



Neutral Citation Number: [2024] EWCA Crim 1486

Case Nos: 202400037 B5
202400151 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SOUTHWARK CROWN COURT
HIS HONOUR JUDGE BAUMGARTNER
U20230847; U20230848

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/12/2024

Before :

LADY JUSTICE MACUR
MR JUSTICE GOSS

and

SIR NIGEL DAVIS

Between :

(1) MICHAL WIEROMIEJZYK
(2) PRZEMYSŁAW WIEROMIEJCZYK
- and -

Applicants

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

The **Applicants** did not appear but provided written arguments
Mr Martin Evans KC (instructed by **The Crown Prosecution Service**) for the **Respondent**
Mr Alan Bates as **Advocate to the Court**

Hearing date: 31 October 2024

Approved Judgment

This judgment was handed down in Court at 2pm on 6 December 2024 and by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SIR NIGEL DAVIS:

Introduction

1. On 11 November 2021 two Restraint Orders were made in the Southwark Crown Court pursuant to the relevant provisions of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (“the 2005 Order”). The Restraint Orders had been made following an external request by the Republic of Poland. They have subsequently been varied in the Crown Court.
2. By written application dated 10 April 2023 the Applicants applied for the discharge of the Restraint Orders. Following a hearing on 21 July 2023 in the Southwark Crown Court, Judge Baumgartner, in a detailed reserved judgment handed down on 22 September 2023, dismissed the application. The Applicants now apply for leave to appeal against that decision; their application for leave to appeal has been referred to the Full Court by the Registrar. This is the judgment of the court on such application, for which any necessary extension of time is granted.
3. Although the Applicants have not been represented in these appeal proceedings, they have lodged written arguments in support of their appeal, seemingly with the assistance of a Polish lawyer. The first Applicant had in fact indicated a wish to be present at the hearing. However, he was on 21 October 2024 refused a variation of his bail conditions enabling him to attend by a reasoned decision of the Regional Court in Sosnowiec. Although he has strongly protested against the fairness of that decision, it seems to us that such a matter was entirely one for the Polish court, that court correctly noting (among other things) that personal attendance before this court was not mandatory.
4. Whilst the Applicants may have strong views on the matter, we should record that, in the opinion of this court, they have suffered no material disadvantage through not being personally present at the hearing. First, they have been able to put in full written submissions. Second, they were represented in the proceedings below by solicitors and by leading and junior counsel. Third, Mr Martin Evans KC, appearing for the Respondent, has been scrupulously fair in addressing the points raised, or which could have been raised, by the Applicants. And finally, and not least, the court has been greatly assisted by the attendance and arguments of Mr Alan Bates appointed by the Attorney General as Advocate to the Court. His role, of course, has extended to addressing all points of law that could properly be made on behalf of the Applicants in this application, a role which he performed with conspicuous ability, learning and thoroughness.

The factual background

5. The background can be shortly summarised for present purposes.
6. As alleged in the initial request by the Republic of Poland, set out in great detail in the prescribed form, the Applicants are said to be members of an organised crime group in Poland, focusing on producing and supplying psychoactive substances through a network of shops and, latterly, through websites. It is alleged that such activities constitute criminal activities under Polish law (albeit a matter disputed by the Applicants). It appears that very considerable sums of money have been generated through such activities. The matter has been subject to criminal investigation (though not thus far proceedings) in Poland.
7. An administrative freezing order in each case was issued in Poland on 29 October 2021, as supplemented on 24 February 2022. Such freezing order extended to certain cryptocurrency accounts held by the Applicants in London with a company called Payward Limited. It is said that at the time of the initial application the amounts in such accounts exceeded US \$24 million. The allegation is that the sums in such accounts represented the proceeds of sale of psychoactive substances. The case of the Polish authorities is set out in very considerable detail in the prescribed form accompanying the request made on 2 November 2021 to the English court, and which also annexed the detailed decision whereby the freezing order had been granted in Poland. A second request dated 7 March 2022 was then made, seeking variations.
8. The initial Restraint Orders, pursuant to such external request, were made on an ex parte basis by Judge Grieve QC in the Southwark Crown Court on 11 November 2021. He of course had before him, as part of the request, the decision making the freezing order in Poland and the fully detailed allegations set out in the prescribed form. He also had a witness statement dated 24 November 2021 of Ms Bordley of the Proceeds of Crime Unit of the Crown Prosecution Service. That confined itself to summarising the legal background and to summarising the factual background as set out in the prescribed form and confirmed that the applicable requirements of the 2005 Order were met. As indicated above, the initial Restraint Orders have subsequently been varied.
9. It should be noted that a challenge was made in Poland by the first Applicant to the freezing order. That challenge, however, was dismissed by the Circuit Court of Katowice on 16 March 2022 by a reasoned decision which affirmed the validity of the freezing order.

