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PROCEEDS OF CRIME ACT 2002

PART 5, CHAPTER 3

REPORT OF THE APPOINTED PERSON FOR
ENGLAND AND WALES AND NORTHERN
IRELAND 2010-2011

REPORT OF THE APPOINTED PERSON FOR ENGLAND AND WALES AND NORTHERN IRELAND 2010- 2011

(PROCEEDS OF CRIME ACT 2002, PART 5,
CHAPTER 3)

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Contents

Introduction	5
Role of the Appointed Person (Section 291)	5
Search Powers (Section 289)	6
Prior Approval (Section 290)	7
Seizure and Detention of Cash (Sections 294, 295)	7
Report to the Appointed Person (Section 290(6) (7))	7
Detention and Forfeiture of Seized Cash (Sections 295-300)	8
The Act	8
2010 - 2011	8
Conclusions	9
Recommendations	9
Appendix 1	10
Appendix 2	13

Introduction

The Proceeds of Crime Act 2002 (“the Act”) received Royal Assent on 24th July 2002. Chapter 3 of Part 5 provides powers for police and customs officers to seize and then apply for the forfeiture of cash which is or represents property obtained through unlawful conduct, or which is intended to be used in unlawful conduct.

The commencement date for these provisions of the Act was 30th December 2002.

A function of “customs officer” now rests in “an officer of Revenue and Customs” (section 6 of the Commissioners for Revenue and Customs Act 2005).

A function of a “constable” has been extended to include an “immigration officer” (section 24 of the UK Borders Act 2007 commenced on 1 April 2010 – SI 2010/606).

To support the power to seize cash, there is a power of search. This is a power to search private premises where a police or customs officer has lawful authority to be present, and a power to search a person.

Search powers should normally only be exercised where prior judicial authority has been obtained. In circumstances where it is not practicable to obtain such authority then approval of a senior officer should be obtained, and if that is not practicable then an officer can search without authorisation.

In all cases where judicial approval is not obtained prior to a search of either private premises or a person and cash is not seized or cash is seized but is not detained for more than 48 hours, then the police or customs officer concerned must prepare a written report and submit it to an independent person referred to in the statute as “the Appointed Person” appointed by the Secretary of State in relation to England and Wales and Northern Ireland (Section 290).

The Secretary of State appointed me as the Appointed Person with effect from 30th December 2002 to coincide with the introduction of the cash seizure powers.

The powers of police and customs officers referred to above are extended to include accredited financial investigators with effect from 12th May 2009 by section 79 and Schedule 11 of the Serious Crime Act 2007 (these provisions were commenced by SI 2008/755, and accredited financial investigators were effectively designated by SI 2009/975 and SI 2009/2707).

On 9th December 2009 UK Border Agency assumed all responsibility for border cash seizure, investigation and forfeiture, so HM Revenue & Customs no longer has any role at the border for cash.

Role of the Appointed Person (Section 291)

The Appointed Person is required to submit a report as soon as possible after the end of each financial year (ending 31st March) with effect from March 2003. The report is to the Secretary of State who must lay it before Parliament.

In the report, the Appointed Person must give his opinion as to circumstances and manner in which the powers of search are being exercised in cases where he has received a report and he may make any recommendations he considers appropriate.

Search Powers (Section 289)

An officer may only exercise the power to search if the following criteria are fulfilled:

- (1) Premises
 - (a) The officer must already have lawful authority to be present on the premises either in the exercise of a power of entry conferred by other legislation or by invitation.
 - (b) There must be reasonable grounds for suspecting that there is “cash” on the premises which is either “recoverable property” or is intended for use in “unlawful conduct”.
 - (c) There must be reasonable grounds for suspecting that the amount of “cash” is not less than the “minimum amount”.
- (2) A person
 - (a) There must be reasonable grounds for suspecting that a person is carrying cash which is “recoverable property” or intended for use in “unlawful conduct”.
 - (b) There must be reasonable grounds for suspecting that the amount of “cash” is not less than the “minimum amount”.
- (3) In the case of customs officers the powers may only be exercised if there are reasonable grounds for suspecting that the unlawful conduct relates to an “assigned matter” under the Customs and Excise Management Act 1979.
- (4) In the case of an immigration officer the powers may only be exercised if there are reasonable grounds for suspecting that the unlawful conduct relates to an offence under the Immigration Acts section 14(2) of the Asylum and Immigration (treatment of Claimants etc) Act 2004.

“Recoverable property” is property obtained through unlawful conduct and includes cash (Section 304 to 310; see interpretation at section 316).

