

# Overseas Corruption – International Assistance

## Introduction

1. The object of this paper is to outline how the UK responds to requests where assets have been identified by a third country where they know or suspect that such assets are located within the UK. It complements the HM Treasury paper - International Corruption: The Role of the UK's Anti-Money Laundering Regime, which details the law and procedure where UK authorities have identified stolen assets.

## Identification

2. This can occur in two ways:
  - Law enforcement request for asset tracing
  - Mutual legal assistance (MLA) request

The first scenario will normally occur at the investigation stage where the overseas authority has suspicions that there are assets held in the UK but are not necessarily clear as to the form in which they are held e.g. bank accounts, real property, shares etc. (1 sentence redacted)

3. Where assets are identified via MLA requests there are normally accompanied by a request to restraint such assets for the purposes of future confiscation in the requested jurisdiction. Whether assets can actually be restrained once identified will be explored below.

## Current Legal Framework - Restraint

4. Once a MLA request has been received either by NCIS<sup>1</sup> and referred to the UKCA<sup>2</sup> or by the UKCA directly, the request may be acceded to by the Secretary of State. The criteria which govern accession are contained within ss.13-15 of the Crime (International Co-operation) Act 2003 (CICA). It should be noted that the UK does not require a treaty or multi-lateral agreement to provide assistance except in cases of restraint and confiscation of the proceeds of crime<sup>3</sup>. Where the authority is then seeking to restrain assets (of whatever description in the UK) they are required to submit additional information before the request can be referred to the Central Confiscation Branch (CCB) of the Crown Prosecution Service<sup>4</sup> - see Annex I for details.
5. Requests need to provide sufficient detail to allow the restraint order to be properly drafted. However, this may prove difficult in cases where no prior asset tracing has been undertaken. This may require financial

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<sup>1</sup> NCIS Interpol is an internationally recognised channel for the transmission and receipt of MLA requests.

<sup>2</sup> Scotland and Northern Ireland also have their own central authorities.

<sup>3</sup> This will change once Part 11 of POCA is commenced.

<sup>4</sup> Requests can be submitted to the Asset Forfeiture Unit of HM Customs & Excise for assigned matters.

investigations to take place to trace the assets and then an application to restrain them may be made.

6. The UK can only restrain assets on behalf of overseas authorities where we have designated them<sup>5</sup> under the Proceeds of Crime Act 1995 and/or the Drug Trafficking Act 1994. In most cases, proceedings must have been commenced before assistance can be provided. There are limited circumstances where proceedings have not commenced and restraint assistance can be given e.g. a prosecuting authority cannot charge an individual because they have fled the jurisdiction and despite an extradition request being made, they cannot be returned due to own national provisions.
7. If the request is in order, the CCB will apply to the High Court for the restraint order and serve it upon the defendant(s) and all affected third parties e.g. banks, solicitors, relatives etc. The order will remain in force until it is discharged.

## Problems

### UK Processes

8. It is quite clear that this process is unsatisfactory for at least three reasons:
  - Firstly, it is reliant upon proceedings having been instituted. At that stage the suspect(s) are aware of the allegations being made against them and may have had enough of an opportunity to remove assets to another jurisdiction. This issue also plagued domestic investigations.
  - Secondly, the distinction between drug and non-drug generating offences may not be clear cut. (1 sentence redacted)
  - Finally, the designation system has caused some embarrassment in the past, because certain states were not designated and therefore, assistance could not be provided.

### Deficiencies in overseas requests

9. UK agencies have found that that many restraint requests fall into one of the following categories:
  - Insufficient information is provided to establish that proceedings have been instituted that have or will result in an external confiscation order being made; or
  - Insufficient information identifying the property to be restrained and/or the defendant's connection to the property.

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<sup>5</sup> By way of Statutory Instrument after a bilateral or multi-lateral agreement is ratified e.g. 1998 UN Convention on Narcotic Drugs and Psychotropic Substances resulted in many states being added to the designation list as regards drugs offences.

