign person with no property or assets in the UK to successfully argue the designation affected their business goodwill either in the UK or elsewhere, it must provide significant evidence that this goodwill is 'marketable' ie, related to realisable and capitalisable value of what had been built up in the past, supported by an established reputation and corresponding commercial relationships. Goodwill related to the value of a future income stream is not sufficient.

While it is unlikely any court will depart from the case law that distinguishes between 'marketable goodwill' and 'promise of future income', the facts of any case must be examined closely to see if there is potential for the scope for the interpretation of 'marketable goodwill' to evolve. Not least because a substantive legitimate expectation may be a protected possession under A1P1 (whether in conflict with national legislation or not) if the underlying interest to which it attaches is itself capable of constituting a 'possession', ie it gives rise to economic rights or bears on property rights, see *Stretch v United Kingdom* (2004) 38 E.H.R.R. 12 and *Elliott Associates v the London Metal Exchange* [2024] EWCA Civ 1168). For

example, a business licence is itself a possession under A1P1 as is an application for registration of a trademark even prior to the trademark being registered.

Impact of the conclusion on jurisdiction

For designated persons with no assets or family in UK territory, the impact of this decision is that they have no recourse to the ECHR and cannot challenge their designations on the basis that it is a disproportionate interference with their Convention rights. They are limited to challenging the rationality of the decision to designate them, ie a review under conventional public law principles (a *Wednesbury* review), described by the court as a lower standard (at [95]). For a recent and admirably clear examination of the structure and nuances of rationality review and deference, and the relationship between proportionality and rationality (albeit not in the sanctions context), see *R (KP) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] EWHC 370 (Admin) (Chamberlain J).

Freeze only on UK assets

One final aspect of the judgment on jurisdiction is worthy of comment. The court said that 'the asset freeze operates only on any assets DANA may have within the UK or its Crown and Overseas Territories' (at para [3], and repeated elsewhere in the judgment).

This comment should be treated with some caution. It is not articulated as a proposition of law, and no authority is given in the judgment to suggest that, as a matter of law, an asset freeze bites only on funds and economic resources within the UK. At the very least it is not settled law. It has usually been understood that, on the ordinary operation of SAMLA 2018 and the 2019 Regulations, SI 2019/600, they apply to assets wherever they are located in the world (albeit it takes effect only on UK conduct or conduct by UK persons). For example, the force of the asset freeze sanctions would be substantially undermined if 2019 Regulations, SI 2019/600, regs 12–15 applied only to funds and economic resources within the UK, such that a UK person could provide funds to a designated person in say Israel, provided those funds were not located within the UK. In the current case, it would mean that a UK person could deal with DANA's Belarusian assets, which is contrary to the common understanding of the regime.

An asset freeze applies to assets anywhere in the world but it takes effect only on conduct which is: (a) conduct in the UK or in the territorial sea by any person; or (b) conduct elsewhere, but only if the conduct is by a UK person (SAMLA 2018, s 21). SAMLA 2018, s 60 deals with the interpretation of 'funds', 'economic resources', and 'freeze' and says nothing to confine the Act to assets within the jurisdiction. There is precedent for UK courts and legislation controlling property outside the territory, for example, in worldwide Mareva injunctions and criminal restraint orders under section 40-41 of Proceeds of Crime Act 2002 (POCA 2002), which are ordinarily understood to operate on assets outside the UK, albeit only in personam upon the addressee of the order. So an asset freeze under the 2019 Regulations, SI 2019/600 prohibits a person in the ordinary territorial jurisdiction of the English courts, or a UK person located elsewhere, from dealing with funds anywhere in the world. For example, using a computer in the UK to administer funds held in the USA for a designated person under the Belarus Regulations would be an offence under English law (under 2019 Regulations, SI 2019/600, reg 11), irrespective of the computer operator's nationality. Likewise, if a company incorporated under the law of any part of the UK (a UK person) deals with a designated person's funds or economic resources in say Israel, it would be an offence under UK law (again under 2019 Regulations, SI 2019/600, reg 11) irrespective of whether the UK person is physically within the territory of the UK. Moreover, on the ordinary application of POCA 2002, Pt 7, if a person's benefit from dealing with the funds or economic resources (or property which represents it) comes within the ordinary jurisdiction of the UK (as to which see *El-Khouri v United States* [2025] 2 W.L.R. 232), dealing with that benefit would be a money laundering offence (see POCA 2002, s

