

EXPLANATORY MEMORANDUM TO
THE JUDICIAL PROCEEDINGS IN SPECIFIED OVERSEAS TERRITORIES
(RESTRICTIVE MEASURES) ORDER 2009

2009 No. 888

1. This explanatory memorandum has been prepared by the Foreign and Commonwealth Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument, the Judicial Proceedings in Specified Overseas Territories (Restrictive Measures) Order 2009 (“the Order”) amends certain Orders applying to the Overseas Territories (“the OT Orders”). The OT Orders amended relate to restrictive measures adopted by the United Nations and the European Union, and related Orders made under the Export Control Act 2002 applying to the Territories. The Order modifies the penalties and offences provisions of the OT Orders as they apply to the Sovereign Base Areas, and separately, so far as they apply to the Falkland Islands, South Georgia and the South Sandwich Islands, the British Antarctic Territory, Saint Helena and Dependencies, the British Indian Ocean Territory, and the Pitcairn Islands.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None. The Order will be made at the Privy Council Meeting on 8th April 2009 and will be laid before Parliament on the following day. The Order will come into force on 30th April 2009 to allow for publication in the Territories.

4. Legislative Context

4.1 The OT Orders were made respectively using enabling powers in (a) the United Nations Act 1946, (b) the Export Control Act 2002, and (c) the Saint Helena Act 1833, the British Settlements Act 1887 and 1945 and under the Royal Prerogative. The Order cites all these enabling powers. The United Nations Act and the Export Control Act provide law-making power for all the territories. The Saint Helena Act provides law-making power for Saint Helena and Dependencies. The British Settlements Acts provide law-making power for the Falkland Islands, South Georgia and the South Sandwich Islands, the British Antarctic Territory, and the Pitcairn Islands. The Royal Prerogative provides law-making power for the Sovereign Base Areas, and for the British Indian Ocean Territory. The enabling powers require that the Order be laid before Parliament, but none of the powers requires any further Parliamentary procedure.

4.2 The modifications to the penalties and offences provisions of the OT Orders are effected mainly by a modification formula in Article 2 of the Order. The modification formula applies modifications to the text of the OT Orders by separate provisions for the Sovereign Base Areas (article 2(2)), and for the Falkland Islands, South Georgia and the South Sandwich Islands, the British Antarctic Territory, Saint

Helena and Dependencies, the British Indian Ocean Territory, and the Pitcairn Islands (article 2(3)).

4.3 In relation to the Sovereign Base Areas, it transpired that the hitherto standard adaptation of the penalties and offences provisions of OT Orders to fit the judicial system in place in the Areas was inappropriate for the division of work between the Judge's Court and the Senior Judge's Court. The standard adaptation provided for trial on indictment before the Senior Judge's Court, and for summary trial before the Judge's Court.

4.4 It has been clarified that in fact, the Judge's Court has had exclusive original jurisdiction for all criminal matters. The jurisdiction of the Senior Judge's Court in criminal matters is solely in an appellate capacity. According to the Sovereign Base Areas authorities, the confusion probably arose as a result of a long-standing practice direction there, which provided that the prosecution of any offence carrying a term of 5 years or more imprisonment should be heard by a Senior Judge. This means, however, a Senior Judge sitting in the Judge's Court, not a Senior Judge sitting in the Senior Judge's Court.

4.5 In addition, the nomenclature of the courts in the Sovereign Base Areas was changed by the Courts (Constitution and Jurisdiction) Ordinance 2007. In that Ordinance, the Resident Judge's Court replaces the Judge's Court and it has exclusive original jurisdiction for criminal matters. For that reason, there is no distinction between summary and indictable offences. In addition, the former classification of offences according to whether they were a "misdemeanour" or "felony" is no longer in use.

4.6 As a result, the modifications contained in article 3(a) to (e) of the Order are necessary. Where the general modification formula cannot be applied due to textual differences from the standard wording in certain OT Orders, specific modifying provisions are applied in article 5 to the particular OT Orders. The result is that when sentencing, the Resident Judge's Court will have available, in addition to the penalties formerly applicable on summary conviction, the higher penalties formerly applicable upon conviction on indictment.

4.7 Under the laws of the Falkland Islands, South Georgia and the South Sandwich Islands, the British Antarctic Territory, Saint Helena and Dependencies, the British Indian Ocean Territory, and the Pitcairn Islands, the Magistrate's Court has jurisdiction to try and to determine any criminal offence, except for a limited range of offences which must be tried on indictment. Therefore offences which in other overseas territories may be triable either way, that is summarily or on indictment, will generally be dealt with summarily in these territories. Without further provision, upon summary conviction, only the lesser penalties on summary conviction would be available when sentencing.

4.8 Accordingly, when, for example, the Falkland Islands' authorities indirectly apply an English statute to the law of the Falkland Islands, the penalty provisions of the statute are usually modified in order that the higher penalties for conviction on indictment are made available when sentencing following summary trial. In order to make similar provision under the OT Orders, article 2(3) of the Order applies the

supplementing provision contained in article 4 to the six territories specified in article 1(2)(b). This will provide the Magistrate, when sentencing following summary conviction and alternatively to the summary conviction penalties, with the higher penalties applicable to conviction on indictment.

5. Territorial Extent and Application

5.1 The Order extends to the Sovereign Base Areas of Akrotiri and Dhekelia, and to the Falkland Islands, South Georgia and the South Sandwich Islands, the British Antarctic Territory, Saint Helena and Dependencies, the British Indian Ocean Territory, and the Pitcairn Islands so far as the OT Orders and the respective modifications made by the Order apply to those territories.

6. European Convention on Human Rights

The Order is made under the statutory powers set out in paragraph 4.1 and under the Royal Prerogative, and although laid, is not subject to any Parliamentary procedure. There are no human rights implications.

7. Policy background

7.1 The UK fully supports UN and EU restrictive measures.

7.2 The Order assists the UK's compliance, in respect of the Overseas Territories to which the Order extends, with its obligations to implement restrictive measures.

8. Consultation outcome

8.1 The specified territories requested these measures and were consulted about the Order, with which they are content. There was no consultation in the UK as the Order has no application there.

9. Guidance

9.1 Any guidance necessary may be sought from the contact below.

10. Impact

10.1 A Regulatory Impact Assessment has not been prepared for this instrument, as it has no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is negligible.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 No monitoring or review is foreseen.

13. Contact

David Ballantyne at the Foreign and Commonwealth Office, Tel: 0207 008 2131 or e-mail: David.Ballantyne@fco.gov.uk, can answer questions regarding the instrument.