

CRIME AND COURTS BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

SUPPLEMENTARY MEMORANDUM BY THE HOME OFFICE AND MINISTRY OF JUSTICE

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 amendments tabled on 11 March 2013 for Commons Report stage.

Introduction

2. The purpose of the new clauses "*Restraint orders and legal aid*" and "*Restraint orders and legal aid: supplementary*" is to permit a contribution to legal aid to be made from assets which are the subject of a restraint order under the Proceeds of Crime Act 2002 (POCA).
3. The current position under section 41 of POCA is that there can be no exception in a restraint order for legal expenses which relate to the offence in relation to which the restraint order is in place. The purpose of this prohibition was to deal with the problem, prior to the enactment of POCA, of reckless dissipation of assets on privately funded defence costs in confiscation and related criminal proceedings. Legal aid is instead available in such cases. Since the enactment of POCA, a means-tested legal aid contribution regime has been introduced in the Crown court regulations made under the Access to Justice Act 1999. This regime will continue once the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) comes into force on 1 April 2013.

New clause "*Restraint orders and legal aid*"

4. New clause "*Restraint orders and legal aid*" amends section 41 of POCA to provide that there must be an exception to a restraint order to enable a relevant legal aid payment to be made. That payment will relate to legal aid provided in connection with offences related to the restraint order (that is, where the prohibition on the exceptions to restraint for other legal expenses applies). The amount of the legal aid payment will be a matter for regulations made under LASPO. The amendments provide powers to make the legal aid exception subject to prescribed restrictions (including as to amount of payments in reliance on the legal aid exception), prescribed conditions and conditions imposed by the court.
5. Article 6 of, and Article 1 of the First Protocol (A1P1) to, the ECHR are engaged by the amendments to POCA, in that they deal with property which is subject to restraint and provide for an exception to restraint for

legal aid purposes. *Raimondo v Italy*¹ held that a restraint order ancillary to enforcement of domestic legislation constitutes the control of use of property rather than its deprivation, and that it served a legitimate aim in preserving assets for the purpose of confiscation. Following this, the domestic restraint regime under POCA has also been held to be compliant with the ECHR, as, specifically, has the prohibition in section 41(4) on using restrained assets for related legal expenses. In the cases of *R v AP and R v U Ltd*,² the Court of Appeal held that Parliament was entitled to conclude that defendants should not be allowed to use restrained assets, until the determination by the court of whether those funds were the result of criminal activity, for the purposes of legal representation. The prohibition in section 41(4) of POCA was compatible with both Articles 1 and 6 ECHR and A1P1. This was a matter of social and economic policy in which the court would afford a wide margin of appreciation to the legislature. The control of use was justified.

6. Article 6 is also engaged as these amendments concern access to legal aid, in particular in criminal proceedings. As set out above, the prohibition on the use of restrained assets to pay for related legal expenses has been held to be compatible with the Article 6(3)(c) right to legal representation. The domestic courts have accepted the reasons for the prohibition, notwithstanding that it represents a restriction on a defendant's right to choose legal representation despite his having the means to do so. The courts have also stated in this context that it is clearly desirable in the ordinary course of events that defendants to restraint orders should enjoy legal representation.³ There is therefore no infringement of the defendant's right to legal representation, subject to the usual tests for access to legal aid (merits and means tests in relation to civil legal aid; the interests of justice test and means tests in criminal cases).
7. Means testing in relation to legal aid has been held to be ECHR compliant,⁴ as have contributions to legal aid where a defendant has sufficient means to pay.⁵ Contributions to legal aid where a defendant can afford them are clearly justified given that the state must meet its obligations to fund legal representation from limited funds. A defendant with restrained assets has means, albeit they are subject to restraint to prevent their dissipation. It is therefore desirable and in the general interest that a defendant who can afford to contribute to his defence does so, and that a defendant whose assets are restrained does not gain an advantage as regards contributions when compared to any other defendant of the same means who will have to so contribute. In so far as a defendant subject to a restraint order may be said to be in a different position because he has no choice but to rely on legal aid, the reasons for the underlying restriction hold good. The cost of legal aid will be controlled

¹ *Application No. 12954/87 (1994) 18 E.H.R.R. 237*

² [2007] EWCA Crim 3128.

