

Is it permissible for a defendant to attend (final) confiscation hearings via audio and/or video link during the coronavirus (COVID-19) pandemic court 'lock down'?

05/05/2020

Disagreement and divergent approaches to this question persist since the [Coronavirus Act 2020](#) amended the [Crime and Disorder Act 1998 \(CDA 1998\)](#). The position as at 1 May 2020 is as follows.

Case Law

The following cases examined the status of confiscation proceedings and confiscation orders when considering whether Article 6 of the European Convention on Human Rights applied to them.

In *R v Benjafield* at para [56], Lord Woolf CJ said:

'In English domestic law, confiscation orders are part of the sentencing process which follow upon the conviction of the defendant of the criminal offences with which he is charged.'

More recently, *R v Briggs-Price* considered the rulings in *McIntosh v Lord Advocate* and *Phillips v UK*. In *Briggs-Price* at para [30], Lord Phillips of Worth Maltravers said:

'These two decisions establish that confiscation proceedings fall to be treated as part of the process of sentencing after conviction and do not, of themselves, involve charging the offender with offences other than that or those of which he has been convicted and which have given rise to the sentencing process.'

Finally, in *SOCA v Perry* at para [31] at 198, in which Lord Phillips PSC said the following:

'Parts 2, 3 and 4 of POCA make provision for value confiscation by the criminal court, by means of what is described as a "confiscation order". "Confiscation" is a misnomer. The scheme of these Parts involves the imposition of the obligation to make a money payment, which is enforced in the same way as a fine, on a person who has been convicted in the relevant jurisdiction. Thus the order is in personam and it is made as part of the criminal process.'

Legislation

The definition of 'sentencing hearing' under [CDA 1998, s 57A\(3\)](#) includes:

'...any hearing following conviction which is held for the purpose of sentencing the offender or determining how the court should deal with him in respect of the offence.'

A distinction is therefore drawn between the sentence itself (ie the punishment) and otherwise dealing with an offender in respect of the offence.

Conclusions

It is the view of the author that confiscation proceedings fall within the definition of 'sentencing hearing' within [CDA 1998, s 57A\(3\)](#) on the basis that they form part of the sentencing process.

Alternatively, it is arguable that confiscation proceedings fall within the same definition on the basis that they amount to a procedure of 'otherwise dealing with an offender in respect of the offence' since they are triggered by the defendant being convicted of the offence.

In either case, it is submitted that confiscation proceedings can be dealt with under [CDA 1998, s 57E](#). Defendants may not appear via live audio link but may appear by live video link if the judge considers that:

- the circumstances of the case make it appropriate to do so

- it is in the interests of justice for participants (including defendants) to take part in the hearing in this way
- the parties have been given the opportunity to make representations

John Oliver is a barrister at 5 St Andrew's Hill. Suitable candidates are welcome to apply to become members of the panel. Please contact curr_awareness@lexisnexis.co.uk.

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