CRITICAL ANALYSIS OF PART 2 OF THE PROCEEDS OF CRIME ACT 2002 (OF THE UNITED KINGDOM LEGAL SYSTEM)

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Introduction
Two reasons have been identified for enforcing forfeiture in Proceeds of Crime Act 2002 (POCA)\(^1\) - first, risk of prison was not an effective deterrent,\(^2\) specially for the drug trafficking dealers.\(^3\) Second, it was to serve as a mode of “identifying and removing the proceeds of crime” and to stop from being invested further in other illegal activities.\(^4\) These reasons laid down the ground work for the UK legislation that ‘crime should not pay’\(^5\) and people should not make profits from unlawful undertakings.\(^6\) Part 2 of POCA deals with confiscation of proceeds of crime. The act sends a strong message to deter such activities.\(^7\) The objects of the regime are - punishment, deterrence, depriving of profits earned from crime to fund further criminal activates.\(^8\)

Confiscation Order
‘Confiscation Order’ is a post-conviction order of the court which focuses on value based\(^9\) assessment of a ‘benefit’ earned from a criminal activity by the offender. Significantly, it means that these offenders have to repay a debt to the government.\(^10\) It does not matter if the defendant passed such benefits to co-conspirators or it has been destroyed.\(^11\) The House of Lords in \(R v May\)^\(^12\) clearly set out that the aim of the act is to deprive

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\(^7\) Home Affairs Committee, Proceeds of Crime (2016-17, HC 25) para 66; \(R v Rezvi\) [2002] 2 Cr App R (S) 70 para [14]; \(R v Benjafid\)[2001] 1 AC 1099 HL para [8].

\(^8\) Stanford International Bank Ltd (In Receivership) Re, [2010] EWCA Cave 137; [2011] Ch. 33 para [162].


\(^10\) Ibid.

the defendant of the ‘product of his crime or its equivalent and not operate by way of fine’. This means that it is irrelevant whether the defendant owns the property alone or jointly with a co-defendant or he has transferred it to another person. In *R v Green* court summarized its opinion and the purpose of the act in the following words- ‘...it does not matter that process sale may have been received by one conspirator who retains his share before passing on the remainder, what matters is the capacity in which he received them.’

**European Convention on Human Rights**

UK is a signatory to many treaties by either signing or ratifying them under the United Nations and Council of Europe which have taken significant steps in controlling crimes. In *R v Waya*, the defendant had raised an issue that the operation of confiscation regime in some situations may infringe Article 1 of the First Protocol to the European Convention on Human Right. Basically, the requirement is that a reasonable relationship of proportionality must exist between the resources employed by the state in the confiscation and deprivation of the property which is the legitimate aim of the act. The notorious fact is that the criminals take measures to hide their proceeds of crime. Therefore, it is essential to implement effective legislation which have fair powers. Similarly, by the virtue of section 6 of Human Rights Act 1998 the prosecutors are under a duty to act in the way which is compatible with Convention Rights, therefore, as a result of which the Crown has an essential duty to make sure that only a proportionate order is sought. As a result, which confiscation regime has been consistent in dealing with crime and in no circumstance, has infringed Article 1 of the First Protocol of the European Convention on Human Rights.

**Making of a Confiscation Order**

Under section 6, the confiscation orders can only be made by the Crown Court. Nonetheless it can also be made under a Magistrate’s Court but only where the defendant is committed to the Crown Court for an order under section 70.

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14 Section 84 (1) (a), (b), (c) of the Proceeds of Crime Act 2002.
15 [2008] UKHL 30 paras [45] [46].
16 The UM Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (19 December 1998); Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime, Strasbourg, 8 November 1990.
18 *R v Benjafield*[2001] 1 AC 1099 HL; *R v Rezni*[2001] 1 AC 1099 HL.
Key Requirements Under Section 6 of POCA 2002

Section 6 of POCA lays down key features of confiscation order. These features are mandatory in nature:

1. The defendant must be convicted of an offence before the Crown Court for offences under Section 3, 4 or 6 of the Sentencing Act or under Section 70.
2. Either the prosecution or director must request the court to initiate the proceedings or the court must believe that it is appropriate to do so.
3. The court must decide whether the defendant has a criminal lifestyle. If it decides that the defendant has a criminal lifestyle, then they must calculate the benefit the person has received from the general criminal conduct. For this purpose, the court will apply section 10 which specifies certain ‘assumptions’. I will deal with this part later in the essay. On the other hand, if the court decides that the defendant does not have a criminal lifestyle then the court must determine the benefit from the particular criminal conduct.

