

McMafia Orders revisited

There has been wide criticism of the National Crime Agency (NCA) and other enforcement agencies this year for their sparse use of Unexplained Wealth Orders (UWOs).

The understandable caution shown by investigators, fearful that early defeats in the courts might permanently hamper their new tool, stands in contrast to a rising clamour from NGOs and the media for an expansion of their use. As UWOs approach their first birthday in January 2019, many are questioning what the benefit is of a statutory power that is rarely used.

The High Court's recent judgment in *NCA v Mrs A [2018] EWHC 2534 (Admin)* may therefore mark a watershed moment in the development of UWOs. The judgment brings clarity to their use and, more importantly, gives confidence to enforcement agencies that such tools can be a practical means of combatting illicit wealth. A director at Transparency International responded to the judgment by stating: "We now hope that the National Crime Agency will take confidence from this ruling and make greater use of this important new power".

NCA v Mrs A [2018] EWHC 2534 (Admin)

This case concerned the first UWO that was granted to the NCA. Mrs Zamira Hajiyeva (ZH), the Respondent to the UWO (known during the proceedings as "Mrs A"), applied to have the order discharged. Whilst the order was granted as long ago as 27 February 2018, the hearing only took place in late July 2018, with judgment handed down on 3 October 2018.

The facts

The NCA sought a UWO against ZH because it had reasonable grounds to suspect that her lawfully obtained income would have been insufficient to obtain certain property. The facts can be taken shortly: in December 2009 a British Virgin Islands company – Vicksburg Global Inc (VGI) – purchased an £11.5m property in Knightsbridge. ZH is the beneficial owner of VGI. It appears that ZH paid a deposit of at least £4,050,000 towards the property in December 2009. Thereafter, ZH discharged a mortgage of up to £7,450,000 over a period of five years. ZH's only source of income during this time

was from her husband, Jahangir Hajiyev. There was no evidence that she received capital or income from any source save for him.

The NCA contended that there were reasonable grounds to suspect that any monies originating from Mr Hajiyev were not lawfully obtained. The NCA averred that between 1993-2015 he was a state employee in Azerbaijan (he is the ex-Chairman of the International Bank of Azerbaijan) and that his income would have been modest. Furthermore, in October 2016, he was sentenced to 15 years' imprisonment for a large-scale fraud and embezzlement in his non-EEA home country. As a result of his conviction he was ordered to pay the bank approximately \$39m.

Obtaining a UWO

The criteria for obtaining a UWO can most easily be understood by breaking down the elements into separate "requirements". These are as follows:

The holding requirement	The court must be satisfied that there is reasonable cause to believe that the respondent "holds" the property.
The value requirement	The court must be satisfied that there is reasonable cause to believe that the value of the property is greater than £50,000.
The income requirement	The court must be satisfied that there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purpose of enabling the respondent to obtain the Property.
The PEP / serious crime requirement	The court must be satisfied that (a) the respondent is a "Politically Exposed Person" (a 'PEP') or (b) that there are reasonable grounds for suspecting that (i) the respondent is or has been involved in serious crime (whether in the UK or elsewhere) or (ii) a person connected with the respondent is, or has been, so involved.

The judgment in *NCA v Mrs A* has provided helpful guidance on how to apply the tests for the various requirements.

Grounds of application to discharge the UWO

ZH applied to have the UWO discharged on eight grounds¹. Amongst others, these included:

- ZH did not fall within the definition of a PEP;
- the income requirement was not satisfied;
- a penal warning for non-compliance was wrongly attached to the UWO;
- the UWO offended ZH's Article 1, Protocol 1 (A1P1) ECHR rights; and
- the UWO offends the privilege against self-incrimination and spousal privilege.

The decision

Mr Justice Supperstone made a number of critical findings for the purposes of future UWOs.

When is an organisation a State-owned enterprise? Majority shareholding will suffice!

One of the definitions of a PEP set out in the fourth money laundering Directive is that a person is a member of the administrative, management or supervisory body of a "State-owned enterprise". Supperstone J's judgment confirmed that an organisation is a "State-owned enterprise" where the Government has a majority shareholding in the organisation, despite arguments that this should be construed more narrowly². However, Supperstone J did not address whether he would reach the same conclusion if the relevant government held a minority shareholding only.

