

Challenge to the First Unexplained Wealth Order Obtained by U.K. Enforcement Authorities is Rejected

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The English High Court has dismissed an application to discharge the U.K.’s first Unexplained Wealth Order (the “UWO”) which was obtained by the National Crime Agency (the “NCA”) on 27 February 2018.¹

Since 31 January 2018 a number of U.K. enforcement authorities have been able to apply to the English courts for an Unexplained Wealth Order in circumstances where a person’s assets appear disproportionate to their known income.² Once granted, an Unexplained Wealth Order requires an individual or company suspected of serious crime, or a politically exposed person (“PEP”) from outside the EEA, to explain and account for the source of their wealth.³

The UWO related to a high value property purchased by a company controlled by the respondent to the order, Zamira Hajiyeva (the “Respondent”). The Respondent is the wife of Jahangir Hajiyev, the former Chairman of the state-owned International Bank of Azerbaijan. Their identities were only revealed on 10 October 2018 following the court’s discharge of an anonymity order which prevented their names from being reported. The decision confirms the broad class of individuals who can be classified as PEPs under English law.

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¹ *National Crime Agency v Hajiyeva (Rev 1)* [2018] EWHC 2534 (Admin) (03 October 2018)

² The material provisions in relation to Unexplained Wealth Orders are contained in ss.362A-362R of the Proceeds of Crime Act 2002, which came into force on 31 January 2018 pursuant to the Criminal Finances Act 2017 (Commencement No.4) Regulations 2018.

³ The requirements for an Unexplained Wealth Order are discussed in detail in our earlier alert memorandum on this topic: <https://www.clearygottlieb.com/-/media/files/alert-memos-2018/unexplained-wealth-orders-eng-updated-pdf.pdf>



Background to the Application

The court made the UWO in February 2018 in respect of a property in London which was purchased in 2009 for £11,500,000 (the “Property”) by a BVI company controlled by the Respondent.⁴ Her husband had been the Chairman of the state-owned International Bank of Azerbaijan (the “Bank”) between March 2001 and March 2015. In granting the UWO, the court accepted that Mr Hajiyev was a PEP,⁵ and as a member of his family the Respondent was a PEP in her own right and could be named as a respondent to the order.⁶

Since leaving the Bank, Mr Hajiyev has been convicted of various offences by the courts of Azerbaijan, including misappropriation, large scale fraud and embezzlement in connection with activities at the Bank. Consequently he has been sentenced to 15 years imprisonment and ordered to pay the Bank approximately \$39,000,000. The Respondent is also wanted in Azerbaijan in connection with avoiding an investigation into the Bank.

The Application

The Respondent argued the UWO should be discharged on eight separate grounds, all of which were dismissed for the reasons set out below.

Ground 1 – Mr Hajiyev is/was not a PEP

The Respondent claimed that her husband did not fall within the statutory definition of a PEP because the Bank was not a “state owned enterprise”. Under the relevant U.K. legislation,⁷ a PEP includes:

“an individual who is, or has been, entrusted with prominent public functions by an international organisation or by a State other than the United Kingdom or another EEA State”.

Individuals with prominent public functions include “members of the administrative, management or supervisory bodies of state-owned enterprises”.⁸

⁴ An Unexplained Wealth Order can be made in respect of any property, even if acquired prior to 31 January 2018, the effective date of the relevant legislation.

⁵ An Unexplained Wealth Order may be made against a non-EEA PEP or alternatively where there are reasonable grounds for suspecting that the respondent, or a person connected to them, are involved in serious crime (s362B(4) of the Proceeds of Crime Act 2002).

The Respondent’s argument was based on the facts that:

- Azerbaijan’s majority shareholding in the Bank did not make it a “state owned enterprise”, and
- under the law of Azerbaijan, the Bank is not a state organization but an “Open Joint Stock Company”.