4. The Court must then decide on the recoverable amount that is to be taken from the defendant which has to be in equal proportion to the profits he made from the criminal activity.
5. A proportionate order will be passed by the court for the recoverable amount unless it has a reason to believe that the defendant is able to prove a lesser amount or the victim initiates civil proceedings.

Criminal Lifestyle Under Section 75

To establish the benefit under general criminal conduct, the court must first decide whether the defendant has a criminal lifestyle or not. The level of implications for the order sought are wide-reaching if it is proved by Section 75 and can include even the first time offenders which is not the object of the Act. The affirmative answer in a case gives the “right to a court” to include “all” income and expenditure of the offender from the past six years and his current...


23 Section 6 (2) Proceeds of Crime Act 2002.

24 Section 6 (3) (a), (b) Proceeds of Crime Act 2002.

25 Section 75 Proceeds of Crime Act 2002.


28 In confirmation with Article 1, Protocol 1, ECHR.


assets in the confiscation order even though they had no link with the offence.31 More importantly, the burden of proof shifts to the defendant to prove his income is the result of legitimate business. This can be problematic if the accounts are insufficient because the courts may then assess the entire income as criminal benefit.32 To speak the truth these broad “assumptions”33 are the primary reasons which have caused massive implementation problems at enforcement phase.34 It is not at the discretion of the court to decide whether a defendant has lived a criminal lifestyle but a box-ticking criteria under Section 75(2).35 A defendant will be deemed to have a criminal lifestyle if he is convicted of an offence under Schedule 2 of POCA (drug trafficking, money laundering, terrorism and other ‘serious’ crimes).36 Second, defendant has been convicted of multiple offences over a course or obtains the benefit of 5,000 pounds or more. Third, the offender has earned the benefit of 5,000 pounds and has been convicted of an offence over a period of six months.37 These assumptions were seen as oppressive but the defense of the legislature was that it was necessary to deal with criminals strictly.38 This reflects strong approach of the provisions but how fair is to have such wide-reaching implications is debatable.

Assumptions in Cases of Criminal Lifestyle Under Section 10
Section 1039 creates a single scheme for mandatory rules or assumptions.40 The court will make four assumptions to settle the ‘question of benefit and amount of proceeds of general criminal conduct’. If the defendant falls under any of it, he will be declared to have a criminal lifestyle. This will include – a property transferred to the defendant in a period of six years before his arrest.41 Second, property which is held by him after his conviction which was a result of a criminal conduct.42 Third, expenditure incurred by him which was the benefit derived from

32 Ivan Lawrence, ‘Draconian and Manifestly Unjust: How the Confiscation Regime Has Developed’ 76 Amicus Curiae 22, 23.
33 Assumptions are made by virtue of Section 10 Proceeds of Crime Act 2002.
35 Section 75(2)(c) Proceeds of Crime Act 2002.
38 Trevor Millington, Mark Sutherland Williams, ‘The Proceeds of Crime: The Law and Practice of Restraint, Confiscation, and Forfeiture’ (OUP 2003) para 15.34.
41 Section 10 (2) Proceeds of Crime Act 2002.
42 Section 10 (3) Proceeds of Crime Act 2002.
this criminal conduct.\textsuperscript{43} Fourth, value of the property obtained by the offender was free of interest in it.\textsuperscript{44} But this section provides “two exceptions” to these assumptions, where the court decides, it will be - incorrect to apply these assumption and it would cause a serious risk of injustice.\textsuperscript{45} Since the enactment of POCA, the defense for exemptions\textsuperscript{46} has been sought by defendants many times but the courts have been reluctant to grant it. The following cases will help shine a light on the referred point.

In \textit{R v Lunnon},\textsuperscript{47} the court held that if a concession was withdrawn, the defendant shall be notified of such a change so he can have the option of proving on the balance of probabilities that he was, after all, a first-time offender, or of inviting the court to be satisfied that there would be a serious risk of injustice, for some other reason, if the statutory assumptions were to be applied. The injustice must relate to the operation of these assumptions and not the consequences of the order.\textsuperscript{48} These assumptions are rebuttable if a defendant can establish that his income is not the result of criminal conduct\textsuperscript{49} although in practice it may prove to be difficult if one cannot remember the facts or it had happened years ago.\textsuperscript{50} The assumptions are rebuttable only if made within the time limit frame. Facts of \textit{R v Lazarus},\textsuperscript{51} were that the defendant was found guilty of possessing and supplying cocaine. The court ruled that defendant was aware, the Crown was going to rely on the statutory assumption and he had enough to time to rebut on the balance of probabilities\textsuperscript{52} if the money was not earned out of dealing with drugs.