340 and POCA 2002, ss 327–329). So, if a non-UK national dealt with a designated person's assets outside the UK, no offence would be committed under English law but if the non-UK national's fee for dealing with those assets (or assets derived from that fee) were then brought within the UK, dealing with them would be a money laundering offence under English law.

In any event, it appears to have been common ground, on these facts at least, that the asset freeze would operate only on UK assets and that there were none. In Dana's skeleton, 'it was said that while it was correct that DANA does not currently have any property or assets within the UK, its designation and the proposed asset freeze interfere with its rights under A1P1 since they '…deprive the Claimant of the ability to conduct business in the UK now and in the future (including instructing and making payment to its legal representatives in the UK) and also deprive the Claimant of the goodwill of the Claimant's business both in the UK and abroad'" (at para [59]).

The operation of the SAMLA 2018, s 38 regime in practice

The other practical importance of the case is as an example of how the section 38 regime of court reviews of sanctions decisions operates in practice. The decision illustrates the following established principles in this regard.

First, as to whether the designation criteria are met, the court is concerned solely with the material before the Secretary of State at the time of the decision under review, rather than fresh material before the court (at para [31]).

Secondly, inevitably such material may have included reference to historic involvement in activities which, at the time they were carried out, were not targeted by the sanctions regime in question. That is not to say, however, that the regime is unlawfully retrospective in its operation (at para [93]).

Thirdly, on an application under SAMLA 2018, s 38, the court must 'apply the principles applicable on an application for judicial review'. Accordingly, as to the designation criteria, the Court should not 'stand in the shoes' of the defendant Secretary of State when conducting the review exercise, rather 'the Court's role is to examine whether the defendant's decision was either based on no evidence or was irrational' (at para [33]), citing with approval *Synesis v Secretary of State for Foreign, Commonwealth and Development Affairs* [2024] KB 81). If the decision was not irrational or procedurally unfair, it matters not if the court itself would have come to a different conclusion.

Fourthly, a proportionality challenge is different. The court must make its own assessment of whether the designation is proportionate (at para [73]) (as a public authority it could not uphold the designation if to do so would be to breach Convention rights).

To do so, four broad matters arise for decision (following the decision in *Bank Mellat* [at p771] (at para [77]): (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right (legitimate objective), (2) whether the measure is rationally connected to the objective (rational connection), (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective (less intrusive measure), and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter (fair balance).

Fifthly, as to the rational connection requirement, the court said: (at para [74]):

> 'what is required under the second limb is a rational connection, "no more and no less". In particular there does not have to be a perfect fit between the legitimate aim and the means chosen to achieve it, provided there is a rational connection between them. Further, where the Secretary of State relies on a number of factors as showing that there is a rational connection between the measure under challenge and its objectives (as in this claim), he is not required to show that each of them is alone a sufficient reason for adopting the measure. As a matter of commonsense, certain of those factors may be weaker than others. What is crucial at the end of the day is whether there is a rational connection between the legitimate aim and the means chosen to achieve it.'

Mr Justice Saini found that since Dana had not challenged that it was an 'involved person' within the meaning of the sanctions regime or that this aspect of the regime is lawful and proportionate, it was not open to Dana to challenge the Secretary of State's rational connection analysis by attacking the factual assumptions upon which the 'involved person' criteria are based (namely that a person has received a benefit from or supported the Belarus government or had enabled or facilitated the repression of civil society in Belarus) (at paras [80]-[81]).