“Unlawful conduct” is conduct unlawful under the criminal law of the part of the United Kingdom in which it occurs, or if it occurs abroad is unlawful in the country in which it occurs and would also be unlawful if it occurred in a part of the United Kingdom (Section 241).

The “minimum amount” is an amount set under Section 303 of the Act by the Secretary of State and was set at £10,000 by the Proceeds of Crime Act 2002 (Recovery of Cash in Summary Proceedings: Minimum Amount) Order 2002 (SI 2002/3016). The Secretary of State altered the minimum amount to £5,000 with effect from 16th March 2004 by the Proceeds of Crime Act 2002 (Recovery of Cash in Summary Proceedings: Minimum Amount) Order 2004 (SI 2004/420) and altered it again to £1,000 with effect from 31st July 2006 by the Proceeds of Crime Act 2002 (Recovery of Cash in Summary Proceedings: Minimum Amount) Order 2006 (SI 2006/1699).

“Assigned matters” under the Customs and Excise Management Act 1979 include such conduct as drug trafficking, money laundering, evasion of VAT, excise and other indirect taxes and duties and evasion of a wide range of import and export prohibitions and restrictions.

“Cash” means notes and coins in any currency, postal orders, cheques (including travellers’ cheques), banker’s drafts, and bearer bonds and bearer shares (Section 289(6)).

Prior Approval (Section 290)

Powers of search may only be exercised with prior appropriate approval unless in the circumstances it is not practicable to obtain prior approval.

Prior appropriate approval is the authority of a justice of the peace, and if that is not practicable then the authority of a senior officer. For police officers a senior officer in this context is an Inspector or above, and for customs officers an officer designated for this purpose, for an accredited financial investigator, a senior accredited financial investigator who falls within a description specified in an order by the Secretary of State and for an immigration officer, an Assistant Director or above.

Seizure and Detention of Cash (Sections 294, 295)

A police or customs officer may seize cash at the borders or inland if he has reasonable grounds for suspecting that the cash is recoverable property or intended for use in unlawful conduct. The cash must not be less than the minimum amount.

The cash may be detained initially for a period of up to 48 hours, and that period can only be extended by an order of a magistrates' court or a justice of the peace.

Report to the Appointed Person (Section 290(6) (7))

In all cases where powers of search are exercised without prior authority of a justice of the peace and either no cash is seized or any cash seized is not detained for more than 48 hours, the officer concerned must make a report to the Appointed Person.

A revised Code of Practice in connection with the search powers has been made under Section 292 of the Act with effect from 6th April 2008 and at paragraphs 28-32 it sets out the requirement for reports and the content of the reports in the following terms:

"Reports to the "appointed person"

28. If a search under section 289 of the Proceeds of Crime Act is conducted without prior judicial approval - even if senior officer approval has been obtained - the officer is legally required to prepare a report in the following circumstances:

if no cash is seized by virtue of section 294, or

any cash seized is not detained for more than 48 hours

Cash may not be detained for more than 48 hours except by order of a magistrate or sheriff, the application for an order is commonly known as a 'detention hearing'. Note that the 48 hours does not include weekends, Christmas day, Good Friday and bank holidays.

29. This report must set out why it was not practicable to obtain judicial prior approval and the circumstances which led the officer to believe that the search powers were exercisable. These factors could include why the officer was on the premises where the search took place, what aroused his/her suspicion and why there was a need for an immediate search. If the prior approval of a senior officer was obtained, the report should state this, with the senior officer's reasons for approval.

30. For cases where the power was exercised in England, Wales and Northern Ireland, the report must be submitted to the appropriate independent person appointed by the Secretary of State. Reports should be made to:

The Appointed Person

c/o Organised and Financial Crime Unit
Home Office
5th Floor, Fry Building (B)
2 Marsham Street
London SW1P 4DF

31. For cases where the power was exercised in Scotland by officers of HMRC, the report must be submitted to the appropriate independent person appointed by the Scottish Ministers. Reports should be made to:

The Appointed Person for Scotland

c/o Scottish Government
IW15
Saint Andrew's House
Regent Road
Edinburgh
ED1 3DG

32. The report should normally be submitted as soon as practicable and in no event any later than 14 days of the exercise of the search power. Following the submission of his or her report, the reporting officer must also submit, to the appropriate appointed person, any supplementary information which the appointed person reasonably requires him or her to submit.

