

CRIME AND COURTS BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

SUPPLEMENTARY MEMORANDUM BY THE MINISTRY OF JUSTICE

1. The Home Office and Ministry of Justice published an ECHR memorandum on Introduction of the Crime and Courts Bill in the House of Lords on 10 May 2012. This further supplementary memorandum addresses the issues arising from Government new clause *Enforcement by taking control of good* tabled for Commons Committee Stage.

Enforcement by taking control of goods

2. New clause *Enforcement by taking control of good* inserts a new clause into the Bill which amends Schedule 12 to the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”). Part 3 of the 2007 Act, of which Schedule 12 forms part, makes provision for unified law relating to the enforcement of debts by seizure and sale of goods, replacing existing common law and statutory provisions. Schedule 12 provides for a new procedure, taking control of goods, to replace existing powers of seizure and sale of goods pursuant to an enactment, writ or warrant which confers power to use the procedure.
3. The amendments made by the new clause address a number of issues identified during the process of preparation for implementation of Part 3 of the 2007 Act as causing difficulties. Those issues are:
 - the absence of a power (mirroring that at common law) to use reasonable force to enter commercial premises to take control of goods for the enforcement of debts under a High Court or county court judgment;
 - the absence of a power (again mirroring that at common law) when a controlled goods agreement has been entered into, to use reasonable force to re-enter premises to inspect the controlled goods or to remove them for storage or sale;
 - the existence of a power to make regulations to enable the use of force against the person;
 - the possibility that the definition of “abandonment” of goods might lead – contrary to the common law position and the policy intention - to controlled goods unsold at auction being deemed to be abandoned and no longer subject to control.
4. Subsection (3) of the new clause inserts a new paragraph 18A into Schedule 12 to the 2007 Act to address the first issue (with consequential amendment in subsection (2)); subsection (4) inserts a new paragraph 19A similarly to address the second issue (again with consequential amendment in subsection (2)); subsection (5) addresses the third issue by repealing the provisions empowering regulations to enable the use of force against the person (with consequential amendment in subsection (8)); and

subsections (6) and (7) repeal the two provisions which created the final issue.

5. The Government considers that the provisions in this new clause are compatible with the Convention rights.
6. The most relevant Convention rights to consider are Article 1 of the First Protocol (the right to peaceful enjoyment of possessions), Article 6 (the right to a fair hearing before an independent tribunal), and Article 8 (the right to respect for private and family life and the home).
7. The European Court of Human Rights has confirmed that the enforcement of a judgment falls under the protection of the Article 6 guarantee. Judgment creditors should not be prevented from benefiting from the success of litigation.¹ In *Hornsby v Greece*,² the Court held that the right of access to a court would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party, and that it would be inconceivable that Article 6 should ensure fair procedures without guaranteeing the implementation of judicial decisions: a view of Article 6 which limited it to the mere conduct of proceedings would fail to protect the principle of the rule of law enshrined in that Article. The Court concluded that "execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6" and that obstacles to, or even delays in, the enforcement of judgments might render the Article 6 guarantee "devoid of purpose". This approach was confirmed in *Apostol v Georgia*³, where the Court reaffirmed that "the right to a court is not merely a theoretical right to secure recognition of an entitlement by means of a final decision but also includes the legitimate expectation that the decision will be executed". While this right may be subject to limitations, such restrictions must not impair the very essence of the right, and must pursue a legitimate aim in the public interest and demonstrate a relationship of proportionality between the means employed and the aim sought to be achieved.
8. In relation to Article 1 of the First Protocol, from the creditor's perspective, in *Stran Greek Refineries and Stratis Andreadis v Greece*⁴, the Court held that a judgment or arbitration award which gives rise to a debt that is sufficiently established to be enforceable may constitute a possession for these purposes, and obstacles to enforcement may constitute interference with it. From the debtor's perspective, the Court has held that the right to peaceful enjoyment of possessions is not necessarily infringed by procedures for the payment of debts. In *Gasus Dosier-und Fördertechnik GMBH v The Netherlands*⁵, the Court considered Dutch legislation which enabled the tax authorities in certain circumstances to seize and sell a

¹ *Prodan v Moldova* Application No. 49806/99 18 May 2004 at paragraph 53

² (1997) 24 EHRR 250

³ Application No. 40765/02 November 28 2006

⁴ (1995) 19 EHRR 293

⁵ 23 February 1995, A 306-B

third party's assets to satisfy a tax-payer's debts, for which the third party was not liable. The Court held that a system of recovery of tax arrears which involved the power to seize and sell a third party's assets was not incompatible *per se* with the requirement of Article 1 of the First Protocol.

9. In relation to Article 8, *K v Sweden*,⁶ appears to have been generally accepted as affirming the compatibility of a mechanism of execution against goods with Article 8. In that case, the European Commission of Human Rights upheld a Swedish law which allowed forcible entry to the applicant's house and the search for and seizure of her goods to recover arrears of government taxes and other debts owed to a private creditor by the applicant's former husband. The Commission considered that the case disclosed a *prima facie* interference, but that this was justified by reference to paragraph 2 of the Article – first, interference can be justified if made "in accordance with the law"; second, interference must be in the pursuit of one or more of enumerated "legitimate aims." (which include the economic well-being of the country, and the protection of the rights and freedoms of others); and third, the interference must be "necessary in a democratic society" for those aims (which requires that the interference is proportionate to the aim being pursued). The Commission decided, first, that the measures were in accordance with Swedish law whose "quality" was "compatible with the rule of law", since the enforcement legislation was formulated in a precise manner though giving discretion as to prior notice of entry, and the seizure was subject to review by the Swedish courts. Second, the protection of creditors' rights was a legitimate aim in terms of the protection of the rights of others. Third, the enforcement was "necessary in a democratic society" in the interest of creditors.
10. The provision in relation to use of force on entry or re-entry, set against this reasoning, appears "lawful" (being part of a scheme for a codified structure which will replace a mixture of common law and statute widely accepted to be complex, inconsistent and confusing, and which will include requirements for prior notice absent from the Swedish scheme), and in pursuit of a legitimate aim and "necessary in a democratic society" on the same basis as in *K v. Sweden*, taking into account the Court's comments on the need for judgments to be enforceable under Article 6 and Article 1 First Protocol.
11. The repeal of the power for regulations to enable the use of force against the person is in the Government's view consistent with the Convention rights, since the power to use force against the person in this context is considered unnecessary, and likely to be disproportionate.
12. Finally, given the support generally to be derived from the ECHR jurisprudence for the proposition that a system allowing for the seizure and sale of goods to enforce judgment debts is not *per se* incompatible with

⁶ (1995) 20 EHRR 403¹⁸ Application No 13800/88 (European Commission of Human Rights, sitting on 1 July 1991).

the Convention rights, the amendments to change the operation of the provisions defining when goods may be considered to have been abandoned are in the Government's view simply clarification of part of a compatible scheme.

Ministry of Justice
25 January 2013