

Court of Appeal Rejects Challenge to U.K.’s First Unexplained Wealth Order

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The English Court of Appeal has dismissed an appeal¹ against a decision of the High Court that upheld the U.K.’s first Unexplained Wealth Order (the “UWO”).

UWOs are a tool available to the U.K. authorities to require explanations of how assets were acquired, when there are grounds to suspect that the owner’s legitimate income is not sufficient to have obtained the asset. The Court of Appeal’s decision contains guidance on the meaning of a politically exposed person (“PEP”) for the purposes of the Proceeds of Crime Act 2002 (“POCA”).

The National Crime Agency (the “NCA”) obtained a UWO in February 2018 against Zamira Hajiyeva, the wife of a former Chairman of the state-owned International Bank of Azerbaijan (the “Bank”).

The High Court rejected Ms Hajiyeva’s challenge to the UWO (discussed in more detail in our previous alert memorandum [here](#)), and the Court of Appeal has upheld that ruling. Ms Hajiyeva is now required to explain her interest in the property that is the subject of the UWO and how it was obtained, including how the costs of obtaining it were met. If a respondent does not comply with an UWO, the property that is the subject of the order is presumed to be recoverable in any civil recovery proceedings brought under POCA.

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¹ *Zamira Hajiyeva v National Crime Agency* [2020] EWCA Civ 108 (5 February 2020).
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Background

Since 31 January 2018, the NCA has been able to apply to the High Court for an Unexplained Wealth Order.² In summary, for the Court to make an UWO against a person in respect of particular property, the Court is required to be satisfied that:

- *first*, there is reasonable cause to believe that the respondent holds the property, and that the value of the property is greater than £50,000;
- *second*, there are reasonable grounds for suspecting that the known sources of the respondent’s lawfully obtained income would have been insufficient to obtain the property; and
- *third*, either:
 - the respondent is a PEP, or
 - there are reasonable grounds for suspecting that (a) the respondent is, or has been, involved in serious crime (whether in a part of the United Kingdom or elsewhere), or (b) a person connected with the respondent is, or has been, so involved.

On 27 February 2018, the High Court made the UWO against Ms Hajiyeva on a without-notice application in respect of a property in London (the “**Property**”), that was purchased in 2009 for £11.5million by a company incorporated in the British Virgin Islands. Ms Hajiyeva applied to set aside the UWO on eight separate grounds, all of which were unsuccessful before the High Court.

The Appeal

In the appeal, Ms Hajiyeva argued that the High Court was wrong not to discharge the UWO on five grounds, including four that had been rejected by the High Court. Each of the grounds of her appeal were dismissed for the reasons set out below.

Ground 1 – The judge erred in his interpretation of the statutory test for identifying a PEP.

The definition of PEP set out in POCA refers to “*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.*”³

Though it was common ground that Mr Hajiyev had held a prominent public function as the Chairman of the Board of the Bank, Ms Hajiyeva argued that there was no evidence that he had been entrusted with a prominent public function “*by an international organisation or by a State other than the United Kingdom or another EEA State.*”

This line of argument had led the Appellant’s lawyers to speculate in the High Court that, were the judge’s reasoning adopted, the directors of a UK company in which shares were held by a non-EEA sovereign wealth fund would be regarded as PEPs on account of their appointment as managers of a company owned, in part, by a sovereign wealth fund of a non-EEA State.

The Court of Appeal (upholding the High Court’s decision) found that the addition of the words “*by an international organisation or by a State other than the United Kingdom or another EEA State*” in the U.K. legislation (which is not included in the wording of the definition in the European Union Directive⁴ from which it is derived) did not have the effect of imposing a second qualification that the person be appointed to their position by an international organisation or a non-EEA State. Rather, the intent of the additional language was to exclude persons entrusted with prominent public functions *within* the EEA, and thereby to limit the scope of the definition to those outside the EEA, without regard for how they had been appointed to the relevant “*prominent public function.*”

² The material legislative provisions in relation to UWOs are contained in ss.362A-362R POCA, which were inserted into Part 8 of POCA by ss.1-2 of the Criminal Finances Act 2017. The legislative requirements for the

Court to make an UWO are discussed in detail in our earlier alert memorandum on this topic, [here](#).

³ S. 362B(4)(a) POCA.

⁴ Directive 2015/849/EU (the “**Directive**”), in particular Article 3(9).

Ground 2 – The judge erred in finding that the Bank was a State-owned enterprise, and therefore that Mr Hajiyev was a PEP.

Ms Hajiyeva argued that the judge had erred in finding that the Bank was “a State-owned enterprise” on the basis that the government of Azerbaijan had, at all material times, “had a majority shareholding in the Bank and had ultimate control of the Bank,”⁵ and by not taking into account the views of Ms Hajiyeva’s lawyer as to the legal status of the Bank as a matter of Azerbaijani law. Ms Hajiyeva sought to distinguish between an enterprise that was State-owned, and a company the shares in which were part-owned by a government body. The statutory provisions were intended to apply to corrupt officials of the former, but not the managers or affairs of a company such as the latter.

The Court of Appeal determined that the application of the statutory provisions was a matter of English law, not a question of a close analysis of local law, and that in circumstances where the government held in excess of 50% of the shares in the Bank, the judge was entitled to conclude that the entity was a State-owned enterprise.

It followed that Mr Hajiyev was a PEP, and that therefore the Appellant, as his wife and therefore a “family member” of a PEP,⁶ was also a PEP.