³ *In re S* [2004] EWCA 2374.

⁴ *Winer v United Kingdom Application No. 10817/84, (1986) 48 D.R. 154*

⁵ *Morris v UK Application No. 38784/97, (2002) 34 E.H.R.R. 52.*

and capped by the Lord Chancellor in accordance with his arrangements with providers. Legal aid contributions do not therefore carry the same risk of dissipation of assets as allowing the defendant to instruct defence lawyers at private rates. Given that the reasons for the prohibition on private legal expenses remain sound, and legal aid will be provided, the Government's view is that it is a justified interference with a person's property rights to require them to make a contribution toward that legal aid in accordance with their means.

8. The Government is therefore satisfied that these amendments to POCA to enable a legal aid contribution from assets which are otherwise restrained are compatible with both a person's right to a fair trial under Article 6, and their rights in respect of property under A1P1.

New clause "*Restraint orders and legal aid: supplementary*"

9. New clause "*Restraint orders and legal aid: supplementary*" provides that the Secretary of State may make provision by regulations about or in connection with payments out of property which is subject to restraint. Subsection (2) of the new clause includes a non-exhaustive list of provisions which may be made, including for the amount of property under restraint to take into account that legal aid payments may be made out of it; for the extension of restraint when a restraint order would otherwise be discharged; about the order in which payments are to be made when a restraint order is in force or has been made; about disclosure and information and about extending powers of investigation, entry, search and seizure in connection with legal aid payments out of restrained assets. The power to make regulations includes power to amend primary legislation, including in particular Part 2 and Chapter 1, 2 or 4 of Part 8 of POCA.
10. For the purpose of enacting these powers, the Government is satisfied that they can be exercised compatibly with the ECHR. Ministers will need to be satisfied that any provision they make is compatible when they lay the regulations before Parliament, and as the powers are subject to the affirmative resolution procedure, a statement will need to be made to that effect. It is not yet determined precisely how these powers will be used to ensure that the legal aid and confiscation regimes work together to secure legal aid contributions, and wherever possible, additional money from offenders. However, as the list in subsection (2) of the new clause indicates, it is envisaged that the powers may be exercised in respect of restraint, both to increase the assets under restraint and to extend the period of restraint for the purpose of securing legal aid payments once other obligations have been satisfied. As set out above, the restraint of property constitutes a control of use under A1P1. Any change in, or extension of, restraint will therefore need to be justified in pursuit of the legitimate aim of securing legal aid contributions, and will need to go no further than necessary in the light of that aim.⁶ However, the Government is satisfied that, should these powers be exercised for the purpose of

⁶ *Venditelli v Italy* (App.No.14804/89).

extending the period of restraint, this will be compatible with the ECHR, because the courts will continue to supervise restraint orders, both in terms of the assets under restraint and the duration of the order. The courts will retain the important safeguard of their discretionary power to vary or discharge the restraint order if they consider its operation or continuation no longer to be justified.

11. Similarly, in relation to the potential use of the others powers under subsection (2) of this new clause, the Government considers that their exercise would be compatible with the ECHR. In particular if the powers are used to amend POCA powers in respect of search, seizure, entry and investigation in connection with legal aid payments, Articles 6 and 8 and A1P1 may all be engaged by such amendments. However, not only will the provisions need to made in accordance with the ECHR, but those who operate them will themselves be subject to the obligation under section 6 of the Human Rights Act 1998 to operate in accordance with the Convention rights in individual cases. Again, the court will retain its jurisdiction over the powers to ensure they are exercised compatibly, for example in granting orders and warrants under Part 8 of POCA.
12. The Government is therefore satisfied that the enactment of these powers is compatible with any Articles of the ECHR which may be engaged by their future exercise.

MINISTRY OF JUSTICE/HOME OFFICE
11 March 2013