The legal framework

10. So far as domestic law is concerned, the relevant provisions are primarily contained in the 2005 Order. In the relevant respects, that provides as follows:

“Art. 7.— Conditions for Crown Court to give effect to external request

(1) The Crown Court may exercise the powers conferred by article 8 if either of the following conditions is satisfied.

(2) The first condition is that—

(a) relevant property in England and Wales is identified in the external request;

(b) a criminal investigation has been started in the country from which the external request was made with regard to an offence, and

(c) there are reasonable grounds to suspect that the alleged offender named in the request has benefited from his criminal conduct.

(3) The second condition is that—

(a) relevant property in England and Wales is identified in the external request;

(b) proceedings for an offence have been started in the country from which the external request was made and not concluded, and

(c) there is reasonable cause to believe that the defendant named in the request has benefited from his criminal conduct.

(4) In determining whether the conditions are satisfied and whether the request is an external request within the meaning of the Act, the Court must have regard to the definitions in subsections (1), (4) to (8) and (11) of section 447 of the Act.

(5) If the first condition is satisfied, references in this Chapter to the defendant are to the alleged offender.”

Art. 8.— Restraint orders

(1) If either condition set out in article 7 is satisfied, the Crown Court may make an order (“a restraint order”) prohibiting any specified person from dealing with relevant property which is identified in the external request and specified in the order.

(2) A restraint order may be made subject to exceptions, and an exception may in particular—

(a) make provision for reasonable living expenses and reasonable legal expenses in connection with the proceedings seeking a restraint order or the registration of an external order;

(b) make provision for the purpose of enabling any person to carry on any trade, business, profession or occupation;

(c) be made subject to conditions.

(3) Paragraph (4) applies if—

- (a) a court makes a restraint order, and
 - (b) the applicant for the order applies to the court to proceed under paragraph (4) (whether as part of the application for the restraint order or at any time afterwards).
- (4) The court may make such order as it believes is appropriate for the purpose of ensuring that the restraint order is effective.
- (4A) Paragraphs (4B) and (4C) apply where the Crown Court makes a restraint order (by virtue of the first condition in article 7) as a result of a criminal investigation having been started in the country from which the external request was made with regard to an offence.
- (4B) The court—
- (a) must include in the restraint order a requirement for the applicant for the restraint order to report to the court on the progress of the investigation at such times and in such manner as the restraint order may specify (a “reporting requirement”); and
 - (b) must discharge the restraint order if proceedings for the offence are not started within a reasonable time (and this duty applies whether or not an application to discharge the restraint order is made under article 9(2)).
- (4C) The duty under paragraph (4B)(a) does not apply if the court decides that, in the circumstances of the case, a reporting requirement should not be imposed, but the court—
- (a) must give reasons for its decision; and
 - (b) may at any time vary the restraint order so as to include a reporting requirement (and this power applies whether or not an application to vary the restraint order is made under article 9(2)).
- (5) A restraint order does not affect property for the time being subject to a charge under any of these provisions—
- (a) section 9 of the Drug Trafficking Offences Act 1986;
 - (b) section 78 of the Criminal Justice Act 1988;
 - (c) Article 14 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990;
 - (d) section 27 of the Drug Trafficking Act 1994;
 - (e) Article 32 of the Proceeds of Crime (Northern Ireland) Order 1996.

(6) Dealing with property includes removing it from England and Wales.

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Art. 9.— Application, discharge and variation of restraint orders

(1) A restraint order—

(a) may be made only on an application by the relevant Director;

(b) may be made on an ex parte application to a judge in chambers.