The court also rejected Dana's submission that reliance on the 'signalling' and incentive effects of sanctions is incapable of establishing a rational connection (at para [83]). The Secretary of State had adduced evidence that there were six ways in which the asset freeze against Dana was rationally connected to the legitimate objective of the sanctions regime, each of which relied on his analysis that the asset freeze had an incentivising effect on the designated person and other similarly situated persons, as regards their conduct towards the Belarus government, or signalled the UK's disapproval of that government's conduct (at para [27]). When considering the particular facts of this case, it might be said (as the court implied) that the asset freezing sanctions had no tangible impact on Dana because there was no property upon which it 'bites'. If that is right and the sanctions upon Dana would be of minimal, if any, consequence to it and, by extension, to other, similarly situated companies, this raises the question of whether the sanctions would have any incentivising effects. This is not a conclusion that would, we anticipate, be readily accepted and this tension is not addressed in the judgment. It does, however, bring into focus both the broad meaning given by the courts to the term 'rational connection' and that a heavy burden rests on the claimant to make good a submission that there is no such rational connection. Further, and with reference to Dana's ECHR jurisdiction argument, if it is accepted that the application of asset freezing sanctions would have an incentivising effect on the designated person (as well as other similarly situated persons), this illustrates the impact of the UK government's sanctions decisions upon such person's property rights even where their property is not linked to the UK.

Sixthly, even in making its own assessment of proportionality, in the exercise of a judgment in matters of foreign policy and the conduct of foreign relations, the court 'must be sensitive to the expertise of the Secretary of State and his advisers in for example assessing the efficacy of a particular measure' (at para [73]).

Seventhly, in assessing proportionality, the court takes account of the evidence before the court at the time of the hearing (at para [74]).

Eighthly, this case once again demonstrates that, as the law currently stands, a pure 'disproportionate application' claim is in practice unlikely to succeed (that is to say a claim in which it is either accepted or established both that the scheme under the regulations as a whole is not disproportionate and that the individual is a person to whom the regime applies, and which is argued merely on the basis that the designation was a disproportionate application of the regime). In such a case, it follows that the person falls within the class of persons in respect of whom Parliament has lawfully determined that there is (or may be) a legitimate public interest in their designation pursuant to the objective of the regime. If it is accepted that it was proportionate for Parliament to determine that people with the claimant's characteristics may be designated, it would take peculiar circumstances thereafter for the decision to

designate a particular claimant to be disproportionate (at paras [71]–[72]). Practitioners who come to the conclusion that their client's only sustainable claim is one that the designation decision was disproportionate as regards to them, should pause to reflect upon those paragraphs of the judgment. The court referred to this analysis as the 'starting point' and 'not the end of the inquiry' (at para [72]) but, from a practical point of view, it presents a very considerable obstacle (see also to the same effect *R (on the application of Fridman) v HM Treasury* [2023] EWHC 2657 (Admin) at para [39]). Further exploration of this issue is anticipated in the eagerly awaited judgment of the Supreme Court in *Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs* (judgment appealed [2024] EWCA Civ 172).

Ninthly, where arbitrariness and differential treatment are argued, the claimant must provide substantial and detailed evidence that (i) the companies to whom a comparison is made are in fact 'direct comparators'; and (ii) the nature and extent of those companies' involvement in comparable sectors can be considered equivalent with regard to the statutory objective in imposing the designation (at para [92]). As above, the evidence has to be such that it satisfies the court that the designation of the claimant and lack of designation of the other companies was irrational.

Finally, as to pleadings, the court construed the claimant's pleadings strictly. It held that a complaint about whether the claimant met the statutory threshold for being an involved person did not fall within a claim articulated to be whether the evidence justified maintaining its designation (at para [29]). Practitioners should take care to ensure that the particular aspects of the statutory framework about which complaint is made are identified with the precision required of a civil pleading at the outset, alternatively that notice is given of any change of case is by a formal application to amend where necessary.

Case details

- Court: King's Bench Division, Administrative Court (London)
- Judge: The Honourable Mr Justice Saini
- Date of judgment: 11 February 2025

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