

Interim measures for and enforcement of overseas confiscation orders

POCLA Members' Confiscation Forum, 12 February 2010

Sources

The primary source is Part 2 of The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (SI 2005 No. 3181), as amended (“the 2005 Order”). This makes provision for the UK to give effect to external requests in connection with criminal investigations or proceedings and to external orders arising from such proceedings.

The 2005 Order was made pursuant to section 444 of the Proceeds of Crime Act 2002 (“POCA”), which provides for the making of Orders in Council dealing with such matters. It came into force on 1 January 2006.

Rule 57.15 of the Criminal Procedure Rules provides that the rules in Part 57 (applicable to all POCA proceedings), Part 59 (applicable to restraint proceedings), Parts 60 to 61 (applicable to receivership proceedings), and Part 71 (appeals to the Court of Appeal under POCA) apply with the necessary modifications to proceedings under the 2005 Order in the same way that they apply to corresponding proceedings under Part 2 of POCA.

Overview

Part 2 of the 2005 Order is divided into chapters. Chapter 1 deals with external requests for interim relief. Chapter 2 deals with the enforcement of external confiscation orders. Chapter 3 contains further provisions about receivers and deals with the procedure on appeal. Chapter 4 deals with interpretation.

The drafting technique was to reproduce *mutatis mutandis* in the 2005 Order the relevant provisions of POCA, so that the domestic court has the same power to enforce an application based on an external request as it would to enforce an application based on a domestic request. But, as appears below, there are differences in the powers of the court under these two instruments.

Definitions

A number of the terms used in the 2005 Order are defined in section 447 of POCA. The following definitions are particularly important.

An *external request* is a request made by an *overseas authority* to prohibit dealing with *relevant property* which is identified in the request. POCA section 447(1).

An *external order* is an order which:

- (1) is made by an overseas court where property is found or believed to have been obtained as a result of or in connection with *criminal conduct*, and
- (2) is for the recovery of specified property or a specified sum of money. POCA section 447(2).

Property is *relevant property* if there are reasonable grounds to believe that it may be needed to satisfy an *external order* which has been or which may be made. POCA section 447(7).

Criminal conduct is conduct which:

- (1) constitutes an offence in any part of the United Kingdom, or
- (2) would constitute an offence in any part of the United Kingdom if it occurred there. POCA section 447(8).

An *overseas authority* is an authority which has a responsibility in a country or territory outside the United Kingdom for any of the following:

- (1) Making a request to an authority in another country or territory (including the United Kingdom) to prohibit dealing with *relevant property*.
- (2) Carrying out an investigation into whether property has been obtained as a result of or in connection with *criminal conduct*.
- (3) Carrying out an investigation into whether a money laundering offence has been committed. POCA section 447(11).

Processing the request

The external request should be sent by the requesting State to the Secretary of State for the Home Office (but in practice to the United Kingdom Central Authority within the Home Office). 2005 Order articles 6 and 18.

The Central Authority is responsible for receiving external requests for mutual legal assistance in criminal matters and transmitting them to the competent authorities for

execution. NB there is no system of designated States under the 2005 Order. The external request can be from an overseas authority in any State whatsoever.

Helpful guidance on making requests to the United Kingdom can be found in the Central Authority's booklet *Mutual Legal Assistance for the United Kingdom*, which is available online from the Home Office website.

The Central Authority may refer an external request to the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions,¹ or, in the case of serious or complex fraud, the Director of the Serious Fraud Office.

The relevant Director may then apply to the Crown Court for the appropriate order.

NB it is a precondition of the exercise by the Crown Court of its jurisdiction under the 2005 Order that the request underlying the application satisfies the POCA definition of an *external request*.

Restraint orders

The Crown Court can make a restraint order pursuant to article 8 of the 2005 Order provided that the conditions in article 7 of the 2005 Order have been satisfied.

- (1) Relevant property in England and Wales is identified in the external request.
- (2) A criminal investigation with regard to an offence, and/or proceedings for an offence have been started and not concluded, in the country from which the external request was made.
- (3) There is reasonable cause to believe that the alleged offender/defendant named in the request has benefited from his criminal conduct.

As in a domestic restraint application, the Director would also be expected to show a risk of dissipation.

NB Article 8 of the 2005 Order provides that, unlike in domestic restraint cases, the restraint order may make provision for reasonable legal expenses in connection with the proceedings seeking a restraint order or the registration of an external order.

Article 9 of the 2005 Order provides for the application, discharge and variation of restraint orders. But, unlike in domestic restraint cases, the 2005 Order makes no provision for payment of compensation in the case of serious default by an investigator.