Ground 3 – The judge erred in concluding that the “income requirement” was met.

In making an UWO, the High Court must be persuaded that “there are reasonable grounds for suspecting that the known sources of the respondent’s lawfully obtained income would have been insufficient to obtain the property.”⁷ Ms Hajiyeva argued that the High Court was, in considering whether the income requirement was made out, wrong to place any reliance on Mr Hajiyev’s conviction in Azerbaijan for fraud and embezzlement offences, given alleged likely deficiencies in his trial.

The Court of Appeal considered that the judge had been entitled to reach the conclusion that the income requirement was made out. While there might be

situations in which a foreign judicial process would be so deficient that a conviction could not form a proper ground for determining that the income requirement was met, in the present case Mr Hajiyev’s conviction was one of only a number of grounds put forward by the NCA, and that the judge was entitled to rely, in particular, on the material shortfall between Mr Hajiyev’s known salary and dividend income in the relevant period, and the price paid for the Property.

Ground 4 – The judge erred in finding that the UWO did not offend the rule against self-incrimination or spousal privilege.

The U.K. legislation provides that a statement made in response to an UWO may not be used in evidence against the respondent in criminal proceedings (the “use immunity clause”). Ms Hajiyeva argued that UWO failed to protect her from, first, being required to give answers exposing her husband to risk of prosecution in the U.K., and, second, being required to give answers that might incriminate either her or her husband in Azerbaijan.

The Court of Appeal agreed with the decision of the High Court that, in including the use immunity clause, Parliament had intended that the privileges sought by Ms Hajiyeva in connection with any possible domestic proceedings be abrogated. The very purpose of an UWO, in requiring the disclosure of information and documents, “would be very largely nugatory if privilege applied.”⁸

As to the risk that such information may be used in foreign proceedings, the information and documents requested by the UWO were to be provided to the NCA, and such provision did not give rise to a real or appreciable risk of prosecution in Azerbaijan. The NCA was itself subject to specific legislative safeguards as to the disclosure of information to third parties, and duties as a public body for the purposes of the Human Rights Act 1998, of which it would have to be mindful in considering any disclosure of the information to foreign authorities.

⁵ *National Crime Agency v Zamira Hajiyeva* [2018] EWHC 2534 (Admin) at [38].

⁶ S. 362B(7)(b) POCA.

⁷ S. 362B(3) POCA.

⁸ *National Crime Agency v Zamira Hajiyeva* [2018] EWHC 2534 (Admin) at [112]; affirmed *Zamira Hajiyeva v National Crime Agency* [2020] EWCA Civ 108 at [51].

Ground 5 – The UWO was a wrong and disproportionate exercise of discretion.

Ms Hajiyeva’s argument on this ground was contingent on succeeding on at least one of the above grounds, and was not therefore considered by the Court of Appeal, since the other grounds of appeal failed.

What have we learned?

Managers of state-owned enterprises are firmly within the scope of UWOs.

The Court of Appeal’s judgment confirms that the definition of a PEP should be construed broadly.

The reasoning of both the High Court and the Court of Appeal suggests that anyone who is carrying out a “*prominent public function*” in a non-EEA State is potentially within the scope of the legislation, and that the manner of their appointment is not necessarily a relevant factor.

As to what constitutes a State-owned enterprise, the Court of Appeal rejected any attempt to draw distinctions between State-owned enterprises for the purposes of the definition of a PEP, on the one hand, and companies in which government bodies merely hold shares, on the other. Such an approach leaves open the possibility that the legislation may be applied to a broad range of entities in which non-EEA States are interested, in particular if the non-EEA State holds a majority of the shares.

UWOs abrogate spousal privilege, and the privilege against self-incrimination both inside and outside the U.K..

The Court of Appeal has made clear that the use immunity clause in the legislation has the effect of abrogating both the rule against self-incrimination, and spousal privilege, in respect of domestic criminal proceedings.

In respect of foreign criminal proceedings, the reasoning employed by the Court of Appeal – that the information provided would be to the NCA only, and that the NCA would not share information with third parties, in particular where such sharing would interfere with a respondent’s rights under the Human Rights Act 1998, or other than in accordance with the existing statutory framework – suggests that

respondents will find it difficult, absent a specific indication that such information may be shared, to persuade the court to exercise its discretion not to make an UWO on grounds of privilege.

Even if there were a valid objection, the Court of Appeal suggested that the appropriate response may be an undertaking from the NCA, presumably as to the use of the relevant information, rather than for the court to exercise its discretion not to make the UWO at all.

Greater clarity on the income test.

The approach taken in both the High Court and Court of Appeal suggests that respondents seeking to discharge an UWO on the basis that the “*income test*” is not satisfied will need to show evidence of legitimate income sufficient to have obtained the relevant property.

It therefore continues to be the case that the NCA may find it difficult to obtain an UWO against a respondent with suspected significant illegitimate wealth, but who also has wealth from lawful sources that is sufficient to account for the cost of acquiring the relevant property.

Non-compliance with an UWO is enforceable by committal proceedings.

The decision of the High Court, on a point that was not the subject of appeal, makes clear that the effect of non-compliance with an UWO is not limited to the presumption that the property is recoverable under Part 5 of POCA, but that court may also enforce non-compliance with an UWO through committal proceedings whereby the respondent may be committed to prison for non-compliance.

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