(2) An application to discharge or vary a restraint order or an order under article 8(4) may be made to the Crown Court by—

(a) the relevant Director;

(b) any person affected by the order.

(3) Paragraphs (4) to (7) apply to an application under paragraph (2).

(4) The court—

(a) may discharge the order;

(b) may vary the order.

(5) If the condition in article 7 which was satisfied was that proceedings were started, the court must discharge the order if, at the conclusion of the proceedings, no external order has been made.

(6) If the condition in article 7 which was satisfied was that proceedings were started, the court must discharge the order if within a reasonable time—

(a) an external order has not been registered under Chapter 2 of this Part, or

(b) there has been no direction by the Crown Court in accordance with Article 15 of the 2014 Regulations to register an overseas confiscation order which applies to property specified in the restraint order.

(7) If the condition in article 7 which was satisfied was that an investigation was started, the court must discharge the order if within a reasonable time proceedings for the offence are not started.”

Article 46(2) indicates that the powers conferred are to be exercised with a view to the value of the property being made available to satisfy an external order.

11. As to “relevant property”, that is defined in s.447 of the Proceeds of Crime Act 2002 (see Article 55 of the 2005 Order). That section also contains other relevant interpretative provisions relating to external requests. It provides:

“Proceeds of Crime Act 2002, s.447 Interpretation

(1) An external request is a request by an overseas authority to prohibit dealing with relevant property which is identified in the request.

(2) An external order is an order which—

(a) is made by an overseas court where property is found or believed to have been obtained as a result of or in connection with criminal conduct, and

(b) is for the recovery of specified property or a specified sum of money.

(3) An external investigation is an investigation by an overseas authority into—

(a) whether property has been obtained as a result of or in connection with criminal conduct, [...]

(aa) the extent or whereabouts of property obtained as a result of or in connection with criminal conduct, or

(b) whether a money laundering offence has been committed.

(4) Property is all property wherever situated and includes—

(a) money;

(b) all forms of property, real or personal, heritable or moveable;

(c) things in action and other intangible or incorporeal property.

(5) Property is obtained by a person if he obtains an interest in it.

(6) References to an interest, in relation to property other than land, include references to a right (including a right to possession).

(6A) A person who obtains a pecuniary advantage as a result of or in connection with conduct is to be taken to obtain, as a result

of or in connection with the conduct, a sum of money equal to the value of the pecuniary advantage.

(6B) References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained both in that connection and some other.

(7) Property is relevant property if there are reasonable grounds to believe that it may be needed to satisfy an external order which has been or which may be made.

(8) Criminal conduct is conduct which—

(a) constitutes an offence in any part of the United Kingdom, or

(b) would constitute an offence in any part of the United Kingdom if it occurred there.

(9) A money laundering offence is conduct carried out in a country or territory outside the United Kingdom and which if carried out in the United Kingdom would constitute any of the following offences—

(a) an offence under section 327, 328 or 329;

(b) an attempt, conspiracy or incitement to commit an offence specified in paragraph (a);

(c) aiding, abetting, counselling or procuring the commission of an offence specified in paragraph (a).

(10) An overseas court is a court of a country or territory outside the United Kingdom.

(11) An overseas authority is an authority which has responsibility in a country or territory outside the United Kingdom—

(a) for making a request to an authority in another country or territory (including the United Kingdom) to prohibit dealing with relevant property,

(b) for carrying out an investigation into whether property has been obtained as a result of or in connection with criminal conduct, or

(c) for carrying out an investigation into whether a money laundering offence has been committed.

(12) This section applies for the purposes of this Part.”

All these provisions, it may be noted, apply on their face to all external requests: not just to those emanating from member states of the European Union.

12. Before 31 January 2020, when the United Kingdom withdrew from the European Union (“Brexit”), external requests for restraint orders from another European Union member state were subject to Part 2 of the Criminal Justice and Data Protection (Protocol No.36) Regulations 2014 (“the 2014 Regulations”). Such Regulations had been made in the context of the relevant preceding Framework Decisions. Under that scheme, the circumstances in which the domestic courts could decline to give effect to an external request for a restraint order were circumscribed: see Regulation 9(5). Further, it was expressly provided by Regulation 10(6):

“No challenge to the substantive reasons in relation to which an overseas restraint order has been made by an appropriate court or authority in a member State may be considered by the court.”