¹ On 1st January 2010 the Attorney General appointed the Director of Public Prosecutions to the post of Director of Revenue and Customs Prosecutions. Although in theory the two posts remain separate and distinct, in practice the RCPO has been merged with the CPS and become its Revenue and Customs Division.

Articles 10 and 11 of the 2005 Order provide for appeals to the Court of Appeal and the Supreme Court respectively about restraint orders.

Management receivers

Article 15 of the 2005 Order provides that if the Crown Court makes a restraint order it can appoint a management receiver. Article 16 of the 2005 Order deals with the powers of management receivers.

Registration of external confiscation orders

Article 21 of the 2005 Order provides that the Crown Court must decide to give effect to an external confiscation order by registering it pursuant to article 22 of the 2005 Order where all the following conditions are satisfied:

- (1) The external order was made consequent upon the conviction of the person named in the order and no appeal is outstanding in respect of that conviction.
- (2) The external order is in force and no appeal is outstanding in respect of it.
- (3) Giving effect to the external order would not be incompatible with any of the rights under the European Convention on Human Rights (but only if the external order authorises the confiscation of property other than money).
- (4) The specified property is not subject to a charge under domestic confiscation legislation.

Article 22 of the 2005 Order provides that where the Crown Court decides to give effect to an external order it must:

- (1) Register the external order.
- (2) Provide for notice of the registration to be given to any person affected by it.
- (3) Appoint the relevant Director as the enforcement authority for the external order.

An external order may only be enforced under the 2005 Order if it has been registered by the Crown Court.

The Crown Court, on an application by the relevant Director or any person affected by the external order:

- (1) *May* cancel the registration of the external order, or vary the property to which it applies, if the Court is of the opinion that any of the conditions in article 21 have not been satisfied.
- (2) *Must* cancel the registration of the external order if it appears to the Court that the external order has been satisfied.

The Crown Court must provide for notice of the cancellation or variation of an external order to be given to the relevant Director and any person affected by the external order.

Articles 23 and 24 of the 2005 Order provide for appeals to the Court of Appeal and the Supreme Court respectively about decisions to vary external orders.

Enforcement receivers

Article 27 of the 2005 Order provides that if an external order has been registered then, on the application of the relevant Director, the Crown Court can appoint an enforcement receiver. Articles 28 and 29 of the 2005 Order deal with the powers of enforcement receivers.

Article 33 of the 2005 Order deals with the application of sums realised by enforcement receivers. As *mutatis mutandis* in domestic legislation, they must be applied as follows:

- (1) First, in payment of such expenses incurred by a person acting as an insolvency practitioner as are provided for by the 2005 Order.
- (2) Second, in making any payments directed by the Crown Court.
- (3) Third, on the defendant's behalf, towards satisfaction of the external order. This is done by paying them to the relevant Director. NOT by transferring them to the requesting State.

Article 37 of the 2005 Order provides that an external order is satisfied when no amount is due under it.

What happens to sums realised under an external order?

The relevant Director pays sums realised under an external order into the Consolidated Fund. But if the requesting State so requests, the United Kingdom Government can at its discretion remit the monies on a diplomatic basis. It will be more likely to do so if the requesting State would do the same if their roles were reversed and/or the monies will be returned to the victims of the underlying crime. See *Smith, Owen and Bodnar on Asset Recovery* at IV.6 paras 139 – 140.

Eg the 2007 FATF *Mutual Evaluation of the United Kingdom* notes at para. 1293 that where funds recovered represent the proceeds of grand larceny or corruption by a kleptocrat and an entire State is the victim, it is the United Kingdom's policy to repay all the recovered funds, minus costs.

The United Kingdom has also concluded bilateral asset sharing agreements with “*between six and eight*” countries and territories, as noted in *Money laundering and the financing of terrorism*, Nineteenth Report of the European Union Committee of the House of Lords, at para. 77. The report was ordered by the House of Lords to be printed on 14 July 2009.

Appeals

Article 47 provides that an appeal to the Court of Appeal under Part 2 of the 2005 Order lies only with the leave of that Court.

Case law

The following is a selection of relevant cases. They include authorities under the pre-POCA legislation, as these are also relevant to the 2005 Order. The cases may be authority for propositions additional to those cited here.

***Government of USA v Montgomery (No 2)* [2004] 1 WLR 2241, HL**

The European Convention on Human Rights does not govern the actions of States that are not party to it, and it does not require contracting States to impose Convention standards on other States. Paras. 17 – 18. But the obligations of contracting states are engaged indirectly on a request for mutual legal assistance if by providing such assistance it will put a person at risk of a flagrant denial of a fair trial in the requesting State. The threatened breach must be fundamental. It would have to amount to a virtually complete denial or nullification of the defendant's article 6 rights. Paras. 22 – 26.