\textit{R v Benjafield and R v Rezni},\textsuperscript{53} the court decided the assumptions are rebuttable and as a consequence may not be applied at all, therefore, the right to the fair trial and right to be presumed innocent until proven guilty under Human Rights Act 1998 (Section 6) did not contravene these rights. In \textit{McIntosh v Lord Advocate}\textsuperscript{54} Lord Bingham observed- ‘… I do not for my part think it unreasonable or oppressive to call on the accused to proffer an explanation. He must show the source of his assets and what he has been living on’.

\textsuperscript{43} Section 10 (4) Proceeds of Crime Act 2002.
\textsuperscript{44} Section 10 (5) Proceeds of Crime Act 2002.
\textsuperscript{46} Section 10 (6)(a), (b) Proceeds of Crime Act 2002.
\textsuperscript{47} [2004] Crim LR 678 CA para [17].
\textsuperscript{49} Section 4 (6) of Proceeds of Crime Act 2002.
\textsuperscript{51} [2004] Cr App R (S) 98 CA; [2004] EWCA Crim 2297 para [21].
\textsuperscript{52} Section 10 Proceeds of Crime Act 2002.
\textsuperscript{53} [2001] 3 WLR 107, 121 [35].
Assessing Criminal Benefit

After the assessment of the criminal lifestyle, the court will then pass a judgement as to decide the criminal benefit calculation. The decision is based on the assessment of the prosecutor and financial investigator. The meaning of a criminal benefit is the property that is obtained by the offender in connection with the criminal conduct. The court laid down a three-question test in *R v May* to calculate the benefit. These questions are- first, has the defendant benefitted from the relevant criminal conduct? Second, the benefit obtained is general or particular? Third, the amount of sum recoverable from the defendant? The court also explained how the concept of ‘benefit’ is not to be confused with ‘criminal profit’. The court held- ‘The benefit gained is the total value of the property or advantage obtained, not the defendant’s net profit after deduction of expenses or amounts of payable to co-conspirators.’

It is indeed important to punish the guilty but result of such confiscation order will put the defendant in a worse economic status than he would be if he did not commit the crime. This particular rule is unjust and draconian.

In *R v Smith*, the defendant had not paid the duty on imported cigarettes by smuggling them. The court held the order of seizing the cigarettes was a subsequent damage to goods and will not affect the confiscation order. In other words, the pecuniary advantage that was obtained before the subsequent seizure did not affect the previous order. The court upheld the decision in *R v Shabir*, where the defendant had previously contended that ‘he was legally entitle to all the amount except for a tiny sum which was obtained by deception and that was the extent of his benefit pursuant to sections 76 (4) or (5)’ and the Crown Court was wrong in passing such an order. Therefore, where there is massive disparity between the confiscation order and defendant’s gain through fraud, it will not be oppressive to pass such an order. Companies and individuals who by way of fraud commit bribery can be at the receiving end of the punitive nature of the confiscation regime. This can be proven with these cases. In *R v Innospec*, the court held that written notice by the prosecutor to the court to make a confiscation order would give primacy to make one over a fine. If a company is in

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56 Ibid.
57 [2008] UKHL 28 [8].
60 *R v Smith (David Cadman)* [2011] UKHL 28 [28].
a position to pay the fine and confiscation order, then there is no problem in paying both. The court concluded that the profits in the present case were not only ‘profits derived from the contracts obtained by corruptions but the very contracts themselves’. The defendant can be asked to pay the money in full and not just the profit he benefitted from the proceeds of crime when he made it from buying and selling of shares.65

In R v Sale,66 the court relied on R v Waya to sort out relevance of proportionality while calculating the benefit of the defendant -

‘The costs of production, i.e., wages, equipment and materials supplied were all incurred in an entirely lawful way, albeit in performance of what was an illegally obtained contract. Those costs should properly be brought into account, and the proportionate method of doing that would be to look at the company’s gross profit generated from the illegally obtained contracts.’