The importance of adhering to that particular provision in the 2014 Regulations was emphasised by the judgment of a constitution of this court in the case of *A v Director of Public Prosecutions* [2016] EWCA Crim 1393; [2017] 1 WLR 713. If a challenge was sought to be made to the substantive basis on which an external request was founded then such challenge should be made before the court of the issuing state which had made the underlying measure.

13. However, the 2014 Regulations were repealed on 31 December 2020, following the expiry of the transitional period consequent upon Brexit. The current position, by a somewhat complex route, is as follows.
14. As from 31 December 2020 the United Kingdom and the European Union agreed the provisions of the Trade and Cooperation Agreement (Treaty Series No.8) (2021) (“TCA”), to take effect on the specified relevant date. The Recitals to the TCA include, among others, recitals to the effect that it was desirable that there was agreement as to a legal basis for cooperation relating to the prevention, investigation, detection or prosecution of criminal offences and to the execution of criminal penalties.
15. Title XI of the TCA deals expressly with Freezing and Confiscation. Article 656 of the TCA in this regard, and consistently with the Recitals and with what is also stated in Article 522, sets out the applicable objectives and principles of co-operation. Article 656 is of importance for present purposes. It provides as follows:

“1. The objective of this title is to provide for cooperation between the United Kingdom, on the one side, and the Member States, on the other side, to the widest extent possible for the purpose of investigations and proceedings aimed at the freezing of property with a view to subsequent confiscation thereof and investigations and proceedings aimed at the confiscation of property within the framework of proceedings in criminal matters. This does not preclude other cooperation pursuant to Article 665(5) and (6). This Title also provides for cooperation with Union bodies designated by the Union for the purposes of this Title.

2. Each State shall comply, under the conditions provided for in this Title, with requests from another State:

(a) for the confiscation of specific items of property, as well as for the confiscation of proceeds consisting in a requirement to pay a sum of money corresponding to the value of proceeds;

(b) for investigative assistance and provisional measures with a view to either form of confiscation referred to in point (a).

3. Investigative assistance and provisional measures sought under point (b) of paragraph 2 shall be carried out as permitted by and in accordance with the domestic law of the requested State. Where the request concerning one of these measures specifies formalities or procedures which are necessary under the domestic law of the requesting State, even if unfamiliar to the requested State, the latter shall comply with such requests to the extent that the action sought is not contrary to the fundamental principles of its domestic law.

4. The requested State shall ensure that the requests coming from another State to identify, trace, freeze or seize the proceeds and instrumentalities, receive the same priority as those made in the framework of domestic procedures.

5. When requesting confiscation, investigative assistance and provisional measures for the purposes of confiscation, the requesting State shall ensure that the principles of necessity and proportionality are respected.

6. The provisions of this Title apply in place of the “international cooperation” Chapters of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, done at Warsaw on 16 May 2005 (the “2005 Convention”) and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, done at Strasbourg on 8 November 1990 (the “1990 Convention”). Article 657 of this Agreement replaces the corresponding definitions in Article I of the 2005 Convention and Article 1 of the 1990 Convention. The provisions of this Title do not affect the States’ obligations under the other provisions of the 2005 Convention and the 1990 Convention.”

16. Article 663 in the relevant respects provides as follows:

“1. At the request of another State which has instituted a criminal investigation or proceedings, or an investigation or proceedings for the purposes of confiscation, the requested State shall take the necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which,

at a later stage, may be the subject of a request for confiscation or which might satisfy the request.

2. A State which has received a request for confiscation pursuant to Article 665, if so requested, take the measures referred to in paragraph 1 of this Article in respect of any property which is the subject of the request or which might satisfy the request.

3. Where a request is received under this Article, the requested State shall take all necessary measures to comply with the request without delay and with the same speed and priority as for a similar domestic case and send confirmation without delay and by any means of producing a written record to the requesting State.

4. Where the requesting State states that immediate freezing is necessary since there are legitimate grounds to believe that the property in question will immediately be removed or destroyed, the requested State shall take all necessary measures to comply with the request within 96 hours of receiving the request and send confirmation to the requesting State by any means of producing a written record and without delay.”