***Government of India v Quattrocchi, The Times*, 28 January 2004; [2004] EWCA Civ 40**

An external restraint order can be made when the English court concludes, on evidence, that there is a reasonable possibility that the requesting State will eventually make a confiscation order. That the matter should be put comparatively low is only to be expected when dealing with what is a preliminary act, ie a restraint order. Para. 19.

The English legislation, which is the relevant legislation for the *vires* of the court, says nothing about the form in which the external request should be made. Para. 34.

The offences allegedly committed in the requesting State have to correspond with offences recognised *mutatis mutandis* in England and Wales. If the conduct in the requesting State is alleged to constitute an offence in that State that corresponds with an offence in England and Wales, then the double criminality requirement is satisfied. Para 35.

***Director of SFO v A* [2008] Lloyd's Rep FC 30; [2007] EWCA Crim 1927**

There is a legitimate English public interest in foreigners not being able to use England and Wales as a place in which to shelter ill gotten gains or their proceeds. Para. 3.

Speaking *obiter*, the court rejected the proposition that, once the conditions for making a restraint order have been met, an order ought to follow almost automatically. There may be many factors for or against the making of a restraint order that require individual assessment in each case. Para. 8.

The case, an application to discharge an external restraint order, was remitted for hearing at first instance. The Court stated that, in light of the complicated issues raised, if it were possible for the presiding judges of the South Eastern Circuit to arrange for the application to be heard by a High Court judge, consistently with the other demands upon their limited time, that would be desirable. Para. 23.

The remitted case was heard by a High Court judge at first instance, where it was known as *Al Zayat*.

***Al Zayat* [2008] Lloyd's Rep FC 390; [2008] EWHC 315 Crim**

An important policy goal in recent decades has been international co-operation in combating crime, especially financial crime. Para. 8.

As in domestic restraint proceedings, the standard of proof is a civil standard, ie a balance of probabilities. Para. 12.

It should be rare that contested hearings concerning restraint orders should occupy days of court time. Para. 69.

Arguments as to human rights issues affecting the courts of the requesting State should be largely (but not entirely) concentrated on the stage when an external order comes to be sought, not the restraint stage. But the court has to keep in mind its obligations under the Human Rights Act 1998 throughout, not only at the confiscation stage. Eg where it is clear that there is no realistic prospect of a fair trial in the requesting State, it would be futile to make a restraint order. Paras 70 – 71.

The court can make a restraint order with respect to offences that allegedly took place before the 2005 Order came into force. Para. 109. This is an important difference between the court's restraint jurisdiction under the 2005 Order and its domestic restraint jurisdiction under POCA. But it is the same, *mutatis mutandis*, as the position under the previous confiscation legislation. See *USA v Montgomery (No 1)* [2001] 1 WLR 196, HL.

Requests for restraint orders are capable of giving rise to issues of some delicacy, calling for a very careful balancing of competing interests. Para. 131.

***King v SFO* [2008] 1 WLR 2634, CA**

An application having the importance and complexity of a restraint application ought normally to be dealt with at a hearing whether or not it was made *ex parte*. A full record of the hearing should be made. Para. 62.

The SFO appealed to the House of Lords (not on this point).

***King v SFO* [2009] 1 WLR 718, HL**

Under the 2005 Order, the court can only make a restraint order with respect to property in England and Wales. It cannot make a worldwide order. This is a significant difference between the restraint jurisdiction under the 2005 Order and the restraint jurisdiction under POCA. Paras. 34 – 38.

***Saccoccio v Austria*, 50 EHRR 243 (11) ECHR (18 December 2008)**

The Austrian court, pursuant to letters rogatory, executed a forfeiture order issued against the defendant by a court in the United States. The order was executed after the Austrian court considered written submissions from the parties but without an oral hearing.

The forfeiture order, and hence the proceedings to enforce it, were civil not criminal in nature. Paras. 56 and 59.

They did not violate the defendant's right to a public hearing under article 6.1 of the Convention. There was a right to an oral hearing unless there were circumstances that justified dispensing with such a hearing. Para. 71. But the court was justified in dispensing with an oral hearing in the instant case as the enforcement proceedings were solely concerned with technical legal issues. Paras. 78 – 80.

Neither did they violate the defendant's right to peaceful enjoyment of his possessions under article 1 of Protocol 1 of the Convention. Article 1 required that the proceedings at issue must afford the individual a reasonable opportunity of putting their case. That requirement

was satisfied in the instant case as the defendant was represented by a lawyer throughout the enforcement proceedings and had the opportunity, of which he made ample use, to submit his arguments. Paras. 89 – 90.

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