Detention and Forfeiture of Seized Cash (Sections 295-300)

In cases where seized cash is put before a magistrates' court it can be ordered to be detained for up to 3 months and the period can be extended by repeated applications up to a maximum of 2 years. The period of 3 months was extended to 6 months by section 64 of the Policing and Crime Act 2009 which was commenced on 25 January 2010 (commencement order SI 2009/3096).

The magistrates' court, on application, can order forfeiture of the cash or any part of it if it is satisfied on the balance of probabilities that it is recoverable property or intended for use in unlawful conduct.

The Act

Section 289 (Searches), Section 290 (Prior approval) and Section 291 (Report on exercise of powers) as amended by the Serious Crime Act 2007 (Schedule II) are set out in Appendix I.

2010 - 2011

During the year Officers of HM Revenue and Customs have made 118 seizures amounting to £2.32 million and have conducted no searches resulting in reports to the Appointed Person. The UK Border Agency has made 535 seizures amounting to £9.14 million and has conducted 5 searches all of which have resulted in reports to the Appointed Person.

Police officers have made 5269 seizures and seized £51.72 million. During the year they made no searches resulting in reports to the Appointed Person.

In addition Police Officers and Officers of HM Revenue and Customs appointed on secondment to the Serious Organised Crime Agency and the nine Regional Asset Recovery Teams made cash seizures. The Serious Organised Crime Agency made 41 seizures and seized £3.36 million. The Regional Asset Recovery Teams made 50 seizures and seized £0.93 million.

Of the 5 reports received 4 relate to searches of five persons, and 1 relates to two different premises.

This latter report was from the Serious Fraud Office who employ Accredited Financial Investigators.

All searches of the person were conducted at airports.

In all but one cases senior officer approval was obtained prior to the search.

In 5 of the reported searches nothing was seized. In 2 searches cash was seized and returned within 48 hours.

At the conclusion of the searches the individuals searched have been asked to self-select their ethnic background. A full analysis is contained in Appendix II.

Statistical details extracted from the reports can be found in Appendix II.

The number of reports received this year (5) is lower than last year (8). No reports were received from police, as last year.

Conclusions

The reasons for the relatively low numbers of reports from HM Revenue and Customs have been set out in previous reports as a greater concentration on activities at frontiers rather than inland (using powers under the Customs and Excise Management Act 1979 rather than the Proceeds of Crime Act 2002). The explanation from the police is that criminal investigations usually lead to an arrest for drug trafficking, theft or money laundering and police invariably use their powers under the Police and Criminal Evidence Act 1984 and the Misuse of Drugs Act 1971 to obtain warrants and seize property including cash.

HM Revenue and Customs and the police were reminded of the statutory requirement to provide reports in appropriate cases to the Appointed Person by the Home Office on my behalf in January 2007 and February 2009.

The explanations made in the individual reports continue to be satisfactory and there is nothing to suggest that the procedures are not being properly followed in accordance with the Act.

Recommendations

There are no recommendations that I consider it appropriate to make this year under Section 291(3) of the Act.

Andrew Clarke

Appointed Person

June 2011

APPENDIX I

289. Searches

- (1) If a customs officer, a constable or an accredited financial investigator is lawfully on any premises and has reasonable grounds for suspecting that there is on the premises cash -
 - (a) which is recoverable property or is intended by any person for use in unlawful conduct, and
 - (b) the amount of which is not less than the minimum amount,he may search for the cash there.
- (2) If a customs officer, a constable or an accredited financial investigator has reasonable grounds for suspecting that a person (the suspect) is carrying cash -
 - (a) which is recoverable property or is intended by any person for use in unlawful conduct, and
 - (b) the amount of which is not less than the minimum amount,he may exercise the following powers.
- (3) The officer, constable or accredited financial investigator may, so far as he thinks it necessary or expedient, require the suspect -
 - (a) to permit a search of any article he has with him,
 - (b) to permit a search of his person.
- (4) An officer, constable or accredited financial investigator exercising powers by virtue of subsection 3(b) may detain the suspect for so long as is necessary for their exercise.
- (5) The powers conferred by this section -
 - (a) are exercisable only so far as reasonably required for the purpose of finding cash,
 - (b) are exercisable by a customs officer only if he has reasonable grounds for suspecting that the unlawful conduct in question relates to an assigned matter (within the meaning of the Customs and Excise Management Act 1979 (c.2)).
 - (c) are exercisable by an accredited financial investigator only in relation to premises or (as the case may be) suspects in England, Wales or Northern Ireland.
- (6) Cash means -
 - (a) notes and coins in any currency,
 - (b) postal orders,
 - (c) cheques of any kind, including travellers' cheques,
 - (d) bankers' drafts,
 - (e) bearer bonds and bearer shares,

found at any place in the United Kingdom.