17. Article 670 provides as follows in the relevant respects:

“1. Cooperation under this Title may be refused if:

(a) the requested State considers that executing the request would be contrary to the principle of ne bis in idem; or

(b) offence to which the request relates does not constitute an offence under the domestic law of the requested State if committed within its jurisdiction; however, this ground for refusal applies to cooperation under Articles 658 to 662 only in so far as the assistance sought involves coercive action.

2. The United Kingdom and the Union, acting on behalf of any of its Member States, may each notify the Specialised Committee on Law Enforcement and Judicial Cooperation that, on the basis of reciprocity, the condition of double criminality referred to in point (b) of paragraph 1 of this Article will not be applied provided that the offence giving rise to the request is:

(a) one of the offences listed in Article 599(5), as defined by the law of the requesting State; and

(b) punishable by the requesting State by a custodial sentence or a detention order for a maximum period of at least three years.

3. Cooperation under Articles 658 to 662, in so far as the assistance sought involves coercive action, and under Articles 663 and 664 may also be refused if the measures sought could

not be taken under the domestic law of the requested State for the purposes of investigations or proceedings in a similar domestic case.”

Article 678(4) then mandates that, for requests for provisional measures, a prescribed form is to be used (as was done in the present case).

18. For the purposes of the present application, Article 689 is also of particular importance. That provides as follows:

“1. Each State shall ensure that persons affected by measures under Articles 663 to 666 have effective legal remedies in order to preserve their rights.

2. The substantive reasons for requested measures under Articles 663 to 666 shall not be challenged before a court in the requested State.”

It can be seen that Article 689(2) is, although somewhat differently worded, of comparable effect to the provisions of Regulation 10(6) of the superseded 2014 Regulations.

19. We were told that there has been no instrument directly implementing into the law of England and Wales the provisions of Title XI of the TCA. We were, however, referred to s.29 of the European Union (Future Relationship) Act 2020 (“the 2020 Act”). Section 29(1) of the 2020 Act provides as follows:

“Existing domestic law has effect on and after the relevant day with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement or the Security of Classified Information Agreement so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.”

It may be added that s.30 of the 2020 Act goes on to provide that a court or tribunal must have regard to Article 4 of the TCA when interpreting that agreement. Article 4 is to the effect that the TCA is to be interpreted in the light of its object and purpose in accordance with existing rules of interpretation of public international law.

The discharge application to the Crown Court

20. The arguments presented by leading and junior counsel for the Applicants in the Crown Court focused on four grounds. First, the Payward accounts were not “relevant property” for the purposes of Article 7 of the 2005 Order. Second, there had been unreasonable delay since the Restraint Orders were first made by the Crown Court on 11 November 2021. Third, the Restraint Orders had been wrongly extended by variation on an incorrect interpretation of the law. Fourth, the Crown Court had been given incomplete or misleading information as to the status of relevant investigations being conducted in the Netherlands and Germany with regard to the Applicants.

21. Each such ground was rejected by the Judge. As to the first ground, relating to the first condition stipulated in Article 7 of the 2005 Order, the Judge, after carefully considering the relevant provisions and the nature of the challenges, concluded that the Payward accounts were relevant property, for which there were reasonable grounds to believe that they may be needed to satisfy an external order. As to the criminal conduct which, under s.447(8) of the Proceeds of Crime Act 2002, was required to underpin the external order, he found that the offences specified in the request met the dual criminality requirement (having, in this regard, referred also to the Psychoactive Substances Act 2016 and having noted that no point was taken by the Applicants as to timing). As to the second ground, the Judge rejected the proposition that there had been unreasonable delay. In doing so, he carefully evaluated the circumstances and took into account the (non-exhaustive) check-list of considerations indicated by the Court of Appeal in *R v S* [2019] EWCA Crim 1728, [2020] 1 WLR 109 at paragraph 39 of the judgment of the Court. The third ground was rejected on the basis that it involved an impermissible delving into the substantive reasons for Poland making the initial measure. As to disclosure, the Judge ruled that there had been no non-disclosure or misrepresentation at the ex parte stage; and the position became immaterial thereafter at the inter partes stages.