Further, Supperstone J considered whether the words "by an international organisation or by a State other than the United Kingdom or another EEA State" contained in section 362B(7)(a) Proceeds of Crime Act 2002 (POCA) were unambiguous. He concluded that they are not because: "Where a person is entrusted with prominent public functions it necessarily follows that they will be entrusted to perform such functions "by" a State or international body"³.

What law should be applied in order to decide whether an organisation is a "State-owned enterprise"?

The enforcement agency and the court in the UK should apply UK law.

In deciding whether an organisation is a "state-owned enterprise", Supperstone J ruled that this is a determination to be made by the enforcement agency and that UK law will apply. Issues of foreign law will not need to be considered⁴. On the premise that most UWOs will be sought against non-UK nationals, this is a critical part of the judgment and provides prosecuting agencies with a level of certainty moving forwards.

Are convictions relevant when considering the "income requirement"?

Yes.

Whilst this finding was almost inevitable, the judgment establishes that convictions can be a relevant consideration when considering the "income requirement", unless there is evidence to demonstrate that there has been a flagrant denial of Article 6 ECHR rights in securing the conviction. This is a high threshold and is only likely to apply in exceptional circumstances, where evidence had been obtained under torture, for example. Convictions should therefore generally be treated as something to which the court can properly have regard⁵.

Can a UWO impose consequences of non-compliance?

Yes.

Supperstone J concluded that the wording of section 362C POCA is concerned with the effect of the UWO itself in cases of non-compliance. It is not concerned with the general consequences of non-compliance. He made clear that nothing in the legislation (impliedly or otherwise) ousted the court's power to enforce compliance with a UWO. If a court was not able to attach a penal notice to UWOs then it may create an "enforcement gap". Accordingly, a penal notice setting out consequences for non-compliance with UWOs is appropriate⁶.

Does the UWO offend ZH's article 1, protocol 1 ECHR rights?

No.

¹ *NCA v Mrs A* [2018] EWHC 2534 (Admin), para 21

² *Ibid*, para 38

³ *Ibid*, para 47

⁴ *Ibid*, para 39

⁵ *Ibid*, para 84 and 85

⁶ *Ibid*, para 94 and 97

Supperstone J concluded that UWOs do not interfere with the right to peaceful enjoyment of one's property. In short: a UWO itself does not give rise to a loss of value, without which Article 1, Protocol 1 is not engaged⁷.

Does the UWO interfere with the spousal privilege against self-incrimination and spousal privilege?

No.

When considering whether UWOs interfere with the privilege against self-incrimination and spousal privilege, Mr Justice Supperstone concluded that the UWO did not offend the privilege against self-incrimination and spousal privilege but made three important findings on this point:

1. the risk of prosecution abroad can be a relevant factor when deciding whether to exercise a discretion to order disclosure⁸;
2. the court must be satisfied that there is a risk of prosecution as a consequence of the UWO and the answers provided in response to it, in order to discharge it⁹; and
3. in creating the UWO procedure, Parliament intended that certain privileges be abrogated (and, even if not so intended, such privileges are abrogated by virtue of section 13 Fraud Act 2006)¹⁰.

Conclusion

The judgment will be welcomed enthusiastically by Government agencies and campaigners for transparency alike. It addresses a number of questions concerning UWOs that have been mooted by legal academics and lawyers since their inception and it should embolden enforcement agencies to see UWOs as a legitimate part of their armoury. This will be an issue of particular importance given the political focus on UWOs as a tool to tackle dirty money and the interests of oligarchs from Russia.

⁷ Ibid, para 100

⁹ Ibid, para 107

⁸ Ibid, para 109

¹⁰ Ibid, para 110 and 113

Given this climate, and with an estimated £4.4bn worth of properties in the UK having been purchased from suspicious wealth, enforcement agencies now have both the incentives and the tools to step up their fight against corruption. It seems inevitable that UWOs will become a growing part of the enforcement landscape and the case of Zamira Hajiyeva may represent the first of many battles in the UK's war on dirty money.

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