- (7) Cash also includes any kind of monetary instrument which is found at any place in the United Kingdom, if the instrument is specified by the Secretary of State by an order made after consultation with the Scottish Ministers.
- (8) This section does not require a person to submit to an intimate search or strip search (within the meaning of section 164 of the Customs and Excise Management Act 1979 (c.2)).

290. Prior approval

- (1) The powers conferred by section 289 may be exercised only with the appropriate approval unless, in the circumstances, it is not practicable to obtain that approval before exercising the power.
- (2) The appropriate approval means the approval of a judicial officer or (if that is not practicable in any case) the approval of a senior officer.
- (3) A judicial officer means -
- (a) in relation to England and Wales and Northern Ireland, a justice of the peace,
 - (b) in relation to Scotland, the sheriff.
- (4) A senior officer means -
- (a) in relation to the exercise of the power by a customs officer, a customs officer of a rank designated by the Commissioners of Customs and Excise as equivalent to that of a senior police officer,
 - (b) in relation to the exercise of the power by a constable, a senior police officer.
 - (c) in relation to the exercise of the power by an accredited financial investigator, an accredited financial investigator who falls within a description specified in an order made for this purpose by the Secretary of State under section 453.
- (5) A senior police officer means a police officer of at least the rank of inspector.
- (6) If the powers are exercised without the approval of a judicial officer in a case where -
- (a) no cash is seized by virtue of section 294, or
 - (b) any cash so seized is not detained for more than 48 hours,
- the customs officer, constable or accredited financial investigator who exercised the powers must give a written report to the appointed person.
- (7) The report must give particulars of the circumstances which led him to believe that -
- (a) the powers were exercisable, and
 - (b) it was not practicable to obtain the approval of a judicial officer.
- (8) In this section and section 291, the appointed person means -
- (a) in relation to England and Wales and Northern Ireland, a person appointed by the Secretary of State,

(b) in relation to Scotland, a person appointed by the Scottish Ministers.

(9) The appointed person must not be a person employed under or for the purposes of a government department or of the Scottish Administration, and the terms and conditions of his appointment, including any remuneration or expenses to be paid to him, are to be determined by the person appointing him.

291. Report on exercise of powers

(1) As soon as possible after the end of each financial year, the appointed person must prepare a report for that year.

“Financial year” means -

(a) the period beginning with the day on which this sections comes into force and ending with the next 31 March (which is the first financial year), and

(b) each subsequent period of twelve months beginning with 1 April.

(2) The report must give his opinion as to the circumstances and manner in which the powers conferred by section 289 are being exercised in cases where the customs officer, constable or accredited financial investigator who exercised them is required to give a report under section 290(6).

(3) In the report, he may make any recommendations he considers appropriate.

(4) He must send a copy of his report to the Secretary of State or, as the case may be, the Scottish Ministers, who must arrange for it to be published.

(5) The Secretary of State must lay a copy of any report he receives under this section before Parliament; and the Scottish Ministers must lay a copy of any report they received under this section before the Scottish Parliament.

Notes:

The powers referred to above were not extended to Accredited Financial Investigators until SI 2009/75 which came into force on 12th May 2009.

The Proceeds of Crime Act 2002 definition of 48 hours was amended by section 100 of the Serious Organised Crime and Police Act 2005.

APPENDIX II

ANALYSIS OF REPORTS, 2010-2011

Total reports received	5
(Reporting 7 searches)	
Reports received:	
(1) England	5
(a) London	3
(b) Provinces	2
(2) Wales	0
(3) Northern Ireland	0
Reports from UK Border Agency	4
Reports from the Serious Fraud Office	1
Searches of persons	5
Searches of premises	2
Place of search	
(a) street	0
(b) railway stations	0
(c) coach stations	0
(d) Airports	5
(e) Premises	2
Searches where prior senior officer approval obtained	6
Searches where senior officer approval obtained retrospectively	0
Searches with no senior officer approval	1
Searches where nothing seized	5
Searches where cash seized and returned within 48 hours	2
Searches where nothing seized	
(i) Person had less than the minimum amount in their possession	0
(ii) Person had an accepted explanation for the cash	5
Reason for search	

(a) Intelligence received	5
(b) Dog indication	0
(c) Observation	2
(d) Voluntary disclosure	0
Self-selection of ethnic background	
White British	2
Black African	0
Asian Indian	0
White Irish	0
Chinese	0
Any other white	2
Any other Asian	0
Any other	1
Not stated	0