Grounds of Appeal

22. The current grounds of appeal are of a significantly different nature from the grounds advanced below.
23. In essence, the applicants as their primary grounds strongly attack the legitimacy of the Polish authorities' criminal investigation and the legitimacy of the freezing order made in Poland. It is asserted that there is a "rule of law crisis" in Poland and unwarranted interferences on the part of the Minister of Justice and Prosecutor General. It is asserted that there is no recognisable crime in Poland on which the freezing order could properly be based and there is breach of the principle (expressed in Latin) of *nullum crimen sine lege*. It is said that the United Kingdom, as a state of law, cannot support an undemocratic justice system in Poland and cannot enforce orders which are illegal.
24. These grounds thus significantly depart from what was argued below in the Crown Court. But one particular ground of appeal does to an extent replicate a point raised below. For it is asserted that "the facts were wrongly established" and the Crown Court erred in finding that there were reasonable grounds for suspecting that the Applicants had benefited from crime: it being asserted that the frozen funds came from legitimate activities. It is also in effect asserted that the making of the Restraint Orders was neither necessary nor proportionate.
25. It at all events can be seen that the grounds of appeal at least raise no challenge as to the Judge's findings that there had been no unreasonable delay in progressing the case and no want of disclosure or misrepresentation in the obtaining of the Restraint Orders. Since the Applicants have been unrepresented in the present appeal proceedings, we should briefly say that we have reviewed for ourselves the Judge's conclusion on those two points. We are entirely satisfied that his conclusions were justifiable and are indeed not open to challenge.

Discussion and Disposal

26. The primary grounds of appeal advanced are, in our judgment, unsustainable. The Polish decisions and orders are a product of their legal process. Notwithstanding the allegations now made, there is no sufficient basis for saying that they are not independent judicial decisions. That being so, they must be respected by the English courts. Indeed, as Mr Evans submitted, these grounds in effect involve raising a collateral challenge to the substantive reasons for the requested measure on the part of the requesting state. But that is contrary to the policy and objectives of the TCA and contrary to the express provisions of Article 689(2) of the TCA. Any challenge to the validity or correctness of the freezing order which gave rise to the requests for the Restraint Orders should thus be pursued – and solely pursued – in Poland. Indeed, it had been pursued by the first Applicant in the Polish courts, which rejected these arguments, including the argument that there was no illegality in the conduct under investigation (*nullum crimen sine lege*). That is the short answer to this particular point as raised by the Applicants.
27. One could perhaps conceive in theory, if not in practice, a scenario whereby there was a total denial of justice, or of access to justice, in a requesting European Union member state or a blatant denial of fundamental rights. If so extreme and exceptional a position could ever arise, then Article 656(3) provides that “the [requested state] shall comply with such requests to the extent that the action sought is not contrary to the fundamental principles of its domestic law”; and, as Mr Bates suggested, a safeguard could be available in the Crown Court’s abuse of process jurisdiction: the measure requested to be enforced being so lacking in the character of a judicial measure as to be regarded as a nullity or otherwise as an abuse of the Crown Court’s process. But we need not dwell further on so extreme a scenario as there is no sufficient basis, evidential or otherwise, for accepting that that could be the position in the present case, notwithstanding the Applicants’ assertions. We have to say that we find it altogether unsurprising that this proposition was not advanced by counsel then appearing for the Applicants in the Crown Court.
28. These considerations then feed into the assessment of the other grounds advanced on behalf of the Applicants.
29. The argument that the freezing order went beyond what was necessary or proportionate thus meets the same objection. Article 689(2) precludes a challenge before the Crown Court to the substantive reasons for a requested measure. That approach is further confirmed by the stated policy and objectives of the TCA and also wholly accords with provisions such as Article 663, as well as Article 656(5) which explicitly confirms that in this context the requirement for respecting necessity and proportionality rests on the requesting (not requested) state. Such an approach also accords with generally accepted principles of comity and is wholly consistent with a speedy, practical and efficacious system of registration, preservation and enforcement. To repeat: the remedy, where one is sought, lies in the courts of the requesting state.
30. We can, however, see at least a potential tension between Article 656(5) and Article 689(2) of the TCA and the appraisal of the existence of some elements of the first or second condition required under Article 7 of the 2005 Order. It could be said, for example, that appraisal of the existence of relevant property (as defined in s.447(7)) or appraisal of the existence of reasonable grounds to suspect that the alleged offender has benefited from his criminal conduct is potentially capable of cutting across the prohibitions conferred by Article 656(5) and Article 689(2) of the TCA. Moreover, if