The NCA presented several pieces of evidence in support of the fact that the Bank was a “state owned enterprise”:

- the Bank’s auditor’s report from 2008 (signed by Mr Hajiyev as Chairman) and its Annual Report from 2013 both confirmed that the government of Azerbaijan controlled the Bank, and
- an extract from an interview given by Mr Hajiyev in 2009 in which he described the Bank as a “state bank [which has] strong government support in capitalization”.

The court found that a company with a majority shareholding held by the state was a “state owned enterprise” (although it made no conclusions as to whether that would have been the case had the government held a minority stake). The court was clear that the Bank’s status as an “Open Joint Stock Company” was immaterial, and that it was U.K. law and not local law which was relevant to the issue. The court also emphasized that the test for determining whether a company is a “state owned enterprise” is not down to its strict legal status or powers, but is instead a more flexible test of ownership and control.

Separately, the Respondent submitted that only a narrow class of people were properly “entrusted with prominent public functions by an international organisation or state”, including for example Heads of State and Heads of Government, but not members of administrative, management or supervisory bodies of state owned enterprises such as her husband. The court disagreed and found such a strained

⁶ A family member of, close associate of, or a person connected with a PEP is deemed to be a PEP for the purposes of an Unexplained Wealth Order (s362B(7) of the Proceeds of Crime Act 2002).

⁷ s362B(7) of the Proceeds of Crime Act 2002

⁸ Article 3(9) of Directive 2015/849/EU of the European Parliament and of the Council of 20 May 2015

interpretation of the legislative wording was contrary to its clear meaning.

The court rejected the Respondent's argument that a failure to adopt the narrow definition of PEP which she proposed would result in too wide a class of persons being subjected to the Unexplained Wealth Orders regime. Lawyers for the Respondent conjectured this could lead to the directors of the Dorchester hotel in London (owned by the Brunei Investment Authority), or Sainsbury's (which counts the Qatar Investment Authority amongst its investors) being regarded as PEPs. In dismissing the Respondent's concerns, the court highlighted that an application for an Unexplained Wealth Order against a sovereign wealth fund would very likely fail as a court is unlikely to be convinced that such a fund's lawful income would be insufficient to purchase the asset which was the subject of the order.

This comment suggests, as is perhaps to be expected, that the main targets of Unexplained Wealth Orders are likely to be individuals (often non-EEA PEPs) with substantial assets but modest legitimate income. It will be far more difficult for enforcement authorities to secure an Unexplained Wealth Order against more public figures whose financial interests include substantial legitimate sources of income.

Grounds 2, 3 and 4 – The “Income Requirement” was not met

To make an Unexplained Wealth Order a court must be satisfied that the “income requirement” has been met. The NCA needed to show there were “*reasonable grounds for suspecting*”⁹ that the known sources of the Respondent's lawfully obtained income would have been insufficient to enable her to obtain the Property. This test is indicative of the status of Unexplained Wealth Orders as a civil recovery tool, and is notably easier for authorities to meet than the standard for criminal prosecutions which require a “*realistic prospect of conviction*”.

The NCA claimed such “*reasonable grounds*” exist as:

- the Respondent paid a deposit of at least £4,050,000 towards the Property in 2009 and discharged a nearly £7,500,000 mortgage over the

next five years despite there being no evidence of having any substantial source of income independent from her husband,

- Mr Hajiyev was a state employee between 1993 and 2015 and his role was unlikely to have generated sufficient income to purchase the Property,
- property transactions involving Mr Hajiyev were not likely to have produced the income required to purchase the Property, and
- Mr Hajiyev has been convicted of significant fraud and embezzlement offences in Azerbaijan.

The Respondent's assertions as to the legitimate sources of her husband's wealth were vague. It was claimed that he was “*very well-off when we married in 1997...had a number of business interests before joining the Bank...had a substantial portfolio of shares in the Bank*”. The Respondent's lawyers also made representations that, having been involved in finance all his working life, and having been the Chairman of a major international bank for 14 years, Mr Hajiyev must have had access to sufficient lawful funds to purchase the Property. Perhaps unsurprisingly these arguments did not persuade the court – more definitive evidence of lawful income was required to challenge the court's conclusions.

