

UPDATE

External confiscation orders: criminality to be judged at the time of application, not the time of the conduct itself

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The Royal Court of Jersey recently considered for the first time the definition of 'criminal conduct' with reference to the registration of confiscation orders made by foreign courts. Importantly, the Court declared that the Court should look at whether the definition is satisfied at the time the application is made to the Jersey Court, and not the time of the conduct itself.

In a recent decision of the Royal Court of Jersey in *Her Majesty's Attorney General v Arne Rosenlund and FNB International Trustees Limited* [2015] JRC 186, the definition of 'criminal conduct' for the purposes of the Proceeds of Crime (Jersey) Law 1999, as modified and included in the Second Schedule to the Proceeds of Crime (Enforcement of confiscation Orders) (Jersey) Regulations 2008 (the **Law**) has been clarified. In particular, the Court held that in considering applications for external confiscation orders, the Court would look to whether the relevant conduct was 'criminal conduct' for the purposes of the Law at the time of the application itself, rather than the date of the actual criminality.

The background to the case can be stated briefly: HM Attorney General in Jersey received an application to register an external confiscation order made by the Lyngby Court in Denmark on 29 May 2012 (and confirmed on appeal) against the first respondent, a resident of Denmark, who had been convicted of tax fraud, and the second respondent, a trustee of a trust of which the first respondent was a beneficiary. HM Attorney General duly brought an application to the Royal Court of Jersey for that registration. However, before that substantive application could be heard, the Court ordered (on application by the Respondents) that one particular issue be dealt with as a preliminary issue.

The preliminary issue concerned the definition of 'criminal conduct' for the purposes of the Law. One of the requirements of the Law in respect of external confiscation orders is that it relates to 'recovering property obtained as a result of or in connection with criminal conduct'.

The definition of 'criminal conduct' is defined as conduct corresponding to an offence specified in Schedule 1 of the Law, which is:

'Any offence in Jersey for which a person is liable on conviction to imprisonment for a term of one or more years (whether or not the person is also liable to any other penalty).'

In this particular case, the offence relied on by HM Attorney General was Article 137 of the Income Tax (Jersey) Law 1961 (the **Income Tax Law**). The issue was that Article 137 only carried with it a penalty of imprisonment in excess of a year from May 2009 onwards. Prior to that, Article 137 only carried a fine as punishment. The relevant conduct in Denmark took place in the Danish tax years 1997 to 2006. The Respondents therefore argued that one applies Jersey law to the transposed conduct as that law existed at the time the conduct occurred ie the definition of 'criminal conduct' was not satisfied. HM Attorney General conversely argued that one applies Jersey law as that law exists at the time the application is made to the Royal Court.

Commissioner Clyde-Smith (sitting alone as the Royal Court) accepted that the provisions of the Law were grammatically capable of more than one meaning. He therefore based his decision primarily on a string of authorities arising from the *Pinochet* litigation in the United Kingdom concerning extradition. One of the

key principles established in those authorities was that in cases where there are alternative interpretations, the correct interpretation is to be interpreted by looking at the statutory context.

The Court noted that the purpose of the Law is to facilitate international co-operation in the recovery of assets from criminals.

This purpose was, the Court said, supported by important considerations of domestic and international public policy. The interpretation of the Law that was most in accord with this statutory purpose was that which makes it easier for Jersey to co-operate and recover assets when requested to do so by foreign governments. This therefore favoured the interpretation contended for by HM Attorney General.

The effect of this interpretation was, however, that the changes to the criminal penalty under the Income Tax Law were effectively given retrospective effect. The Court referred to the text by Bennion on statutory interpretation, which states:

'Changes relating to the past are objectionable only if they alter the legal nature of a past act or omission in itself. A change in the law is not objectionable merely because it takes not that a past event has happened, and bases new legal consequences upon it.'

In this case, the Law did not change the legal nature of the first respondent's conduct, it merely based new legal consequences upon it. The first respondent had been convicted in Denmark and had a confiscation order made against him, all this taking place in presumed compliance with the European Convention on Human Rights.

The Court stated that the purpose of the legislative provisions requiring overseas conduct to be transposed to domestic substantive criminal offences is to ensure that domestic views as to what conduct should and should not be criminalised are applied. The purpose of limiting that application to offences which carried a minimum penalty of a year imprisonment was to ensure that the relevant statute was only used for more serious offences. The Court found that the effect of the amendment to the Income Tax Law was simply to reclassify it as an offence which fell within the provisions of the Law, which the Court found to be analogous to extending the relevant legislation to a designated country.

This is, however, somewhat at odds with previous authority in Jersey in particular *Bhojwani v AG*, which, in interpreting the definition of 'criminal conduct' in the Law for a different purpose, stated that there was an obligation on a prosecuting authority to demonstrate that the action in a foreign jurisdiction would have amounted to an offence in Jersey at the time of the criminal action itself, and that the Law did not change the law prevailing in Jersey prior to its enactment, nor did it change the legal consequences that those acts would have attracted in Jersey. The Court, in this case, appears to have distinguished between cases such as *Bhojwani*, which was looking at the definition in the context of prosecuting an individual, and the present case, where the prosecution had taken place elsewhere and was effectively just being enforced in Jersey.

The Royal Court ultimately found that it must interpret the provisions of the Law with regard to the purpose of the Law. The Court found this purpose to be the enforcement of external confiscation orders wherever the underlying conduct occurred, and whether it passes the Jersey thresholds for criminality and seriousness were to be assessed at the time of the application.

This case therefore demonstrates again the commitment of the Royal Court of Jersey in ensuring that Jersey legislation is interpreted and applied in a manner consistent with Jersey's international standards and obligations. There may however be more to come on the point, which is subject to an appeal.

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[Document Reference]