and to the extent that there is such a conflict that cannot safely, as had been submitted to the judge, be resolved by resort to the provisions of s.29 of the 2020 Act as interpreted by Green LJ in *Heathrow Airport Limited v H.M.Treasury* [2021] EWCA Civ 783 at paragraphs 226 – 230 of his judgment (and in substance repeated subsequently by Green LJ in *Lipton v BA City Flyer Limited* [2021] EWCA Civ 454, [2021] 1 WLR 2545 at paragraphs 78-82 of his judgment). He had there among other things stated: “Parliament has however implemented the TCA via the [2020 Act] ... Where there are gaps s.29 is engaged to fill the space ... The section transposes the TCA onto domestic law, expressly and mechanistically changing it in the process. Following s.29, domestic law on an issue means what the TCA says.”

31. That approach, which Green LJ described in paragraph 230 of his judgment in the *Heathrow* case as one of “automatic modification” albeit it applied only in so far as it was required, in effect gives a clear and unequivocal supremacy to the provisions of the TCA in the event of any material omission in domestic legislation or of any conflict between those provisions and domestic legislation.
32. However, that general approach (described by Mr Bates in argument as “expansive”) can, with respect, no longer be regarded as authoritative. This is because, subsequent to the decision of Judge Baumgartner in the present case, it was explicitly and in considered terms rejected by the majority judgment (the other judgments not expressing a view on the matter) of the Supreme Court on further appeal in the *Lipton* case [2024] UKSC 24, [2024] 3 WLR 474: see paragraphs 69 to 80 of the joint judgment of Lord Sales and Lady Rose (with whom Lady Simler agreed). It was held that s.29 of the 2020 Act did not have the unqualified effect Green LJ had suggested in relation to the TCA. It was stated to be inconsistent with wider aims consequent upon Brexit to interpret s.29 as “having such an intrusive and automatic effect in our law” (paragraph 79). It was stated that if in some future case it was sought to be argued that the effect of s.29 was to modify the wording of some domestic law the court or tribunal concerned should consider the meaning and effect of s.29 afresh (paragraph 80). The Supreme Court did not itself advance its own view (apart from the rejection of the view of Green LJ) as to the meaning and effect and operation, in general terms, of s.29 of the 2020 Act.
33. In the present context, we consider that a broad and purposive and practical approach is appropriate such that we need not ourselves engage further in a general consideration of the effect of s.29. It would be an extremely sensitive and disruptive matter to say in the present context that elements of the long-standing requirements expressly set out in the domestic legislation in Article 7 of the 2005 Order by way of conditions have in effect been disapplied or overridden by Articles 656(5) and/or Article 689(2) of the TCA. That, in our judgment, is not a conclusion readily to be reached; and there is here, in our judgment, no conflict between the respective provisions sufficient to require such a “modification” of Article 7 in these respects, even if that were permissible (which is debatable in the light of what we have said above). It is in this context to be borne in mind that, whilst for obvious policy reasons this part of the TCA relating to provisional measures is drafted in generally prescriptive terms, a degree of deference to the domestic law of the requested state is acknowledged in the first part of Article 656(3). It is also to be borne in mind that the appraisal by the Crown Court as to the satisfaction of the conditions in Article 7 of the 2005 Order is to be undertaken by reference to the information provided in the external request submitted by the

requesting member state itself. Further, the requesting state can be taken to be aware of the requirements of Article 7 of the 2005 Order and to have addressed them. If that is duly done, the Crown Court would have no reason or basis not to accept what it is said. In that way, in the assessment of whether the first condition or second condition, as the case may be, is satisfied there would be no “challenge” to the substantive reasons for the requested measure and mutual conformity can be achieved. Moreover, it has never been suggested, so far as this court is aware, that the elements of Article 7 of the 2005 Order were not required to be satisfied if the Crown Court were to make a Restraint Order pursuant to an external request in accordance with the regime previously applicable under the 2014 Regulations and when the UK was a member state of the European Union. It would be surprising if a contrary result were intended to be reached, by reference to the TCA, following Brexit.