The Respondent also submitted that her husband's conviction in Azerbaijan was the result of a show trial conducted without any regard to his human rights, and that the English court should place no weight on it. The court noted the very high threshold for excluding reliance on a foreign conviction on the basis of human rights, and went to say that, at the current “*investigative*” stage, there was no requirement for the NCA to determine the fairness of Mr Hajiyev's trial.

However, the court did suggest that this was an issue the NCA may have to address “*at a later stage...depending on any action that the NCA may take*”, presumably referencing the possibility of civil recovery proceedings in respect of the Property. The court also considered that, independent of Mr Hajiyev's conviction, there was corroborating evidence of the allegations made against him (which

⁹ s362B(3) of the Proceeds of Crime Act 2002

included that he abused his position by issuing credit cards to his family through which large debts were accumulated).

Statements relating to one of the Respondent's department store loyalty cards revealed that she had spent over £16,000,000 in Harrods from 2006 to 2016 using more than 35 different credit cards issued by the Bank.

Ground 5 – The UWO incorrectly attached a penal warning

The Respondent argued that the UWO erroneously included a penal warning which was unnecessary as the relevant legislation deals with the consequences of non-compliance. The court disagreed and found there was nothing in the statute to prevent a penal notice being attached to the UWO, and that the court may enforce non-compliance through committal proceedings.

Ground 6 – The UWO offends the Respondent's right to peaceful enjoyment of the Property

The court was not persuaded that the infringement of the Respondent's rights to property under Article 1, Protocol 1 of the European Convention of Human Rights justified the discharge of the UWO. The Respondent failed to prove that the relevant article was engaged as the UWO did not give rise any loss of value in the Property. Even if the Respondent's right to property has been interfered with, the court found that interference to be modest and proportionate.

Ground 7 – The UWO offends privilege against self-incrimination and spousal privilege

This argument was raised on the basis that the Respondent is the subject of an ongoing criminal investigation in Azerbaijan, that her husband is in custody in that country and is at risk of further proceedings there, and that they may both be at risk of criminal proceedings in the U.K..

The court cited a number of reasons why these arguments could not succeed, including that the claimed privileges operate only as regards criminal offences in the U.K.,¹⁰ and that the evidence does not currently present a real risk that the Respondent or her husband would be prosecuted for offences in the U.K..

Perhaps most importantly, the court considered that Parliament must have intended that these privileges do not apply to the procedure for Unexplained Wealth Orders, or else the powers to compel the production of information from respondents to Unexplained Wealth Orders “*would be rendered very largely nugatory*”.

Ground 8 – In all the circumstances the court ought not to have made the UWO

The court swiftly concluded that, given the failure of the Respondent's first seven grounds for the discharge of the UWO, all the circumstances suggested it was appropriate for the UWO to have been made.

Implications

The judgment confirms the English court's broad interpretation of the PEP definition, and that respondents wishing to discharge an order on the basis that the “income requirement” has not been satisfied will have to present specific details of legitimately obtained wealth. It also suggests it could be difficult to obtain an Unexplained Wealth Order against a respondent who may be benefitting from unlawful income, but who also has a legitimate source of substantial wealth.

This application covered many of the grounds which commentators predicted would form the basis of challenges to Unexplained Wealth Orders; the interpretation of the PEP requirement, compatibility with human rights legislation and arguments of privilege against self-incrimination. Enforcement authorities will take comfort from the court's treatment of these issues. With only a handful of Unexplained Wealth Orders so far sought, it remains to be seen whether this judgment will encourage enforcement authorities to apply for Unexplained Wealth Orders at an increased rate.

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¹⁰ s14(1) of the Civil Evidence Act 1968