10. The first can usually be resolved through liaison with the requesting authority to obtain the requisite information. The second can rarely be resolved without the assistance of a UK financial investigator. It has been the experience of UK agencies that outwardly straightforward requests lack clarity or raise third party issues that require investigation before the restraint application can be progressed. As many requests are multi-faceted, seeking asset tracing and restraint, a UK based financial investigator is often allocated to the case before it is referred to CCB. The most difficult cases to progress are those where property details are deficient and no UK financial investigator has been allocated.
11. (Paragraph redacted)

## Current Legal Framework - Confiscation

12. This is usually an easier procedure to undertake as a full criminal process has taken place in the overseas jurisdiction and they are seeking the enforcement of a confiscation order that they have imposed against a defendant. The UK will not seek to enforce an order until all appeals have been exhausted in the overseas jurisdiction.
13. As stated above at paragraph 6, the UK can only enforce confiscation orders where an overseas jurisdiction has been designated. However, when dealing with issues of corruption it is highly unlikely that unless a restraint order has been in force, that there will be any assets left in the UK at the conclusion of the overseas trial process. This reinforces the notion of having the capability to restrain assets at the earliest possible stage.

## Judicial Review

14. This was the one of the major delaying factors in the Abacha case. The right of the subjects of the request (or affected parties) to challenge the decisions taken by the Secretary of State in relation to accession and transmission of the evidence. It can also apply to accession for the purposes of restraint and confiscation as well as enforcement of any order granted by the court.
15. The general rule is that any application for judicial review should be made as soon as possible but within 3 months of the date of the decision giving rise to the action. However, leave to apply out of time (outside the 3 month period) may be granted in certain circumstances. Once the application has been made the parties can request expedition of the hearing, but when the matter is listed and dealt with is entirely a matter for the court. Once the application has been lodged and until the matter has been finally dealt with the Secretary of State cannot progress the request.

16. (Paragraph redacted).

## The Future – The Proceeds of Crime Act 2002 (POCA)

17. This legislation, the majority of which came into effect in 2003 provides for a number of improved and extended powers for identifying, investigating, freezing and recovering the benefit (direct and indirect) from crime. The investigative powers within POCA are different from general criminal powers as they allow access to confidential records, usually banking and other financial information, without notifying the subject of the investigation. These enhanced investigative techniques are used to tackle money laundering and to facilitate confiscation proceedings and civil recovery investigations/proceedings.
18. POCA also allows for the freezing of any property suspected of being the proceeds of crime from any point after a criminal investigation has started. This addresses the first two criticisms outlined in paragraph 8 above. The powers are not offence specific, but relate to unlawful conduct and therefore are wide enough to capture corruption in whatever way it is perpetrated and equally, the laundering of the funds. Secondly, there is no requirement for proceedings to have commenced before restraint orders can be applied for. This should therefore, reduce any opportunity that a suspect has to remove assets from the jurisdiction to evade their restraint.
19. POCA also introduced the Asset Recovery Agency (ARA). Of interest overseas jurisdictions are ARA's civil recovery powers that will enable them to sue in the High Court to recover the proceeds of unlawful conduct using the civil standard of proof i.e. balance of probabilities. They will also be able to enforce overseas confiscation orders on behalf of overseas authorities.

### Issue

20. Before the enhanced provisions of POCA and ARA's civil recovery powers can be used on behalf of overseas authorities (see Part 11 of POCA), secondary legislation has to be drafted and laid before the Privy Council. This has proved to be much more complex than originally was thought. The timetable for implementation of these provisions is October 2005.

### Conclusion:

21. Many of the perceived problems that the UK has faced criticism for will be remedied to a large extent when Part 11 of POCA comes into force. Combined with the UK Anti-money laundering regime, this should make it more difficult for stolen assets to be secreted in the UK financial system. In dealing with overseas requests we will still be heavily reliant upon the information provided to us in asset tracing and

MLA requests. If this information is insufficient or deficient in nature, the UK will not be in a position to progress the matter (for which we will inevitably be criticised).

- 22.** We are supporting as much as possible, international initiatives to combat corruption – the G8 and the Commonwealth Secretariat currently have initiatives in development that envisage both legislative changes and technical assistance to aid those states which are subject to corruption in realising the return of stolen assets as quickly and efficiently as possible. On the domestic front, the FCO, Home Office and DFID as well as OGD's are engaged either bilaterally or multilaterally to effectively deal with this issue.

## Annex I – CICA accession criteria

The request must have been issued by:

- Court, tribunal or other authority that can issue requests<sup>6</sup>

It must be in relation to:

- Criminal investigation or proceedings
- Administrative investigation or proceedings
- Appeal in administrative proceedings
- Clemency proceedings

The Secretary of State must be satisfied that:

- An offence committed or reasonable grounds for suspecting that an offence has been committed
- An investigation or proceedings has been instituted

These criteria apply to all MLA requests no matter what the assistance sought. If they are satisfied, the UK Central Authority will accede to the request and allocate it for execution.