34. As to Articles 8(1) and 9(4) of the 2005 Order they confer a broad discretion on the court. Whilst it could be said that a requirement such as that set out in Article 689(2) of the TCA could be seen as a limitation on that discretion, nevertheless, as Mr Evans and Mr Bates submitted, those Articles neither expressly nor impliedly impose any requirement on the Crown Court to evaluate for itself the substantive reasons for, or necessity and proportionality of, the requested provisional measure. Indeed, the Crown Court can perfectly properly proceed on the footing that the requesting member state has satisfied itself that the requested measure is justified and that requirements of necessity and proportionality have been duly assessed. Thus the powers conferred by Articles 8 and 9 of the 2005 Order can be read consistently with, and can be exercised in a way respecting, the provisions of Articles 656(5) and 689(2) of the TCA. Moreover, such an approach would accord with the provisions of s.30 of the 2020 Act; with the policy and objectives of the TCA; and with the “steer” given by Article 46(2) of the 2005 Order itself.
35. In the event, Judge Baumgartner did not dispense with consideration of the satisfaction of the first condition under Article 7 of the 2005 Order simply by relying on Article 689(2) of the TCA. Instead, he made his own assessment, by reference to the materials provided in the requests and to the domestic legal provisions. In our judgment, he was in the circumstances right to take that approach.
36. As to the Judge’s actual evaluative conclusions, we consider that he was fully entitled to conclude that “relevant property” (as defined) had been identified in the requests; and fully entitled to conclude, from what was said in the requests, that there were reasonable grounds to suspect that the Applicants had benefited from their criminal conduct. Those evaluative conclusions are unassailable in this court.
37. The Judge’s assessment as to dual criminality is also unassailable. The offences specified in the prescribed form here fall within the ambit of Article 670 of the TCA read with the offences listed in Article 599(5) and the Judge further found that the requirements of s.447(8) of the Proceeds of Crime Act 2002 were satisfied. Those conclusions were also justified.
38. Accordingly, in our judgment there is, overall, no valid basis for challenging the Judge’s refusal to discharge the Restraint Orders.

Conclusion

39. This application therefore must be dismissed.
40. By way of concluding remarks, we make the following observations as to the required approach with regard to external requests for provisional measures from member states of the European Union.
- (1) An external request, and the information contained in it, should always be carefully scrutinised by the Crown Court;
 - (2) In deciding whether to make a Restraint Order pursuant to such an external request the current required approach continues to be in substance the same as that required immediately before 2021;
 - (3) In deciding whether to make a Restraint Order the Crown Court must initially assess whether the first condition or second condition set out in Article 7 of the 2005 Order is satisfied;
 - (4) In deciding whether the relevant condition is satisfied and whether to make a Restraint Order the Crown Court should focus solely on the information provided with the external request;
 - (5) In deciding whether to exercise the power under Article 8 of the 2005 Order to make a Restraint Order the Crown Court should aim to give effect to the policy and objectives of the TCA, as well as to the “steer” given in Article 46(2) of the 2005 Order itself.
 - (6) In deciding whether to make a Restraint Order the Crown Court is not (subject, for the avoidance of doubt, to the prior requirement to be satisfied by the external request as to the first condition or second condition in Article 7) concerned with the substantive reasons for the making of the measure which is the subject of the request;
 - (7) On any subsequent application to discharge or vary a Restraint Order under Article 9 the Crown Court again is not concerned with the substantive reasons for the making of such measure; and any substantive challenge to the measure (including any challenge as to its necessity and proportionality) should be raised by the affected party in the requesting state.
41. We should not part from this case without paying tribute to the judgment of Judge Baumgartner. He confronted all the detailed and technical points raised before him and dealt with them with conspicuous thoroughness and care. Although the grounds and arguments on the appeal have by no means always tracked the grounds or arguments advanced before him, this Court was much assisted by his judgment.
42. Finally, we were told that this has been, so far as is known, the first case to come before the Court of Appeal concerning an external request from a member state relating to a provisional measure pursuant to the 2005 Order following the advent of the TCA. For that reason, we give permission for this judgment to be cited, notwithstanding that the application for leave to appeal has been refused.