Abuse of Process

The application by the court to enforce primary legislation where the defendant has the right to appeal will not result into abuse of process of the court.67 This policy is reflected in R v Nelson, R v Pathak, R v Paulet,68 the court concluded that stay of proceedings would be a suitable remedy for confiscation order but when there is an argument of abuse of process then this argument cannot be based on the result of a proceedings which is in confirmation with the provisions set out in the Act to point out that the result is “oppressive”. The jurisdiction must only be exercised with due caution and confined to proceedings to avoid true oppression. In other words, the power should not be used simply because the judge disagrees with the decision of the Crown to pursue confiscation,69 it should be a well-thought out order.

In R (On the Application of BERR) v Baden Lowe,70 the director of the company pleaded guilty for an offence71 to have transferred the property of the company during its winding up by fraud. The court held that order to recover amount more than the profits of the offender in this case will not lead to abuse of process.72 R v Wilkinson,73 court held

65[2013] EWCA Crim 1306 paras [31], [57].
66[2002] 2 Cr App R (S) 70 para [20].
70[2009] 2 Cr App Rep (S) 81.
71Section 206(1)(b) Insolvency Act 1986.
that abuse of process has to be based on traditional principles. Hughes LJ stated:

‘This jurisdiction must be exercised with considerable caution, indeed sparingly. It must be confined to cases of true oppression. In particular, it cannot be exercised simply on the grounds that the Judge disagrees with the decision of the Crown to pursue confiscation, or with the way it puts its case on that topic. A specific example of that principle is that it is clearly not sufficient to establish oppression, and thus abuse of process, that the effect of confiscation will be to extract from a Defendant a sum greater than his net profit from his crime(s).’

The Court of appeal in R. v Nield confirmed that confiscation proceedings that will result in the recovery of more than the sum embezzled are not automatically abusive. The bottom-line is that only in exceptional cases, the courts will hold a confiscation proceedings to be as an abuse of process but courts have also identified that there is no “closed category of cases”. Therefore, where the defendant restored the amount he had benefitted from the crime to the loser, he should not be subjected to a confiscation order. Otherwise, it would mean an additional financial punishment which would be disproportionate and oppressive. Moreover, section 6(6) converts the power of making an order into a discretionary one where the defendant’s benefit would be recovered in civil proceedings.

**Effectiveness of the Act - Results in the Recent Years**

Current statistics show that 5,924 confiscation orders were made (in 2014-15), as compared to 640,000 offenders who were convicted in UK. The cost of administering confiscation orders in the same year was more than £100 million whereas the collection by enforcement agencies was around £155 million. To make the matters worse, National Audit Office declared that there was a sum of £1.61 billion debt outstanding from confiscation orders. Therefore, the poor operation of the confiscation order has severely affected its effectiveness. The number above expose that not enough confiscation orders are enforced, an ideal balance would be to apply a common set

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74 EWCA Crim 993; Michael Stockdale, Rebecca Mitchell, ‘Confiscation Orders and Abuse of Process; Discretion to Prevent “Double Whammy” under the Proceeds of Crime Act 2002’ 31(2) Company Law 39, 41.
77 R v Morgan [2009] 1 Cr App Rep (S) 60.
82 Committee of Accounts, Confiscation Orders (HC 2013-14, 49) HC 942 para 2.
of criteria to ensure enforcement. Other tools that can be used - to develop a better range of cost and performance, more confiscation orders, leadership and training in financial investigations. Truth be told, the law is wide and strict enough to not only deter fraud but to also implicate the ones committing it. Indeed, the implementation of the provisions is an issue that needs to be dealt with but otherwise, the Act is good law in wiping out defrauds. The case of Edward Davenport is a fine example of it. Mr Davenport was declared to have a criminal lifestyle after he was convicted of fraud. The court successfully passed an order against him and recovered the confiscation amount. The real question though is how correct it is to do so? To remove the convicts, these provisions are set so wide that they include almost every offender in the definition of ‘criminal lifestyle’. My concern is that even the assets which are not earned through illegal means are also covered under it and such an action is not seen as abuse of process as declared in the cases mentioned above.

**Conclusion**

Justice demands that profits should be taken out of crime and that is the very basis of confiscation orders. Part 2 of the Act does deal with issues of fraud effectively but the recent data reflects stricter appliance of the legal provisions is needed. As far as, the abuse of process is concerned, the idea of law should be to deter the offender and not confiscating all of his incomes, therefore, confiscation orders should not go beyond the benefits received.

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