## Additional Restraint Criteria

The MLA request must identify:

- Current holders or controllers of the property
- Nexus/Link between subject and property
- Brief details of all property held outside UK

An accompanying certificate is to be issued by the Central Authority to confirm the following:

- Proceedings have been instituted

If no confiscation order (CO) has yet been made:

- Confirmation that CO is for recovery property or value of property
- Confirmation that CO is expected to be made in the proceedings
- Received in connection with crime (drug trafficking or other serious crime)
- Confirmation that the CO can be enforced outside the jurisdiction of the requesting state

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<sup>6</sup> This may be a body that is assigned by statute to issue requests e.g. Economic and Financial Crimes Commission, Nigeria.

If there is a restraint order in force in requesting jurisdiction, an authenticated copy of that request should be transmitted.

### Additional Confiscation Criteria:

The MLA request must give:

- Details of property held by defendant in UK.
- Any 3rd party interests in property specified.
- Enclose an authenticated copy of the confiscation order (CO)

An accompanying certificate is to be issued by the Central Authority to confirm the following:

- The CO is in force and not subject to appeal (or CO or any conviction to which it relates)
- The CO remains unpaid
- Confirmation that the CO is for recovery property or value of property received in connection with crime (drug trafficking or other serious crime).
- In cases where the CO was made in absentia that the defendant was informed of CO proceedings and that he was given sufficient notice to enable him to defend the proceedings.

# International Corruption

## Sani Abacha

### Introduction:

This case has caused and still continues to cause the HMG embarrassment as regards its handling of cases of corruption. However, a number of measures have been put in place that should prevent another 'Abacha' type scenario taking place in the UK again. More detail on those provisions are contained in the Home Office paper and the HM Treasury paper entitled International Corruption: The role of the UK's Anti-Money Laundering Regime.

This brief paper will concentrate solely on the Abacha case and other related cases.

### Case History:

The UKCA received a mutual legal assistance request dated 23<sup>rd</sup> June 2000 from Swiss lawyers acting for the FGN. The request concerned investigations by the FGN into the alleged systematic looting of state coffers by the former dictator Sani Abacha and his family and associates. The request *inter alia*, asked that substantial amount of (mainly banking) evidence be obtained from the UK.

Additional information was sought from FGN before the Secretary of State acceded to the request. In May 2001, the then Home Secretary agreed to execute the request. The request was passed to the Serious Fraud Office for execution. At that point those acting for the defendants in the Nigerian case challenged the Secretary of State's decision, who are family and associates of the late General Abacha. That challenge was ultimately defeated in the UK, in a judicial review which took place in October 2001. The court in the UK accepted that the Secretary of State was entitled to rely on the information that it had from the Nigerian Government, that it was genuinely concerned with the prosecution of criminal offences in this matter.

The Serious Fraud Office then began their collection of the evidence and over the course of the next few months a substantial volume of evidence was returned to the Home Office for transmission to the requesting authorities.

By the time that the evidence was received in the Home Office but before a decision on transmission had been taken, it had become apparent that negotiations were in place in relation to a possible global settlement involving the defendants in Nigeria. That settlement was made public on 17 April 2002. The basic terms of the settlement were that the claimants were to pay back \$1 billion to the FGN. They were to keep over \$100 million and the civil and criminal cases were to be settled against the claimants.

(Paragraph Redacted)



The UKCA were made aware of the collapse of the global settlement formally by letter dated 30 August from solicitors acting for the FGN who effectively asked us to resume the mutual legal assistance proceedings as soon as possible. The Abacha family solicitors were informed of this request and they submitted representations in October 2002. (Three sentences redacted).

(Two sentences redacted). A decision to transmit was communicated to all parties on 15 March 2004.

### Current situation:

The UKCA were informed on 2 April 2004 of their intention to judicially review the decision of the Secretary of State. Their application was initially refused by the single judge and a renewed application before the court was lodged on 15 September. The evidence requested in this case was finally transmitted to Nigeria on 16 December 2004 via the Nigerian High Commission. As regards the request to restrain funds in the UK, this was withdrawn in late 2003.

(Paragraph redacted)

### What more can be done?

The Metropolitan Police have confirmed that during the relevant period i.e. when the Abacha scandal came to light, they were involved in reviewing Suspicious Activity Reports that involved Nigerian citizens and they could find no links to Abacha related funds. From their point of view there is no more that can be done without further intelligence or evidence being provided to them.

Section (three paragraphs redacted)

### What more can be done?

The SFO monitors cases in which it provides assistance under mutual legal assistance treaties to identify cases appropriate for domestic prosecution after liaising with the requesting state. (Sentence redacted)